


RESEARCH ARTICLE

Reflections on Constitutionalism and Democratic Governance in Africa

Nsongurua Udombana* 

Human Rights Institute, National Human Rights Commission, Abuja, Nigeria
Email: udombanan@gmail.com

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Abstract

Several post-independence African states have opted for constitutional democracies in response to various governance challenges. Most of these constitutions espouse values of constitutionalism, such as the rule of law, human rights and citizenship. This article interrogates the concept of constitutionalism, examines its pillars and values, and reflects on how Africa's constitutions mirror them. Its thesis is that a constitutional government does not necessarily approximate constitutionalism. The article argues, with evidence, that many states possess constitutions but fall short in practising constitutionalism. It calls on these states to embark on institutional reforms and to pursue good governance that improves the living standards of their citizens.

Keywords: citizenship; constitution; constitutionalism; democracy; good governance; human rights; republicanism; rule of law

“Democracy cannot exist unless we fight for it. It should not be taken for granted. Unless we protect democracy, democracy will not protect us”.¹

Introduction

Most of what constitutes the modern African states emerged after decades of struggle for self-determination. But the principle of self-determination served other values beyond decolonization; it was “the first building block in the creation of a democratic entitlement” and was pivotal to the democratizing wind that blew across Africa and the rest of the Global South in later decades.² Civil society also deployed the principle of self-determination to oppose autocratic regimes that defined Africa's landscape prior to the 1990s. Africa's colonial and postcolonial experiences influenced the continent's constitutional engineering. Many modern states resorted to constitutional democracy as a direct response to their colonial past.³ But there was “a prolonged fit of constitutional fever” post-1990, in response to post-independence political

* LL.M (Lagos), LL.D (Unisa), FC.Arb. Professor of International Law, Human Rights Institute, National Human Rights Commission, Nigeria. Professor Udombana has taught in several universities in Africa, Europe and North America and is a former pro-chancellor of Ritman University, Nigeria.

1 A. Barak *Purposive Interpretation in Law* (2005, Princeton University Press) at 236.

2 T. Franck “The emerging right to democratic governance” (1992) 86 *American Journal of International Law* 46 at 55; J. Summer *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2007, Martinus Nijhoff) at 163–64, 244–45 and 258–59; and generally, N. Udombana “Articulating the right to democratic governance in Africa” (2002) 24 *Michigan Journal of International Law* 1209.

3 See eg Angolan Constitution 2010, Preamble.

challenges.⁴ The common thread in most post-independence, post-military constitutions is that they espouse values of constitutionalism: democracy and political accountability, the rule of law, human rights, equality and social justice. The Algerian Constitution is typical; through it, Algerians endow themselves “with institutions based on the participation of citizens in the conduct of public affairs and which realize social justice, equality and liberty of each and all, in the framework of a democratic and republican State”.⁵ Determining whether a particular constitution approximates to the ideals of constitutionalism, and how, “depends on an evaluation of how the institutions and norms promoted by the constitution in question fare in terms of the constitutionalist ideal”.⁶

This article reflects on some constitutional values in the light of contemporary political governance and assesses the extent of their application in Africa’s political ecosystem. I argue that governance is not a laboratory experiment aimed at examining the bounds of political theory; rather, it is the structured and structural expression of public lives, hopes and fears. It is still a matter of debate whether many democratic governments in Africa advance constitutionalism in practice. The evidence shows that the continent is still challenged by arbitrary rule, despite affirmations of constitutional principles in several national and regional instruments. The antithesis is the unconstitutional changes of government that are again spreading like wildfire in Africa.

The article proceeds in four parts: the first examines the essence of constitutionalism, incorporating the idea of constitutional democracy. The second part surveys some values of constitutionalism, as reflected in Africa’s constitutions and regional norms. These values – the rule of law, separation of powers, judicial independence, human rights, citizenship, etc – distinguish a constitutional democracy from totalitarianism. The third part assesses the practice of constitutionalism and democratic governance in Africa. It demonstrates that bad governance, consisting of political corruption, economic mismanagement and other challenges, still defines Africa’s political ecosystem. From the initial excitement towards constitutional democracy in the twilight of the 20th century has come a waning of democratic energies and practices. The stakes involved in the quest to control and administer the state and its resources incline its leaders to repress constitutionalism.⁷ The final part is prescriptive, reflecting on measures necessary to advance good governance on the continent. It is good governance – consisting of structures and processes designed to ensure accountability, transparency, responsiveness, the rule of law, stability, inclusiveness, empowerment and broad-based participation – that gives meaning to constitutionalism.

Constitutionalism and democracy

Constitutionalism is an old concept in legal and political theory. There has been much scholarly work on this important field, even in the particular context of Africa.⁸ Notwithstanding, it remains “an on-going process in which each new generation engages and which necessarily alters in the process of such engagement”.⁹ But what is meant by constitutionalism and its associated term “constitutional democracy”? How can it be determined that a particular constitution approximates

4 J de Gaudusson “Introduction” in J de Gaudusson et al (eds) *Les Constitutions Africaines Publiées en Langue Française* (1998) 9 at 9.

5 Algerian Constitution 1996 (as amended), Preamble; cf Kenyan Constitution 2010, Preamble.

6 N Dorsen et al *Comparative Constitutionalism: Cases and Materials* (2003, Thomson West) at 10.

7 See B Nwabueze *Crisis of Governance in Nigeria* (2018, John Archers) at 14.

8 Eg M Mbondenyi and T Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013, Pretoria University Law Press); C Fombad and C Murray (eds) *Fostering Constitutionalism in Africa* (2010, Pretoria University Law Press); J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (2001, Fountain Publishers); J Hatchard, M Ndulo and P Slinn *Comparative Constitutionalism and Governance in the Commonwealth* (2004, Cambridge University Press); BO Nwabueze *Constitutionalism in the Emergent States* (1973, C Hurst and Co) at 12.

9 M Mbondenyi and T Ojienda “Introduction to and overview of constitutionalism and democratic governance in Africa” in Mbondenyi and Ojienda *Constitutionalism*, above at note 8 at 3.

the ideals of constitutionalism, and to what extent? This background section interrogates these and related questions.

The essence of constitutionalism

Government is a makeshift, a “necessary evil”. It is “necessary” because humans are “community-building animal[s]”, and living with others “is the condition of a rational existence”.¹⁰ Men and women can only realize their personalities and creativity in an ordered society. Yet the functioning of a civilized community is “too complex and too manifold to be left to the blind regulation of impulse; and even if each man could be relied upon to act consistently in terms of intelligence there would be need to differentiate right from wrong”.¹¹ Things resent being badly ordered, says Plato.¹² Government is “evil” because it is run by fallible humans, whose natural inclination is towards themselves. Like the Biblical Jacob, we wrestle to get our way by trying to cheat or defeat anyone who has, or aspires to get, something that we desire. The crude struggle for, or will to, power often leads to envy and a desire to oppress and humiliate rivals. Politics is a zero-sum game, in which one person’s gain is equivalent to another’s loss. These vices ultimately lead to an abuse of free will and incline political office-holders to use power as a tool to dominate others. One’s sense of morality lessens as one’s power increases. Lord Acton, a British historian, was right when he famously observed that power tends to corrupt and absolute power corrupts absolutely.

The necessity for, and the evils in, government make it imperative to devise means to limit the arbitrariness inherent in the exercise of political power. A free society, writes Hayek, “needs permanent means of restricting the powers of government, no matter what the particular objective of the moment may be”.¹³ Dante Alighieri, famous for his *Divine Comedy*, wrote elsewhere that limitations on power weaken justice which, according to him, cannot operate in practice without the power to render to each their due.¹⁴ But centuries earlier, Plato wrote that no human being “is capable of having irresponsible control of all human affairs without becoming filled with pride and injustice”.¹⁵

Constitutionalism betokens limited government under the law. It recognizes the necessity for a government, but insists on limiting its powers.¹⁶ It embodies the idea that all powers must be exercised according to commonly accepted principles. Judged by its standard, what a government can accomplish in fact is limited to what its powers can accomplish in law. Persons are conferred with power because it is thought that they will most likely do what is right, “not in order that whatever they do should be right”.¹⁷ A contrary proposition would be a return to the philosophy of the divine rights of kings, long discredited. Locke argued in 1690 that a people has the right to rise up and displace a government that breaks the social contract, after “a long train of Abuses, Prevarications, and Artifices”.¹⁸

Dictatorship or arbitrary rule is the antithesis of constitutionalism. It is a “government conducted not according to pre-determined rules, but according to the momentary whims and caprices of the rulers”.¹⁹ Such a government is no less arbitrary if it happens to be benevolent. All unfettered power,

10 H Laski *A Grammar of Politics* (2005, Anamika Publishers) at 41.

11 *Ibid.*

12 Plato *Metaphysics* at 1076a4 (quoting Homer *Iliad* at 2.204).

13 FA Hayek *The Constitution of Liberty* (1960, University of Chicago Press) at 182.

14 D Alighieri *Monarchia* Book 1, para 11, extracted in O O’Donovan and J Lockwood O’Donovan (eds) *From Irenaeus to Grotius: A Sourcebook of Christian Political Thought 100–1625* (1999, Wm B Eerdmans Publishing Co) at 417.

15 Plato *The Laws* (trans RG Bury, 1926, Loeb Classical Library) Book IV, 713C.

16 Nwabueze *Constitutionalism*, above at note 8 at 1.

17 Hayek *Constitution*, above at note 13 at 181.

18 J Locke *Two Treatises of Government* (1690) at 433.

19 Nwabueze *Constitutionalism*, above at note 8 at 1.

by its nature, is autocratic. There is a presumption of constitutionalism in a constitutional democracy. However, to make assurance doubly sure, some constitutions expressly outlaw any political regime founded on arbitrariness, dictatorship, injustice, corruption, sectionalism, nepotism and personal power.²⁰

Pillars of a constitutional order

A constitutional order rests on some pillars: one is popular sovereignty, the other is democratic government. I examine each of these pillars in seriatim.

Popular sovereignty

Liberal political philosophers and theorists see government as a derivative power. In a constitutional order, no individual or group of persons can vest the exercise of power in themselves. To do so is to usurp “popular sovereignty”, a political doctrine positing that ultimate power lies in the hands of the people, not in the hands of those exercising political power. Popular sovereignty is rooted in republicanism, a Lockean creed that is embedded in the American political fabric but which also finds expression in African political thought. Amid Africa’s numerous groups, belief systems and languages “lurks a uniformity of metaphysics and, even, of epistemology”.²¹ Wherever one turns in traditional African societies – whether Ashanti, Baganda, Bunyoro, Igbo, Luo or Tallensi – rulers trace their mandates to sources other than themselves.²² According to an Igbo proverb, “[t]he man who carries a deity is not a king. He is there to perform his god’s ritual and to carry sacrifice to him.”²³ Many emergent democracies in Africa also espouse republican principles, as in Angola, Malawi, Nigeria, Ghana and Namibia.²⁴ The Algerian Constitution provides that “[t]he people shall be the source of all authority”, a provision that implicitly reflects the country’s revolutionary struggle for independence.²⁵ Other constitutions provide that no person may claim or exercise state authority except as authorized by the constitution.²⁶

Popular sovereignty has three elements. The first is the power to constitute a frame of government – the constitution. The second is the power to choose those who run the government, and the third is the powers involved in governing.²⁷ The power to constitute or reconstitute a constitution is primordial; it is the ultimate mark of a people’s sovereignty.²⁸ A constitution is the supreme or organic law of any society, but it is not the Grundnorm, as it is often mischaracterized. (A Grundnorm, in Kelsen’s *Pure Theory*, is not a norm of positive law; rather, it is a legal fiction, a presupposition in juristic thinking.) As a protocol of survival and continuity for any social group, a constitution “is based on the will of the people, which is different from the will of the people at the core of ordinary legislation”.²⁹ And it is the people’s participation in the process of constitution-making that confers legitimacy on the outcome.

The power to form a constitution cannot be conferred by the same constitution, because it is the basis of its creation. Where a constitution expressly recognizes the people’s constituent power, it

20 Eg Benin Constitution 1990, Preamble.

21 F Otubanjo “Themes in African traditional political thought” in JA Ayoade and AA Agbaje (eds) *African Traditional Political Thought and Institutions* (1989, Centre for Black and African Arts and Civilization) 3 at 6.

22 See id at 9.

23 Quoted in C Achebe *Arrow of God* (1974, Heinemann) at 27.

24 Angolan Constitution, sec 3(1); Malawian Constitution 1994 (as amended), sec 1(1); Nigerian Constitution 1999 (as amended), sec 14(2)(a); Ghanaian Constitution 1992 (as amended), Preamble and sec 1; Namibian Constitution 2014 (as amended), sec 1(2).

25 Algerian Constitution, sec 7.

26 See Kenyan Constitution, sec 2(1–2); Ethiopian Constitution 1995, sec 9(3); Nigerian Constitution, sec 1(2).

27 BO Nwabueze *Presidentialism in Commonwealth Africa* (1974, C Hurst and Co) at 392.

28 Ibid.

29 Barak *Purposive Interpretation*, above at note 1 at 236–37.

does so only *ex abundantia cautela* (out of an abundance of caution).³⁰ Similarly, the constitution is not supreme because it says so; it is supreme because it is made by the peoples “in whom the sovereign power is reposed”.³¹ In other words, its supremacy is a tribute to its having been made by a higher power than the constitution itself or anything derived from it.

Democratic government

Earlier, I stated that popular sovereignty also entails the power to choose the persons who should run a government. This introduces the idea of a democratic government. Democracy is based on two core principles: the right to vote and the right to participate in government.³² The right to vote, and to be voted for, is at the core of a constitutional democracy. It is the will of the people that legitimizes the democratic character of any regime.³³ Regular free and fair elections help to institutionalize legitimate authority in representative government and in the democratic transfer of power.³⁴ The Rwandan Constitution defines democracy as a government “of the people, by the people and for the people”, a direct invocation of Abraham Lincoln.³⁵ (Never mind the serial and forced constitutional amendments by the country’s authoritarian president to remain perpetually in power.) Spinoza defines democracy as “a state in which the sovereign people, guided by laws which are its own work, does by itself all it can do well, and delegates all that it could not”.³⁶ One could extend to democracy the vicarious liability maxim *qui vacet per alium facit per se* (he who acts through another acts through himself).

Almost all African constitutions guarantee to their “citizens” the sovereign right to choose their representatives in regular, free and fair elections, as in Angola, Algeria and Malawi.³⁷ The South African Constitution guarantees to “every adult citizen” the right to vote in elections and “to stand for public office and, if elected, to hold office”.³⁸ Even where such a right is enshrined as a “directive principle” in a constitution, the Ghanaian Supreme Court held it to be a part of fundamental human rights.³⁹ But democracy is both formal and substantive. It is not, or ought not to be, solely about adult suffrage or rule by the majority, or even legislative supremacy.⁴⁰

Most modern states opt for a constitutional democracy because it facilitates an open and accountable government.⁴¹ This is democracy’s “inner morality”. A constitutional order provides, or should provide, a foundation for an open society and democratic control over law-making. It enables binding decisions to be adopted by organs composed directly of elected representatives supported by public debate, with the participation of civil society. In other words, a constitutional order makes room for “deliberative democracy”, “an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving”.⁴² Deliberative democracy provides an opportunity for people to conduct public argument “in the disciplined language of legal and hence political principle”.⁴³ It allows people to challenge the most fundamental

30 *Njoya and Others v Attorney-General and Others* [2004] 1 EA 194 (KeHC) (2004) AHRLR 157, para 29.

31 *Ibid.*

32 See generally RA Dahl *On Democracy* (1998, Yale University Press).

33 Kenyan Constitution, sec 1(3); Namibian Constitution, sec 1(2).

34 African Charter on Democracy, Elections and Governance, AU doc Assembly/AU/Dec.147(VIII) (2007), art 2(3) (ACDEG).

35 Rwandan Constitution 2003 (as amended), sec 1.

36 B Spinoza *Political Works* (trans AG Wernham, 1959, Oxford University Press) at 136.

37 Angolan Constitution, sec 3(1); Algerian Constitution, sec 11; Malawian Constitution, sec 6.

38 South African Constitution 1996, sec 19(3).

39 *Ocansey and Another v Electoral Commission and Another*, writ no JJ/5/2008, judgment of 23 March 2010 [2010] AHRLR 165, para 38.

40 Barak *Purposive Interpretation*, above at note 1 at 239.

41 Cf Malawian Constitution, Preamble.

42 C Sunstein *Designing Democracy: What Constitutions Do* (2001, Oxford University Press) at 7.

43 R Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (2006, Princeton University Press) at 156.

assumptions of a democratic society and enables political actors to resolve disagreements not simply by majority rule but also by creating institutions that ensure “reflection and reason-giving”.⁴⁴ The legislature, which embodies the principle of representation, is expected to control the actions of public powers on behalf of the people.⁴⁵ The government will also not normally act “unless and until diverse people have had an opportunity to consult with one another and to listen to one another’s concerns”.⁴⁶

Although in democracies the people delegate their sovereign powers to state institutions, this does not prejudice their right to participate directly in governance. Indeed, any democracy worth its name must empower the people by devolving to them “some real decision-making power over and above the formal consent of electoral choice”.⁴⁷ A government of the people, of necessity, must be a government *by* the people. The people “embody all of the community’s wisdom, goodness, honesty, justice, its sense of right and wrong, in short, all the civic virtues available in it, which should outweigh all its vices”.⁴⁸ They are entitled to discuss political and economic matters as parts of their constitutional duties.⁴⁹ Mill expressed the same sentiment in 1861:

“There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general.”⁵⁰

Many constitutions provide for popular participation in government, as in Nigeria and Ethiopia.⁵¹ Several states have also ratified regional and sub-regional instruments enshrining popular participation in governance. For example, all 55 African Union (AU) members are parties to the Constitutive Act of the AU (the AU Act).⁵² State parties to the Act affirm their desire, *inter alia*, “to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector”.⁵³ In the Protocol on the Amendments to the AU Act, also ratified by all AU members, the parties commit themselves to providing for the effective participation of women in decision-making, particularly in political, economic and socio-cultural areas.⁵⁴ There are 38 state parties to the African Charter on Democracy, Elections and Governance (the Charter), as of 14 February 2023 when the ratification status was last updated on the AU website. The Charter aims, *inter alia*, to “[p]romote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs”.⁵⁵ It also commits its states parties to promote the participation of vulnerable groups in the governance process. This obligation extends to those with special needs.⁵⁶ Egypt, Senegal and Tanzania are among the 17 states that are yet to ratify the Charter;

44 Id at 239.

45 Algerian Constitution, sec 15.

46 Sunstein *Designing Democracy*, above at note 42 at 240.

47 C Ake *Democracy and Development in Africa* (1996, Brookings Institution Press) at 132.

48 BO Nwabueze *Further Thoughts on the Nigerian Constitution and Polity* (2019, John Archers) at 164 (emphasis original).

49 Cf *McGinty v Western Australia* [1996] 186 CLR 140 [HC Australia].

50 JS Mill *Utilitarianism, Liberty, and Representative Government* (ed Ernest Rhys, 1910, Dent) at 207.

51 Nigerian Constitution, sec 14(2)(c); Ethiopian Constitution, sec 8(3).

52 OAU doc CAB/LEG/23.15 (2000).

53 Id, Preamble.

54 AU doc Assembly/AU/Dec.26(II) (July 2003), art 3(i); cf Protocol to the African Charter ... on the Rights of Women in Africa, AU doc Assembly/AU/Dec.19(II) (2003), art 9(1) (Protocol on Women’s Rights).

55 ACDEG, above at note 34, art 2(10).

56 Id, art 31(1).

the latter two are particularly surprising given their assumed democratic credentials. The African Charter on Values and Principles of Public Service and Administration provides that “Public Service and Administration shall be participatory in order to ensure the effective involvement of all stakeholders including Civil Society in the planning and delivery of services”.⁵⁷ Finally, the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance enjoins “[p]opular participation in decision-making, strict adherence to democracy, and decentralization of power at all levels of governance”.⁵⁸

The values of constitutionalism

Constitutionalism is meant to advance democracy. It ensures that the government is truly responsible and accountable, and that every citizen is equally protected by law.⁵⁹ Its ideals, and the method of pursuing them, are based on a number of postulates. Among these are the equality of all as to their rights, liberty and dignity, and “an incurable human incapacity for unanimity in regard to ends and means in relation to any problem or matter”.⁶⁰ Though not a certainty, fundamental values enable a government that makes an effort to advance them. An unconstitutional order, on the other hand, casts a long shadow on state legitimacy. This section examines some constitutional ideals in an African context as a sequel to the previous part. Space will permit an examination of only three of these ideals – the rule of law, human rights and citizenship.

The rule of law

A consideration of the values of constitutionalism should necessarily begin with the rule of law; both ideas are intimately linked. Carothers observes the “uncertainty about what the essence of the rule of law actually is”.⁶¹ This uncertainty might be due to its different content in diverse jurisdictions rather than its meaning. Basically, the rule of law is “[t]he name commonly given to the state of affairs in which a legal system is legally in good shape”.⁶² Its precept demands that everyone, including state officials, should be subject to the law rather than to an arbitrary exercise of state power. The term “law” in “rule of law” goes beyond extant legislation by an existing authority vested with legislative power; it connotes “a body of abstract rules of justice that bind a community together”.⁶³ Thus, if those vested with legislative power “are to function within the rule of law, they must legislate according to the rules set by the preexisting law and not according to their own volition”.⁶⁴

The rule of law and due process are bedrocks of constitutionalism and democracy. In a constitutional democracy, all natural and artificial persons are subject to the constitution and must discharge its stipulations in good faith. Judicial review is integral to the rule of law, and serves two functions. First, it is an accountability mechanism dealing with the control of public power by courts. It thereby ensures that the executive loyally implements legislation. Second, it protects the rights of individuals who may be affected by legislative and executive acts.

Dicey is usually credited with coining the expression “rule of law”. He gave three meanings to the concept: the supremacy of law, equality before the law and civil liberties.⁶⁵ But Dicey “did not apply

57 AU doc Assembly/AU/Dec.337(XVI) (2011), art 5(4).

58 ECOWAS doc A/SP1/12/01 (2001), art 1(d).

59 See eg South African Constitution, Preamble; Ethiopian Constitution, sec 12(2); Algerian Constitution, sec 12.

60 O Awolowo *Thoughts on Nigerian Constitution* (1966, Oxford University Press) at 146–47.

61 T Carothers “Promoting the rule of law abroad” (January 2003) *Carnegie Endowment for International Peace* at 3, available at: <<https://carnegieendowment.org/2003/01/28/promoting-rule-of-law-abroad-problem-of-knowledge-pub-1169>> (last accessed 14 December 2023).

62 J Finnis *Natural Law and Natural Rights* (1980, Oxford University Press) at 270.

63 F Fukuyama *The Origins of Political Order* (2012, Profile Books) at 245.

64 Id at 246.

65 See AV Dicey *An Introduction to the Study of the Law of the Constitution* (1985, Macmillan).

his paint on a blank canvas”;⁶⁶ he popularized an idea that was traceable to early writers. Hyperides wrote centuries earlier that the laws should be master in a democracy,⁶⁷ while Aristotle stressed that “it is more proper that the law should govern than any of the citizens”, that the persons holding supreme power “should be appointed only guardians and servants of the law”, and that “he who could place supreme power in mind, would place it in God and the laws”.⁶⁸

Africa’s constitutions enshrine the concept of the rule of law in diverse ways. Some enshrine “the primacy of the Constitution and the law”,⁶⁹ in effect, any conduct inconsistent with the constitution, including “[a]ny law, customary practice or a decision of an organ of state or a public official”, is invalid.⁷⁰ The Kenyan Constitution contains explicit provisions prohibiting any challenge to its validity or legality, and makes any attempt to establish a government in a manner inconsistent with the constitution illegal.⁷¹ Some constitutions treat such acts as treasonable, and even vest on all citizens “the right and duty at all times” to resist any violent or other unlawful means to suspend, overthrow or abrogate the Constitution or any part of it, or any attempt to do any such act.⁷² The Nigerian Constitution prescribes that no one shall be deprived of liberty except in accordance with a procedure permitted by law. Accordingly, general limitations on rights should be by “law that is reasonably justifiable in a democratic society”.⁷³

In sum, the rule of law regulates power, upholds a government’s rational choices and limits its arbitrariness. It guarantees responsible government and a society that strives for justice rather than power. A law-based state is primarily concerned with those norms that are compatible with the fundamental values of human society: dignity, equality, freedom, social justice, non-discrimination, inclusiveness, transparency and accountability.⁷⁴ The rule of law is an important contributor to economic growth, as it allows constitutional democracies to accommodate legitimate choices and voices. A law-based state is not indifferent to values, neither does it deal merely with any sort of values or rights. While sovereign authorities rule through human agencies, the rule of law ensures that the process, as far as possible, should be channelled through the means of rule-making and attempts at its faithful implementation.⁷⁵ That way, the rule of law “ensures that individual citizens have a fair warning about the rules to be applied to their actions they choose to take and the opportunity of a fair hearing to determine what legal consequences of those rules are”.⁷⁶

Human rights

Human rights are often associated with the rule of law. The Universal Declaration of Human Rights (UDHR), which ushered in the dawn of the post-World War II era, proclaims “that human rights should be protected by the rule of law”.⁷⁷ Respect for human rights is a constitutional value.⁷⁸ A state cannot claim to be democratic if it does not respect the freedom, equality and dignity of all human beings. The value of freedom requires that governments should have the powers only

66 T Bingham *The Rule of Law* (2010, Penguin) at 3; and generally BZ Tamanaha *On the Rule of Law: History, Politics, Theory* (2004, Cambridge University Press) at 127.

67 Hyperides *In Defence of Euxenippus* (ed JO Burti, Loeb Classic Library, II 468) at sec xxi, para 5, available at: <https://www.loebclassics.com/view/hyperides-defence_euxenippus/1954/pb_LCL395.463.xml> (last accessed 23 January 2024).

68 Aristotle *Politics* (trans W Ellis, 1931, Everyman) at 1287a.

69 Eg Angolan Constitution, sec 2; Ethiopian Constitution, sec 8(2); Nigerian Constitution, sec 1(1); Kenyan Constitution, sec 2(1).

70 Ethiopian Constitution, sec 9(1); South African Constitution, sec 2; *Ocansey*, above at note 39, para 35.

71 Kenyan Constitution, secs 2(3) and 3(2).

72 Eg Ghanaian Constitution, sec 3(3)–(4).

73 Nigerian Constitution, secs 35(1) and 45(1).

74 Lustration case PL US 1/92 (Sb), extracted in Dorsen *Comparative Constitutionalism*, above at note 6 at 1272–73.

75 See C Sampford *Retrospectivity and the Rule of Law* (2006, Oxford University Press) at 40.

76 *Ibid.*

77 Universal Declaration of Human Rights, UN doc A/Res/810 at 71 (1948), Preamble.

78 *Ocansey*, above at note 39, para 61.

for such action as is explicitly required by law, so that no one possesses any arbitrary power.⁷⁹ The value of equality posits that everyone should have the same opportunity to influence decisions affecting them.⁸⁰ The value of dignity demands that public officials and others should treat a person “in a way that is not inconsistent with their accepting that his life is of intrinsic importance and that he has a personal responsibility for realizing value in his own life”.⁸¹

Dignity is an absolute, supreme and inviolable value. It is the *raison d'être* of human rights; thus, it deserves an extended commentary.⁸² Human rights seek to protect the uniqueness of each individual, which underpins the concept of integrity and dignity as entitlements. “Each and every one of us as everyday people,” says West, “is unique and distinctive, singular and irreducible, and therefore of equal value.”⁸³ At the same time, our essential dignity arises from the unity or universality of humankind. Humanity in general shares “an imaginary divinity”.⁸⁴ Dignity underpins the conception of civilization, what Cicero calls *humanitas* – recognition of one’s personality and the right of others to care for their personalities. This recognition “implies compromise and self-restraint and sympathy and consideration”.⁸⁵ Dignity is “the only possible motive for universal respect towards all human beings”.⁸⁶ It is impossible, Weil writes, “to feel equal respect for things that are in fact unequal unless the respect is given to something that is identical in all of them”.⁸⁷ Equal respect affirms the equality of all human beings.

Dignity also determines our attitude towards each other and explains the natural phenomenon which drives us to condemn or oppose bullying, harassment or other forms of inhumane or degrading treatment of others, with or without their consent. We desire to live in dignity because, without it, “our lives are only blinks of duration”.⁸⁸ It is so basic and inherent in humankind that not even mental disability can deprive a person of it.⁸⁹ Like reason, it inheres in the individual independent of their sex or status. Unlike power, which is a means of commanding, dignity is not a means to anything; it is like beauty – good in itself, a finality that involves no objective. It constitutes what Kant calls “a good will”: “good not because of what it effects or accomplishes, nor because of its fitness to attain some proposed end; it is good only through its willing, i.e., it is good in itself”.⁹⁰ Elsewhere he wrote that “[h]umanity itself is a dignity; for man cannot be used merely as a means by any man (either by others or even by himself) but must always be treated at the same time as an end”.⁹¹

Human rights are universal in scope, hence their equal guarantee in global, regional and national human rights instruments. The UN Charter “reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.⁹² Its Article 1 embodies principles of justice and non-discrimination. The UDHR, in turn, guarantees popular sovereignty, the equal right to vote in elections, the right to participate

79 Hayek *Constitution*, above at note 13 at 182.

80 Council of Europe “Democracy” in *Compass: Manual for Human Rights Education with Young People*, available at: <www.coe.int/en/web/compass/democracy> (last accessed 14 December 2023).

81 Dworkin *Is Democracy*, above at note 43 at 35.

82 See generally A Chaskalson “Human dignity as a foundational value of our constitutional order” (2000) 16 *South African Journal of Human Rights* 193; A Gewirth “Human dignity as the basis of rights” in M Meyer and W Parent (eds) *The Constitution of Rights* (1992, Cornell University Press) at 10.

83 C West “A grand tradition of struggle” (2020) *The English Journal* 39 at 41.

84 S Weil *Waiting on God* (1950, William Collins and Sons) at 114.

85 RH Barrow *The Romans* (1949, Penguin) at 13.

86 S Weil *Gateway to God* (1974, William Collins and Sons) at 39.

87 *Id* at 40.

88 R Dworkin *Justice for Hedgehogs* (2011, Belknap Press) at 423.

89 *Purohit and Moore v Gambia* [2003] African Commission on Human and Peoples’ Rights (ACHPR) comm no 241/2001, para 57.

90 I Kant *Groundwork for the Metaphysics of Morals* (ed CM Korsgaard, 2012, Cambridge University Press), para 394.

91 I Kant *The Doctrine of Virtue* (trans MJ Gregor, 1964, Harper Torchbooks) at 116, para 38.

92 UN Charter, Preamble.

in government and equal access to public services.⁹³ These provisions were expressed in a positive form in the International Covenant on Civil and Political Rights.⁹⁴ Almost all African states constitutionalize human rights in varying degrees. Most constitutions guarantee civil and political rights, as in Nigeria, Ethiopia and Kenya.⁹⁵ But the Nigerian Constitution is problematic as it excludes non-citizens from certain rights guaranteed to them under international human rights law: privacy, freedom of movement, equality and property.⁹⁶ Nigeria should address this anomaly through a constitutional amendment.

Many constitutions also enshrine generous economic, social and cultural rights, as in Malawi and Ethiopia.⁹⁷ The South African Constitution protects healthcare, food, water, social security, education, etc,⁹⁸ albeit qualified by considerations of “available resources”, “reasonable measure[s]” and the “progressive realisation” clauses.⁹⁹ Others incorporate the three dimensions of rights, like Senegal’s, which provides that “[t]he Republic of Senegal guarantees to all citizens their individual fundamental freedoms, economic and social rights as well as group rights”.¹⁰⁰ It even uniquely criminalizes their infringement or the intentional restriction of their exercise.¹⁰¹ The Ethiopian Constitution guarantees the third-generation right to development and stresses that “[t]he basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs”.¹⁰²

Citizenship

Constitutionalism guarantees common citizenship, which defines the relationship between the individual and the state. Both constitutional and international human rights instruments recognize citizenship rights. Citizenship is based on three principles.¹⁰³ First, citizenship implies membership in a collective. Individuals acquire their constitutional status as citizens, by virtue of which they become members of the state. The issuance and possession of a passport allows them to carry their citizenship status with them even where they migrate to another country, unless they elect to renounce their status and acquire that of another country. Varied civic duties attach to citizenship; these include the duty to help enhance the power, prestige and good name of the state, to defend the state and to render such national service as may be required. They also entail respecting the dignity of other citizens and their rights and legitimate interests, living in unity in the spirit of common fellowship, making positive and useful contributions to the advancement, progress and wellbeing of the community where the citizen resides, rendering assistance to appropriate and lawful agencies in the maintenance of law and order, declaring one’s income honestly to appropriate and lawful agencies, and paying one’s tax promptly.¹⁰⁴

Second, the constitution guarantees the rights of every citizen, including the right not to be arbitrarily deprived of citizenship. Citizenship by naturalization could be lost where the individual unlawfully trades with an enemy state during times of war, or engages in or associates with any

93 UDHR, above at note 77, art 21.

94 999 UNTS 171 (1976), art 25 (ICCPR).

95 Nigerian Constitution, cap 4; Ethiopian Constitution, secs 14–40; Kenyan Constitution, sec 10(2)(b).

96 Nigerian Constitution, secs 37 and 41–43.

97 Malawian Constitution, sec 17; Ethiopian Constitution, secs 41–42. See generally N Udombana *Social and Economic Rights in Africa: International and Public Law Perspectives* (2023, Routledge).

98 South African Constitution, cap 2.

99 See eg id, sec 29(1)(b).

100 Senegalese Constitution 2001, sec 8.

101 Id, sec 9.

102 Ethiopian Constitution, sec 43(4).

103 *Gill v Registrar of Political Parties* Civil Appeal 1 of 2011, 30 March 2011 [2011] AHRLR 225, para 35 (Seychelles Supreme Court).

104 Nigerian Constitution, sec 24; cf Algerian Constitution, secs 74–83; South African Constitution, sec 3(2).

business that, in the opinion of the president, is “carried on in such a manner as to assist the enemy”.¹⁰⁵ In a citizenship-based society, all members have equal and full rights;¹⁰⁶ that is, they are “equally entitled to the rights, privileges and benefits of citizenship”.¹⁰⁷ The right to equal protection under the law, enshrined in several human rights instruments, embodies the same principle.¹⁰⁸ A citizen is no more or less so because s/he lives in a city or in a village, is literate or illiterate, is poor or rich, or because s/he speaks one language or another. In citizenship, all are “members one of another”; meaning, to invoke an ancient text, that “there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female”.¹⁰⁹ The person is more important than any category or label. The reverse is the case in a state based on ethnicity; in such a state, the government plays politics with polarization and uses ethnically based considerations to distribute public goods. Ethnicity creates an unequal status of citizenship and makes it easy for political demagogues to manipulate consciousness of difference, to find targets of opportunity and to mobilize support for chauvinistic causes.¹¹⁰

Outside the sphere of civic duties, the third principle is that the individual is free and responsible only to him/herself. In that mode, s/he is an autonomous person rather than a citizen. Even in that, the legal philosophy of free individuality ought to be based on the human mind – the self-consciousness of a reasonable being – as propounded by philosophers such as Kant, Fichte and Hegel.¹¹¹

Constitutional and international human rights laws share much in the content and scope of citizenship, with similar modes of judicial enforcement. But much needs to be done to align national laws on citizenship with global and regional standards. The laws and practices governing citizenship in many states still leave many people without a country to which they belong. Discriminatory citizenship practices exacerbate tensions in many states, while stateless Africans are systematically exposed to human rights abuses.¹¹² *Anudo v Tanzania* is illustrative: the applicant’s Tanzanian nationality was withdrawn, after which he was deported to Kenya. Kenya, in turn, expelled him back to Tanzania, where he was stranded in a no man’s land at the border. The African Court on Human and Peoples’ Rights held that the deprivation of the applicant’s nationality was arbitrary, contrary to the Tanzanian Constitution and Article 15(2) of the UDHR, and that “the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness”.¹¹³ The Court continued:

“International Law does not allow, save under very exceptional situations, the loss of nationality. The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guaranties which must be respected, allowing the concerned to defend himself before an independent body.”¹¹⁴

Between constitutional ideals and governance realities

There is no doubt, from the survey in the preceding sections, that several African constitutions espouse constitutionalism and democratic governance in one form or another. There is also no

105 Nigerian Constitution, sec 30(2)(b).

106 See eg Algerian Constitution, secs 32 and 34.

107 South African Constitution, sec 3(2).

108 Eg ICCPR, above at note 94, art 26; ACDEG, above at note 34, art 10(3).

109 Holy Bible, Galatians 3:28.

110 See S Adejumobi “Citizenship, rights, and the problem of conflicts and civil wars in Africa” (2001) 23 *Human Rights Quarterly* 148 at 148.

111 Gill, above at note 103, para 35.

112 See generally B Manby *Citizenship Law in Africa: A Comparative Study* (2016, Open Society).

113 *Anudo v Tanzania*, ACtHPR app no 012/2015, judgment of 22 March 2018 [2018] 2 AfCLR 248, paras 88 and 78.

114 Id, para 79, referencing Report of the Secretary General, Human Rights Council, 25th session, 19 December 2013.

doubt that democracy is a revered term the world over, but there is nothing magical about it. It is a human construct that can be used for good or bad ends. Ideally, it should serve as an instrumental freedom to advance good governance and human dignity. If it fails to achieve these goals, then democracy is no better than autocracy. Proceeding from this premise, this part cross-examines the practice of constitutionalism and democratic governance in Africa. The result, as will be shown, is mixed at best. In general, many states are increasingly mired in the tyranny of narrow-minded, misconceived power. Elected or, as is often the case, selected politicians have bastardized the word “democracy” by failing to respect and act on its ideals.

Arrested democratization

At the turn of the new century, Africa collectively boasted that democratic regimes that are committed to the protection of human rights, people-centred development and market-oriented economies are emerging in Africa.¹¹⁵ That boasting was not wholly true, largely because many of the rulers were themselves rebels. Some still hold tightly to power and are ready to trample constitutional values under their feet. Of course, there is clear evidence of cyclical electoral contests in many countries. The freedom, fairness and impartiality of elections have improved on the continent, particularly between 2008 and 2017.¹¹⁶ There has been a peaceful transfer of power from a ruling party to the opposition in a few countries, such as Ghana, Senegal, Tanzania, Zambia and Nigeria. Tunisia conducted a successful democratic transition, crowned by legislative and presidential elections in 2014 that were largely transparent, peaceful and credible. The AU commended the exercise and emphasized that the Tunisian experience could serve as a “possible model for [the] democratization process in Africa”.¹¹⁷

The AU recently praised its members for what it calls “the gains achieved in advancing democratic elections and consolidating good governance as essential conditions for responding to the need of their citizens, particularly through improved socio-economic delivery”.¹¹⁸ The inaugural indigenous Africa Governance Report, which the AU Assembly commissioned in 2017 and formally considered in 2019, also declared that governance has generally improved in Africa.¹¹⁹ It however acknowledged the “least gains ... in democracy and political governance”.¹²⁰ The 2021 version of the report even states that African governments have “demonstrated their capabilities and honoured their contracts to ensure the best policy outcomes for citizenry”, thereby strengthening “cultures of democracy” and delivering “public goods to the most vulnerable”.¹²¹ These reports, I suggest, do not reflect reality. Progress towards democratization has been uneven or inadequate at best. According to the Mo Ibrahim African Governance Report,

“[T]he capacity of election monitoring agencies has worsened and the space for political participation and opposition parties has shrunk since 2014. Measures related to civil rights and liberties, including the freedom of association and assembly and the freedom of expression[,]

115 New Partnership for Africa’s Development Framework Document, OAU doc NEPAD/01 (October 2001), para 7.

116 See Mo Ibrahim Foundation *Agendas 2063 and 2030: Is Africa on Track?* (2019) at 47, available at: <https://mo.ibrahim.foundation/sites/default/files/2020-02/African_Governance_Report_2019.pdf> (last accessed 23 January 2024).

117 Decision on Democratic Transition in Tunisia, AU doc Assembly/AU/Dec.568(XXIV) (January 2015), para 1.

118 Decision on the Fifth Report of the PSC of the AU on the Implementation of the AU Master Roadmap of Practical Steps for Silencing the Guns in Africa by the Year 2020, AU doc Assembly/AU/Dec.755(XXXIII) (February 2020), para 6.

119 AU “The Africa governance report 2019”, available at: <https://au.int/sites/default/files/documents/36418-doc-eng-the_africa_governance_report_2019_final-1.pdf> (last accessed 30 November 2022); Decision on the Revitalization of the African Peer Review Mechanism, AU doc Assembly/AU/Dec.631(XXVIII) (January 2017); Decision on the State of Governance in Africa, AU doc Assembly/AU/Dec.720(XXXII) (February 2019), para 5.

120 AU “Africa governance report”, id, para 8.

121 AU “The Africa governance report 2021” at 59, available at: <<https://au.int/en/documents/20220328/africa-governance-report-2021-africas-governance-futures-africa-we-want>> (last accessed 16 May 2023).

are declining and recorded their lowest scores in 2017. In particular freedom of expression has suffered since 2014.”¹²²

Many states adopted constitutions as a means to attain political legitimacy, but with little or no basal commitment to constitutionalism. The social, political and economic conditions in these states have led to the paradox of having constitutions without constitutionalism.¹²³ Even countries that are presumably democratic still experience legitimacy crises; they lack both “democratic legitimacy”, which is generated by perceptions of real participation in governance, and “formal legitimacy”, which is generated by results produced from institutions or systems erected through democratic processes.¹²⁴ Many countries have a notorious record for bad elections, such as Nigeria, where “multiple actors pursue pre-determined outcomes through common enterprise rather than allowing the people’s vote to determine the country’s political leadership”.¹²⁵ According to a recent European Union election observation mission report on Nigeria, “[t]he 2023 general elections did not ensure a well-run transparent, and inclusive democratic process as assured by the Independent National Electoral Commission (INEC). Public confidence and trust in INEC were severely damaged during the presidential poll and [were] not restored in state level elections.”¹²⁶ Courts, rather than the popular will, increasingly determine Nigeria’s electoral outcomes and political leadership, in what has become a “democracy by court order”.

The degree of democratization in Africa varies from authoritarianism at one end to functional multiparty systems at the other, with many “grey zones” in the middle. “Authoritarian democracy” is a contradiction in terms, but this is the version practised in many states. In Ethiopia, Prime Minister Abiy Ahmed launched a campaign of political liberalization after the March 2018 election. His normalization of relations with neighbouring Eritrea after decades of conflict won him a Nobel Peace Prize in 2019. A few years later, he flared and faded like a dying star, following his autocratic tendencies and his high-handedness against the Tigray people’s assertion of self-determination.¹²⁷ Even the Norwegian Nobel Committee issued a statement that Abiy has “a special responsibility to end the conflict and contribute to peace”, a rare rebuke of an honouree.¹²⁸ Insecurity is tearing lives apart in several other countries, thus making the promise of democracy and sustainable development a facade.

Tenure elongation

A political culture of changes of power based on regular, free, fair and transparent elections conducted by competent, independent and impartial electoral bodies is still an exception rather than the rule. Political office-holders manipulate almost every election to stay in power. As of 2021, five sitting heads of state had been in power for more than three, sometimes four, decades each: Paul Biya in Cameroon (in power since 1982), Denis Nguesso in the Democratic Republic of the

122 Mo Ibrahim Foundation *Is Africa on Track?*, above at note 116 at 47.

123 HWO Okoth-Ogendo “Constitutions without constitutionalism: Reflections on African political paradox” in D Greenberg et al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993, Oxford University Press) 65.

124 See JE Alvarez *International Organizations as Law-Makers* (2005, Oxford University Press) at 101.

125 National Human Rights Commission “An independent review of evidence of gross violations of the rights to participate in government, to public service, and to fair trial through the election petition process in Nigeria 2007 and 2011, Phase I: Final report” (2015, National Human Rights Commission) at 7.

126 EU Election Observation Mission “Nigeria 2023: Final report” (June 2023) at 6, available at: <https://www.eas.europa.eu/eom-nigeria-2023/european-union-election-observation-mission-nigeria-2023-final-report_en> (last accessed 30 July 2023).

127 D Walsh and A Dahir “Why is Ethiopia at war with itself?” (16 March 2022) *New York Times*, available at: <<https://www.nytimes.com/article/ethiopia-tigray-conflict-explained.html#link-5149fd7f>> (last accessed 30 November 2022).

128 Statement by the Chair of the Norwegian Nobel Committee of 13 January 2022 on the situation in Ethiopia (13 January 2022), available at: <<https://www.nobelprize.org/prizes/peace/2019/statement/>> (last accessed 30 November 2022).

Congo (from 1979 to 1992, and from 1997 to the present), Teodoro Nguema Obiang Mangué in Equatorial Guinea (since 1979), Isaias Afwerki in Eritrea (since 1991) and Yoweri Museveni in Uganda (since 1986).¹²⁹ The late Robert Mugabe refused to accept defeat by the opposition Movement for Democratic Change in 2007, in an election that witnessed the mass repression of opposition supporters. He misruled Zimbabwe for 37 years and turned the continent's breadbasket into a basket case. He once proclaimed that "only God will remove [him]", his way of showing contempt for the electoral process.¹³⁰

Africa is plagued by many one-issue politicians whose sole aspiration is to get to the top. Once there, they remain on top or even attempt to go higher. The gradual regression into unconstitutionality, such as the forced elongation of presidential tenure, also raises a legitimate question about whether western democracy is unsuited to Africa. Many of the elite who put themselves forward as the faces of democracy during military eras do not believe in it. These so-called champions of democracy and freedom have worked tirelessly to subvert constitutionalism. Many alleged democracies operate under what Weber calls "charismatic authority", as distinct from traditional or modern-rational variants.¹³¹ Even where some leaders emerge through the instrumentality of elections, they subsequently seek to perpetuate themselves in power under the pretext that they are so ordained by God. This mindset pushes elected and unelected rulers to undermine their own constitutions to prolong their stay in power, which is political corruption.¹³² In their inordinate desire to consolidate power, rulers resort to propaganda and create the impression that they are "too good to die". They grow bolder through their success and impunity. Tenure elongation is so routine that when President Sall of Senegal announced that he would not seek a third term, which would have meant a forced constitutional amendment, it became a cause for commendation and celebration.¹³³ It was like praising an infant for eating her food.

Power is sweet, particularly in Africa where democracy is largely defined by sycophancy and hero-worship, with crowds of courtiers forever assuring rulers of their messianic credentials. The rulers become slaves to passion, thereby subverting reason and morally driven governance. This explains why Africa's virtual dictators are reluctant to retire and allow fresh hands to reboot their countries for stability and possible economic growth. In the best-case scenario, these rulers clone their successors or reproduce their species like mice – as in Benin and the Democratic Republic of the Congo – rather than open up the political space for alternative leadership and fresh vision. Where cloning fails, the preceding regime tries, to borrow Justice Valko's words, "to preserve, to the greatest extent possible, a mutually connected and conspiratorial team that will enable it, even under a changed internal political situation, to influence even the ensuing democratic developments, or to reverse these developments at a propitious time".¹³⁴

Corruption and constitutionalism

Venial patronage and political corruption have probably done more damage to constitutionalism and democratization in Africa than any other challenge. Corruption appears to be a shared "value" in Africa. In the few remaining states still pretending to be democratic, the political elite

129 C Klobucista "Africa's 'leaders for life'", (30 June 2021) *Foreign Affairs*, available at: <<https://www.cfr.org/background/africas-leaders-life>> (last accessed 1 December 2022).

130 N Onishi and J Moyo "Robert Mugabe resigns as Zimbabwe's president, ending 37-year rule" (21 November 2017) *New York Times*, available at: <<https://www.nytimes.com/2017/11/21/world/africa/zimbabwe-mugabe-mnangagwa.html>> (last accessed 25 November 2022).

131 See M Weber *Economy and Society* (vol 1, 1978, University of California Press) at 212 ff. Charisma in Greek means "touched by God".

132 See G Arnold *Africa: A Modern History* (2005, Atlantic Books) at 921.

133 "Senegalese President Macky Sall says he won't seek a third term in 2024 elections after protests" (3 July 2023) *Le Monde*, available at: <<https://www.lemonde.fr/en/international/article/2023/07/03/>> (last accessed 5 July 2023).

134 Lustration case, in Dorsen *Comparative Constitutionalism*, above at note 6 at 1271.

see power as a trophy. They are more anxious to promote their selfish gains than the common good. From Northern to Southern and from Eastern to Western Africa – not excluding Central Africa – there is a long and labyrinthine tale of primitive theft of the common wealth by those entrusted with it. Greedy and dishonest politicians treat their countries as prostrate victims to be ravished in pursuit of vain glory.¹³⁵ The names of the political elite who live above board and demonstrate excellence in leadership in many of these countries could fit onto the back of a postage stamp. The last person who won the Mo Ibrahim Prize for Achievement in African Leadership was former President Mahamadou Issoufou of Niger in 2020, for leading his people “on a path of progress”.¹³⁶ Before him was former President Ellen Johnson Sirleaf of Liberia, in 2017, and former President Hifikepunye Pohamba of Namibia, in 2014. The Prize Committee could not find a fit and proper candidate for the award in 2009, 2010, 2012, 2013, 2016, 2018, 2019 or 2021.¹³⁷ The long absence of qualified candidates provides a rare insight into the calibre of men and women who have ruled and ruined their nations.

Corruption in Africa cuts across sex and age, indicating that the older generations have taught the younger ones the ways of greed. Even family members of holders of high political office have been implicated in money laundering.¹³⁸ The judiciary, which should give oxygen to the heart of constitutionalism, is infected by epidemics of corruption. Justice is often traded with silver and gold in many states, especially in election-related cases. The slogan in some countries is, why hire a lawyer when you can hire a judge? Because this is an age which valorizes wealth, no matter the manner of its accumulation, it is no longer obvious that those who sit in judgement over others ought to live an exemplary life.

The negative effect of corruption on the political, social and cultural stability and economic development of Africa has been profound. Corruption, says Fombad, “is eating away the life of the ambitious constitutional reforms that states across the continent embarked upon from the 1990s onward with a goal of developing a culture of constitutionalism, good governance, and respect for the rule of law”.¹³⁹ It undermines accountability and transparency in the management of public affairs.¹⁴⁰ It limits a government’s ability to advance the human security of its citizens, including their health and education. A 2023 report on Nigeria shows that several primary healthcare centres have no medical personnel due to corruption, thereby compromising the healthcare services and wellbeing of the local population.¹⁴¹ Corruption is a gross violation of the right to life, which incorporates the rights to dignity and livelihood.¹⁴² Indeed, Hassan rightly argues that the right to life is closely related to many other rights: respect for dignity, freedom from exploitation, degradation, slavery, torture, cruel and inhuman or degrading punishment and treatment, and healthcare.¹⁴³

135 See generally SB Agang, C Jones and P Pillay (eds) *A Multidimensional Perspective on Corruption in Africa: Wealth, Power, Religion and Democracy* (2019, Cambridge Scholars Publishing).

136 Mo Ibrahim Foundation “President Mahamadou Issoufou wins 2020 Ibrahim Prize for Achievement in African Leadership” (8 March 2021), available at: <<https://mo.ibrahim.foundation/news/2021>> (last accessed 25 November 2022).

137 The names of previous prize winners and criteria for the awards are available at <<https://mo.ibrahim.foundation>> (last accessed 23 January 2024).

138 Eg K Short “Zambian police arrest former president’s son and his wife on corruption charges” (27 June 2023) VOA, available at: <<https://www.voanews.com/a/zambian-police-arrest-former-president-s-son-and-his-wife-on-corruption-charges-/7154942.html>> (last accessed 6 July 2023).

139 CM Fombad “Corruption and the crisis of constitutionalism in Africa” in CM Fombad and N Steytler (eds) *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies* (2020, Oxford University Press) 15 at 15.

140 AU Convention on Preventing and Combating Corruption, AU doc Assembly/AU/Dec.27(II) (2003), Preamble.

141 “Lack of medical personnel, corruption prevalent in Abuja PHCs – Report” (3 July 2023) *Premium Times*, available at: <<https://www.premiumtimesng.com/news/top-news/607800>> (last accessed 6 July 2023).

142 See *Sudan Human Rights Organization and Another v Sudan*, ACHPR comm no 279/03 [2009] AHRLR 153, para 146; *Asare and Others v GA West District Assembly and Another*, suit AP 36/2007, judgment of 2 May 2008 [2009] AHRLR 343, paras 13–14 (Supreme Court of Ghana).

143 B Hassan *The Law of the African Charter on Human and People’s Rights* (2007, Trafford Publishing) at 189.

Corruption makes many Africans proverbially wash their hands with spittle despite living on the bank of the river.

Crisis of citizenship

Pluralism, tolerance and broad-mindedness are markers of democracy.¹⁴⁴ In such a society, the government and the governed share a common set of rules, and public figures tolerate a greater degree of criticism. In *Lingens v Austria*, it was held that “politicians may be subject to stronger public criticisms than private citizens”.¹⁴⁵ They have to, because power is a trust. It is held upon conditions. The constitutionally protected “personal space” of public officials and key political players is smaller than that of other individuals. Thus, public officials must especially allow themselves to be subjected to the criticism of others, “in the interest of the democratic functioning of the State and likewise in the democratic formulation of public opinion”.¹⁴⁶

Things are different in Africa. The relationship between the government and citizens is largely adversarial. Governments generally have a bunker mentality of “us” versus “them”, where “them” represents citizens who must be kept at arm’s length. Strong men and women practise poisonous and sectarian politics, pitting citizens against each other as part of a divide-and-conquer strategy. Differences in political opinions may be treated as seditious or treasonous. Those opposed to government policies often suffer recrimination, discrimination, harassment or worse. Journalists – the usual suspects and scapegoats – are sometimes arbitrarily arrested, detained, tortured, sometimes declared stateless. A purely academic piece critical of a political system could earn the writer deportation, as in *Kenneth Good v Botswana*, as could a satirical piece on a country’s political leaders, as in *Attorney-General v Roy Clarke*.¹⁴⁷

There is so much rhetoric about democracy and so little good governance. The concept of democracy as citizenship is nearly absent even in many of the states that espouse constitutionalism. Africa’s development challenges are often given as alibis for the unnecessary social misery that bedevils its citizens, but the true reason lies in the greed of its leaders. Mindless graft at the top translates into poverty at the bottom. In consequence, many citizens have gone into voluntary servitude abroad in search of better pastures – akin to biblical times, when people sold themselves as slaves in order to eat.¹⁴⁸ The quest for, or the illusion of, a “better” life has led to the current tragic situation where “[t]ens of thousands of young African bodies have been swallowed by the sea or abandoned in the desert, in pursuit of a decent life for which they are prepared to risk everything, because they believe there is no hope at home”.¹⁴⁹ Those who manage to migrate may be subjected to slave-like conditions in their host countries, not to mention racial discrimination.¹⁵⁰ Western countries cast African migrants as problem people rather than people with problems deserving empathy. European countries in particular ignore the fact that immigrants’ contributions are part of the leaven of their development loaf. The irony should not be lost on them: these countries abducted Africans into slavery, but they are now adopting hard-line

144 Cf *Handyside v UK* [1976] 58 ILR 423, para 49, relating to freedom of expression.

145 *Lingens v Austria*, case no 9815/82, 8 July 1986, para 28.

146 Decision 36/1994 (VI.24) AB hat (Hungarian Constitutional Court).

147 *Kenneth Good v Botswana*, ACHPR comm no 313/05 [2010] AHRLR 43; *Attorney-General v Roy Clarke*, Appeal no 96A/2004, 27 March 2007 [2008] AHRLR 259 (ZaSC), which held that the deportation of the applicant was disproportionate and extreme.

148 See Holy Bible, Genesis 47:19–21.

149 HEP Kagame “The imperative to strengthen our union: Report on the proposed recommendations for the institutional reform of the African Union” (27 January 2017) at 4, available at: <https://static.pmg.org.za/Kagame_Report.pdf> (last accessed 15 December 2023).

150 UN “UN experts urge more action to ensure dignity, equity and justice for migrants, refugees and asylum seekers of African descent” (30 August 2022), available at: <<https://www.ohchr.org/en/statements/2022/08/un-experts-urge-more-action-ensure-dignity-equity-and-justice-migrants-refugees>> (last accessed 15 November 2022).

immigration policies against them solely on the basis of race, a legal and cultural construct with no scientific content or validity. But, as Yew cautions, there are two alternative solutions to the migration problem: either to accept that all people have equal rights or to return to the rule of the strong over the weak.¹⁵¹

Imperatives of good governance

Good governance consists of structures and processes designed to ensure accountability, transparency, responsiveness, stability, inclusiveness, empowerment and broad-based participation. Good governance is like an insurance policy; it does not prevent an economic crisis, but it does give a secure base from which to face its consequences. This final section reflects on political governance in Africa; among other things, it calls on states to reconstruct their postcolonial institutions and politics in order to achieve good governance that delivers tangible dividends to citizens.

Reconstructing states

The vital first step towards strengthening constitutional orders in Africa is state reconstruction. Colonialism led to fractious distortions in various shades of identities, and postcolonial states are still grappling with its debilitating legacies, not to mention the crippling effects of continuing western imperialism. Many states are unable to deal with such challenges as corruption due to weak institutions, complicated by the fact that they remain supplicants for western aid.¹⁵² As Arnold writes: “The degree of corruption present in African states are [sic] closely associated with questions of meaningful economic independence, and calls by donors for recipients to tackle corruption never lead to a curtailment of aid[,] though occasionally they are followed by a temporary suspension of it as part of a ritualistic donor–recipient confrontation.”¹⁵³ But states must reform their institutions to respond to governance challenges. We can acknowledge the potential difficulties in changing colonial legacies, but the tragedy lies in giving up in the attempt. Governments should devote time, energy and attention to examining more closely the nature of contested memories that have become part and parcel of their history. They should then work towards an inclusive national consensus on the structure and guiding principles that guarantee a unified, progressive, prosperous and egalitarian society.

Africa needs leaders who better understand the rule of law, which is the foundation of a just society. Governments must let the rule of law *rule* in their respective domains. Those sworn to uphold the constitution have an obligation to advance the cause of constitutional principles.¹⁵⁴ Without the rule of law, marginalized or oppressed people would be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.¹⁵⁵ People resort to unconstitutionality when rulers become owners of the state, tamper with constitutions, impulsively amend electoral laws to manipulate the democratic processes and trample on other constitutional values. These acts of impunity explain the resurgence of coups d'état in Africa, such as the recent ones in Niger and Gabon. Constitutionalism is the panacea for unconstitutional changes of government.

A new grammar of politics

Inclusivity must be the new grammar of politics in Africa. Africa needs systems of government that are based on permanent social dialogue and the search for political consensus. Governments should open up the civic space for their population to share concerns and should proactively respond in

151 LK Yew *From Third World to First. The Singapore Story: 1965–2000* (2000, HarperCollins Publishers) at 353.

152 Arnold *Africa*, above at note 132 at 921.

153 *Id* at 922.

154 GJ Jacobsohn *Apple of Gold: Constitutionalism in Israel and the United States* (1993, Princeton University Press) at 118.

155 UDHR, above at note 77, Preamble.

ways that enhance transparency and inclusivity in decision-making processes.¹⁵⁶ They should create a level playing field for meaningful citizen participation in governance. There should be periodic recourse to, and use of, referenda whenever circumstances necessitate, aimed at discerning the will of the governed in any evolving national constitutional architecture. Such measures are crucial for peaceful political succession and predictable transfers of power.¹⁵⁷

Africans themselves must make constitutionalism work by voting at elections. But focusing solely on electoral politics as the site of democratic life is myopic. It “fails to appreciate the crucial role of the underlying moral commitments and visions and fortifications of the soul that empower and inspire a democratic way of living”.¹⁵⁸ Public figures frame the lives of those who come within the ambit of their decisions; thus, the quality of their efforts must be constantly subjected to popular judgement.¹⁵⁹ Citizens must draw on the Socratic commitment to questioning and critiquing governing authorities and should forcefully lobby for people-oriented legislations. As Laski argues, “it is the plain lesson of the historic record that the wants of men will only secure recognition to the point that they are forcibly articulate”.¹⁶⁰ Silence is not golden in the face of rampant sophistry by Africa’s political elite.

African youths are yearning for a better future, and must be a part of its design. The African Youth Charter mandates its state parties to “[p]rovide access to information and education and training for young people to learn their rights and responsibilities, to be schooled in democratic process, citizenship, decision-making, governance and leadership such that they develop the technical skills and confidence to participate in these processes”.¹⁶¹ Governments should seize on the multiple opportunities that the digital revolution creates to break the wall that hitherto hampered effective communication with their youth. Such creative measures could help to “effectively steer political transitions away from disruptions, due to communication gaps and misinformation via social media”.¹⁶²

Prioritizing human security

Every government exists to safeguard the security and welfare of its citizens.¹⁶³ Governance is about positively touching people’s lives in their homes, roadsides, schools, marketplaces, fields, vineyards or parks. African governments should pay closer attention to human security, defined as “the security of the individual in terms of satisfaction of his / her basic needs”.¹⁶⁴ It entails “the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his / her full development”.¹⁶⁵ Human security is shaped by factors such as political stability, development policies and environmental management.¹⁶⁶

156 See AU “Declaration on unconstitutional changes of government in Africa” (17 March 2022), para 3, available at: <<https://www.peaceau.org/en/article/declaration-on-unconstitutional-changes-of-government-in-africa>> (last accessed 22 November 2022).

157 “Master roadmap of practical steps to silence the guns in Africa by year 2020”, adopted by the Peace and Security Council in Lusaka in 2016 at 8, available at: <https://dppa.un.org/sites/default/files/170201_au_silencing_the_guns_roadmap.pdf> (last accessed 23 January 2024).

158 C West *Democracy Matters: Winning the Fight against Imperialism* (2004, Penguin) at 15.

159 Laski *Grammar*, above at note 10 at 55.

160 Ibid.

161 AU doc Assembly/AU/Dec.121(VII) (2006), art 10(3)(d).

162 AU “Declaration”, above at note 156, para 5.

163 Nigerian Constitution, sec 14(2)(b); South African Constitution, Preamble.

164 AU Non-Aggression and Common Defense Pact, AU doc Assembly/AU/Dec.71(IV) (2005), art 1(k).

165 Id.

166 See generally N Cheeseman *Democracy in Africa: Success, Failures and the Struggle for Political Reform* (2015, Cambridge University Press).

Globalization and its gospel of free-market fundamentalism is a major threat to democratic life and human welfare. The free market trivializes concerns for the public interest, because the business of business is *business*, that is, profit maximization. A democratic government must be involved in raising the level of production and services to achieve economic growth, sustainable development and job creation.¹⁶⁷ Development policies along these lines will augment citizens' living standards in the context of a democratic society.¹⁶⁸ Human needs must also not be sacrificed on the altar of national security. The security of a nation is directly proportional to the security of individual citizens to live in peace, to satisfy their basic needs and to be able to participate fully in societal affairs and enjoy their freedoms.¹⁶⁹ When governments mismanage scarce state resources, or dissipate them on weapons acquisition in pursuit of so-called national security, they proportionately neglect education, healthcare, shelter and climate problems. They also expose millions to poverty and generate social and political grievances that result in conflicts or other threats to constitutional order.

Africa's response to the migration crisis must go beyond a mere declaration "emphasizing the importance of adequate protection of the rights of migrant workers and their families".¹⁷⁰ What is needed is a concerted collective pressure on western countries to implement existing international norms on the subject.¹⁷¹ Such protection extends to so-called "illegal immigrants", who are regularly subjected to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments in western countries.¹⁷² There is nothing like goodwill slavery. As the Community Court of ECOWAS put it: "Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave."¹⁷³ The migration crisis largely results from bad governance in the home states; the absence of a sanctuary at home exposes many Africans to harsher conditions abroad and testifies to the urgent need for political and economic reforms.

Conclusion

From the evidence gathered in this article, one can conclude that Africa has set its political eyes on constitutionalism and democratization. Many states run a constitutional democracy, or a semblance of it. However, the life of the law is not logic but experience, and it is shaped by the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, [and] avowed consciousness".¹⁷⁴ Democracy must produce good governance, which is critical for peace, security and development.¹⁷⁵ The jury is still out on how far the values of constitutionalism are reflected in fact in Africa. To the present writer, many constitutional values still seem far cries in Africa. The good news is that citizens, particularly the youth, are increasingly getting engaged in governance and refusing to accept poor governance as the norm. That, in itself, is progress. Progress is made out of a resisting material.

I conclude by restating some key postulates. Constitutionalism limits power in order to advance good governance. Democracy is an instrumental freedom, not a final cause; it is a means to an end, a power to realize a purpose. Political power is a public trust in the service of the governed. Politics

167 Cf Cairo Declaration, OAU doc AHG/Decl.1(XXIX) (June 1993), para 14.

168 AU Non-Aggression Pact, above at note 164, art 3(c).

169 Conference on Security, Stability and Cooperation in Africa, Solemn Declaration, OAU doc AHG/Decl.4(XXXVI) (July 2000), para 10(b).

170 Declaration on Employment, Poverty Eradication, Inclusive Development in Africa, AU doc Assembly/AU/Decl.6 (XXIII) (January 2015), para 4.

171 See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc A/Res/45/158 (18 December 1990), establishing basic principles concerning the treatment of migrant workers and members of their families.

172 Cf Committee on Economic, Social and Cultural Rights "State obligations under the [ICESCR] in the context of business activities", General Comment no 24, UN doc E/C.12/GC/24 (10 August 2017), para 8.

173 *Koraou v Niger*, suit no ECW/CCJ/App/08/08, judgment of 8 October 2008, para 79.

174 OW Holmes Jr *The Common Law* (2009, Harvard University Press) at 3.

175 Cf Protocol on the Peace and Security Council, AU doc Assembly/AU/Dec.4(I) (2002), Preamble.

and economic development are interconnected, and both must constantly embrace each other for the common good. A constitutional democracy underpinned by proper economic management would guarantee sustainable development and inclusive prosperity for Africans; that is the bottom line. For Africa, the sacrifice is not as great as it seems. All that a government has to do is to improve what it can.

Competing interests. None