Stellenbosch Handbooks in African Constitutional Law

# THE SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM

Edited by Charles M. Fombad

OXFORD

STELLENBOSCH HANDBOOKS IN AFRICAN CONSTITUTIONAL LAW

BOOK ONE

# Separation of Powers in African Constitutionalism

Edited by

CHARLES M. FOMBAD

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# *Stellenbosch Handbooks in African Constitutional Law*

The *Stellenbosch Handbooks in African Constitutional Law* is a series of books that engage with contemporary issues of constitutionalism in Africa in a unique and highly original manner. The first experiment in democratic and constitutional governance in Africa that started after independence was soon overtaken by dictatorships, and arbitrary and repressive rule. The pulling down of the Berlin Wall followed by the collapse of the communist dictatorships in Eastern Europe unleashed a fresh wind of democratization and new hopes for the establishment and entrenchment of constitutional governance and constitutionalism in Africa. This series is designed to avoid a mere repetition of the now well-rehearsed concerns and doubts about constitutionalism on the continent and instead to identify, analyse, and promote serious discussion on the critical issues that can shape, refine, and deepen the strides being taken towards consolidating constitutionalism in Africa.

Although comparative constitutional law has now emerged strongly in the last two decades as a major field of legal scholarship, most of the extensive research and publications that have been carried out have focused mainly on the well-established democracies. The only African country that has occasionally attracted some research interest from a comparative law perspective is South Africa. The few books that do present some perspectives on African comparative constitutional law focus narrowly and exclusively on developments in either Anglophone, Francophone, or Arabophone Africa but with nothing cutting across these divides. Yet, since 1990, Africa has been undergoing profound and far-reaching constitutional developments that deserve to attract the attention of comparatists. Very limited comparative law research has been carried out to understand the nature of these constitutional changes, review their impact on the attempts to entrench an ethos of constitutionalism on the continent, and assess the prospects for the future.

The overriding objective of the *Stellenbosch Handbooks in African Constitutional Law* series is as follows. First, the series will stimulate interest in comparative constitutional law research and studies on the different constitutional traditions operating in Africa by presenting a comprehensive analysis of the latest thinking, research, and practice. In this way, the series intends to fill the huge knowledge gap in the existing literature on comparative African constitutional law as well as point to directions for future research. Second, each volume will for the first time, bring together high quality innovative and original material from diverse perspectives written by scholars and legal practitioners drawn from the different constitutional traditions operating on the continent. In this respect, each volume will strive to cover Anglophone, Arabophone, Francophone, Hispanophone, and Lusophone Africa. In many respects, this will ensure that the African voice is heard in the global constitutional debate. Third, because most African countries share many common features, such as the colonial legacy, geographical proximity, and social, economic, political, and cultural conditions, the books in the

series adopt a comparative approach that highlight gaps and good practices in a manner that will provide a rich source of authoritative information for promoting an intra-African legal dialogue and the cross-fertilization of ideas across the different constitutional traditions. Finally, the books in the series are intended to act as a repository for the accumulation of knowledge, experience, and expertise on the continent. Each handbook stands alone and is intended to provide an invaluable source of authoritative reference material for academics, researchers, students at all levels, legal practitioners, and policy makers.

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# *Preface*

The books published in the series *Stellenbosch Handbooks in African Constitutional Law* have emerged from a set of seminars known as the Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) organized by the Stellenbosch Institute for Advanced Study (STIAS) and the Institute for International and Comparative Law in Africa (ICLA) of the University of Pretoria. The first of these seminars took place at the Wallenberg Research Centre of STIAS in Stellenbosch from 4–6 September 2013. For this first seminar, a carefully selected group of outstanding African and some non-African constitutional law scholars and practitioners were invited. During the discussions, plans were made for future seminars and the need to publish the papers presented was agreed upon. By the time the second seminar took place, from 17–19 September 2014, contact had already been made with four eminent publishers including Oxford University Press (OUP), to discuss the possibility of their publishing these papers in a new series devoted to Africa. All four accepted but the participants decided to publish the papers with OUP.

We thank OUP, for agreeing to launch this series, and for the support and assistance they have provided. Special thanks go to Mr Alex Flach at OUP who took an early interest in the project and has provided invaluable ongoing support. This idea would never have been brought to fruition without the financial support provided by STIAS and ICLA. We want to particularly thank the present Director of STIAS, Professor Hendrik Geyer, his predecessor and founding Director of STIAS, Professor Bernard Lategan, as well as the two Co-Directors of ICLA, Professors Christof Heyns and Erika de Wet, who have at all times been the solid rock on which this project is moving forward. Finally, thanks are also due to all the scholars who have contributed to the project, especially those who took part in the SASCA 2013 seminar and those whose excellent contributions to the 2014 event are featured in this maiden volume. We hope that subsequent volumes will build on this foundation, including and reflecting all the diverse constitutional traditions on the continent and contributing to constitutional discussion within Africa, and with the world.

# Contents

*General Introduction to the Stellenbosch Handbooks in African Constitutional Law Series* v
*Preface* vii
*Table of Cases* xi
*Table of Legislation* xvii
*List of Abbreviations* xxv
*List of Contributors* xxvii

Introduction 1
*James Fowkes and Charles M. Fombad*

PART I: OVERVIEW

1. The Evolution of Modern African Constitutions: A Retrospective Perspective 13
*Charles M. Fombad*
2. An Overview of Separation of Powers under Modern African Constitutions 58
*Charles M. Fombad*

PART II: THE RELATIONSHIP BETWEEN THE LEGISLATURE AND THE EXECUTIVE

3. Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa 95
*Francois Venter*
4. Kenya's Budding Bicameralism and Legislative–Executive Relations 116
*Conrad M. Bosire*
5. Legislative–Executive Relations in Presidential Democracies: The Case of Nigeria 135
*Sylvester Shikyil*

PART III: THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE POLITICAL BRANCHES

6. An Overview of Judicial and Executive Relations in Lusophone Africa 159
*Fernando Loureiro Bastos*
7. Super-presidentialism in Angola and the Angolan Judiciary 182
*André Thomashausen*

8. Relationships with Power: Re-imagining Judicial Roles in Africa 205
*James Fowkes*

9. Defying Assumptions about the Nature of Power Relations Between the Executive and Judiciary: An Overview of Approaches to Judicial and Executive Relations in Ghana 226
*Kofi Quashigah*

10. Judicial–Executive Relations in Nigeria's Constitutional Development: Clear Patterns or Confusing Signals? 239
*Ameze Guobadia*

11. Relations Between the Legislature and the Judiciary in Ethiopia 265
*Assefa Fiseha*

12. Judicial–Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy? 286
*Walter Khobe Ochieng*

13. An Overview of the Diverse Approaches to Judicial and Executive Relations: A Namibian Study of Four Cases 300
*Nico Horn*

PART IV: INDEPENDENT CONSTITUTIONAL INSTITUTIONS

14. The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa 325
*Charles M. Fombad*

15. The Public Prosecutor and the Rule of Law in Anglophone Africa 345
*Jeffrey Jowell*

16. Separation of Powers and the Position of the Public Prosecutor in Francophone Africa 359
*Horace Adjolohoun and Charles M. Fombad*

17. Constitutional Legitimacy and the Separation of Powers: Looking Forward 385
*Michaela Hailbronner*

*Index* 399

# Table of Cases

ANGOLA

Constitutional Court No 233/13 of 15 November (Diário da República, Série I, No. 220, November 15, pp 3147 to 3149) ... 170
Supreme Court Judgment 83/2003 (21 October 2003) ... 170

BENIN

Constitutional Court of Benin, DCC 11-067 (20 October 2011) ... 390
Constitutional Court of Benin, DCC 14-156 (19 August 2014) ... 390
Constitutional Court of Benin, DCC 14-185 (6 November 2014) ... 374
Constitutional Court of Benin, DCC 14-199 (20 November 2014) ... 390

BOTSWANA

Attorney-General and Another v Kgalagadi Resources Development Company (Pty) Ltd [1995] BLR 234 ... 76
Desai & Another v State [1984] BLR 14 ... 79
Gogannekgosi v Commissioner for Workmen's Compensation and Others [1993] BLR 360 ... 76
Ngope v O'Brien Quinn [1987] BLR 348 ... 80
Petrus & Another v State [1984] BLR14 ... 79
Re Editors of Botswana Gazette and Another [1990] BLR 655 ... 78

ETHIOPIA

Birtukan Mideksa v Federal Prison Administration, Federal First Instance Court, Lideta Bench, File No 140618, 2001EC (unpublished) ... 280
Gedera Hotels PLC v Commercial Bank Federal Supreme Court Cassation File No 33552 Hamle 24, 2000 EC (unpublished) ... 279
Getachew Yimenshiwa v The Office of General Auditor Federal First Instance, Arada Bench, File No 25016, 1997 EC (unpublished) ... 279, 280
Heirs of Wasihun v Agency for Government Houses Federal Supreme Court Cassation, File No 43511, 2009 (unpublished) ... 280
Mahberawi Watsina Belesiltan v Ato Birhanu Hiry and Ato Kebede G Mariam Federal Supreme Court Cassation Division File No 18342 Tahsas 17, 1998 EC (unpublished) ... 279, 281
Regassa Chali v Werke Kimosa Federal Supreme Court, Civil Petition File No 29/1998 (unpublished) ... 268

FIJI

Matalulu v DPP [2003] 4 LRC 712 ... 354, 355

FRANCE

Decision of the Constitutional Council of France, 11 August 1993 ... 371

## GERMANY

German Constitutional Court Case (Hartz IV) BVerfGE 125 .... 392

## GHANA

Amponsah v Minister of Defence [1960] GLR 140 .... 228
Balogun v Edusei (1957) 3 WALR 574 .... 228, 229
Ex parte Bannerman 2 G & G 293 .... 232
Ex parte Salifa 2 G & G 374 .... 232
Ex parte Salifa (2) 2 G & G 378 .... 232
New Patriotic Party v Attorney-General (1993–94) 2 GLR 35 .... 223, 228, 391
New Patriotic Party v Inspector General of Police 2 G & G 2097 .... 233, 236, 237
Re Akoto [1961] GLR (Pt II) 523 .... 229
Re Dumoga [1961] 1 GLR 44 .... 228
Re Okine (1959) GLR 1 .... 228
Sallah v Attorney-General 2 G & G 1319 (2d) .... 231
State v Otchere [1963] 2 GLR 463 .... 228, 231
Tsiboe v Kumasi Municipal Council (1959) GLR 253 .... 228

## INDIA

Samsher Singh v State of Punjab AIR (1974) 2192 (SC) .... 139

## KENYA

Abdi Yusuf v Attorney General & 2 Others, Petition Number 8 of 2013 .... 296
Amoni Thomas Amfry & Another v Minister for Lands & 8 others, Petition Number 6 of 2013 .... 296
Attorney General & 6 Others v Mohamed Balala & 11 Others, Civil Appeal Number 191 of 2012 .... 297
Benson Riitho Mureithi v J.W. Wakhungu & 2 Others, Petition Number 19 of 2014 .... 296
Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, Petition 16 of 2011 .... 292
Coalition for Reform and Democracy (CORD) and 2 others v Republic of Kenya and 1 other High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition No 268 of 2014 consolidated with petition No 630 of 2014 and petition No 12 of 2015 .... 129
David Kariuki Muigua v Attorney General & Another, Petition Number 161 of 2011 .... 296
Gibson Kamau Kuria v Attorney General, Miscellaneous Civil Application No 550 of 1988 .... 290
Independent Policing Oversight Authority & Another v Attorney General & 660 Others, Petition Number 390 of 2014 .... 295
Joseph Kimani Gathungu v Attorney General & 5 others [2010] eKLR .... 288
Judicial Service Commission v Gladys Boss Shollei & Another, Civil Appeal No 50 of 2014 .... 292
Judicial Service Commission v Speaker of The National Assembly & 8 Others .... 293
Nancy Makokha Baraza v Judicial Service Commission & 9 Others, Petition 23 of 2012 .... 293
Njoya and Others v Attorney-General and Others (2004) AHRLR 157 (KeHC 2004) Judicial Service Commission v Speaker of The National Assembly & 8 Others .... 27, 87
The Senate v The National Assembly (Supreme Court of Kenya, Advisory Ref No 2 of 2014) .... 128, 129
Trusted Society of Human Rights Alliance v Attorney General High Court of Kenya at Nairobi, Petition No 229 of 2012 37 .... 391

## NAMIBIA


Chikane v Cabinet for the Territory of South West Africa 1990 (1) SA 349 ........ 304
Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General 1998 NR 282 (SC) (1) ........ 310
Frank v The Chairperson of the Immigration Selection Board 1999 NR 257 (HC) ..... 317, 318, 320
Government of the Republic of Namibia v Sikunda 2002 SA5/0 NASC 1 ........ 309, 310, 320
Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa 1987 (1) SA 695 (A) ........ 304
Katofa v Administrator-General for South West Africa and Another 1985 (4) SA 211 (SWA) ........ 302
Katofa v Administrator-General for South West Africa and Another 1986 (1) SA 800 (SWA) ........ 302
Minister of Justice v Magistrates Commission and Another, unreported case of the Supreme Court of Namibia, Case no SA 17/2010, per AJA Langa. AJA Strydom and AJA O'Regan concurred, delivered on 21 June 2012 ........ 316
Mostert v Minister of Justice 2003 NR 11 (SC) ........ 312, 313
National Assembly for the Territory of South West Africa v Eins 1988 (3) SA 369 A ........ 304
Principal Immigration Officer and Minister of Interior versus Narayansamy 1916 TPD 274 ..... 303
Shifidi v Administrator-General for South West Africa and Others 1989 (4) SA 631 (SWA) ........ 302, 304, 305, 306
Sikunda v Government of the Republic of Namibia and Another (1) 2001 NR 67 (HC) ........ 309
Sikunda v Government of the Republic Of Namibia and Another (2) 2001 NR 86 (HC) .... 309, 310
Sikunda v Government of the Republic Of Namibia and Another (3) 2001 NR 181 (HC) ........ 309
Sikunda v Government of the Republic of Namibia and Another (Unreported Case of the High Court of Namibia. Coram: Justice Manyarara. Judgment on 24 October 2000) ........ 309
Sikunda v Government of the Republic Of Namibia And Another (Unreported Case of the High Court of Namibia. Coram: Justice Levy. Judgment on 31 October 2000) ........ 310
State v Acheson 1991 (2) SA 805 (Nm) ........ 308
State v Heita and Another 1992 NR 403 (HC) ........ 307
State v Heita and Others 1987 (1) SA 311 (SWA) ........ 305, 306
State v Kleynhans and Others 1991 NR 22 (HC) ........ 306
State v Vorster, unreported case of the Supreme Court of SWA ........ 304
The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and another 2001 NR 107 (SCA) ........ 317, 389
Van Rooyen and Another v the State 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 ........ 312, 314
Walter Mostert and Another v Magistrates Commission and Another, unreported case of the High Court of Namibia, Case No: (P) I 1857/2004 ........ 315


## NIGERIA


Adegbenro v Akintola (1963) 3 All ER 544 ........ 261
Akintola v Aderemi (1962) WNLR 185 ........ 261, 263
Alamieyeseigha v Igoniwari (No 2) [2007] 7 NWLR (Pt 1034) 524 (SC) ........ 151
Attorney General of Abia State and others v Attorney General of the Federation (2003) 1 SC (pt 11) 1 ........ 260
Attorney General of Abia State v Attorney General of the Federation (2006)16 NWLR (Pt 1005) 265 (SC) ........ 137, 138
Attorney General of Lagos State v Attorney-General of the Federation (2004) 18 NWLR (Pt 904) 1 ........ 258, 259
Attorney-General, Lagos State v Attorney-General of the Federation (2004) 18 NWLR (PT 904) 127 (SC) ........ 149

Attorney General of Ogun State v Attorney General of the Federation (1982) 3 NCLR 166...... 138
Attorney General Ogun State v Attorney General of the Federation, Bendel and Bornu States (1982) 1–2 SC 13 ........ 260
Attorney-General of the Federation v Attorney-General of Abia State and others (2002) 4 SC (Part 1) 1; [2002] 6 NWLR (Pt 764) 542........ 260
Attorney General of the Federation & Ors v Abubakar & Ors (2007) 10 NWLR (Pt 1041) 53 (SC) ........ 139
Awolowo v Federal Minister of Internal Affairs [1962] LLR 177 ........ 256
Balonwu v Peter Obi (2007) 5 NWLR (Pt 1028) 488 (SC)........ 151
Dapianlong v Dariye (2007) 8 NWLR (Pt 1038) 332 ........ 151
Federal Minister of Internal Affairs and Others v Shugaba Darman [1982] 3 NCLR 915......... 258
In the Matter of Interpretation of Sections 81(1) (2) and 84(1), (2), (3) of the Constitution of the Federal Republic of Nigeria, Suit No FH/LABJ/CS/2013 (unreported)........ 254
Inakoju v Adeleke (2007) 4 NWLR (Pt 1025) 423 (SC)........ 151
Inakoju v Adeleke (2007) All FWLR Part (353) 3 ........ 262
INEC v Musa (2003) 3 NWLR (Pt 806) 114 (SC)........ 138
Lakanmi & Kikelomo v Attorney-General Western State [1971] 1 UILR........ 245, 263
Military Governor of Lagos State v Chief Ojukwu (1980) NWLR (Pt 18) (SC)........ 150
National Assembly v President Federal Republic of Nigeria [2003] 41 WRN 94 (CA) ........ 243
Okojie and others v Attorney General of Lagos State [1981] 1 NCLR 218; [1981] 2 NCLR 337 (FCA)........ 258
Okoli v Udeh (2008) 10 NWLR (Pt 1095) 213 (SC) ........ 151
Salami v National Judicial Council and others Suit no FHC/ABJ/CS/723/11 ........ 263, 248 249, 250, 252, 253, 257
The Chairman of The Board of Inland Revenue v Joseph Rezcallah and Sons Ltd [1961] NRNLR 32........ 242
The Federal Board of Inland Revenue v Azigbo Bros Ltd [1963] NNLR 121 ........ 242
Ugwu v Ararume (2007) 12 NWLR (Part 1048) 367 ........ 262

SOUTH AFRICA

Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) ........ 348
Democratic Alliance v Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA)........ 348
Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) ........ 75
Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC) ..... 335
Fourie v Minister of Home Affairs [2005] 1 All SA 273 (SCA) ........ 389
Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC) ...... 334, 338, 339, 348
Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC) ........ 334, 337
Minister of Health v Treatment Action Group (TAC) (No 2) 2002 (5) SA 721 (CC)........ 75
Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC) ........ 389
Mohamed v President of the Republic of South Africa 2001 (3) SA 893 (CC)........ 75
New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC)........ 334, 337
Pikoli v The President of the Republic of South Africa 2010 (1) SA 400 (GNP)........ 348
Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) ........ 39
S v Makwanyane 1995 (3) SA 391 (CC) ........ 39, 79

UNITED KINGDOM

Associated Provincial Picture Houses Ltd. v Wednesbury Corp [1948] 1 KB 223 ................ 355
Attorney General v Gouriet [1978] AC 435 ................ 353
British Railways Board v Herrington [1972] AC 877 ................ 79
Conway v Rimmer [1968] AC 910 ................ 80
Eviston v DPP [2002] 3 IESC 62 ................ 354
Liversidge v Anderson [1942] AC 206 (HL) ................ 228
R v DPP ex parte Manning [2000] EWHC 562 (QB), [2001] QB 330 ................ 357
R v Electricity Commissioners ex p London Electricity Joint Committee Co. [1924] 1 KB 171 ... 257
R v Home Secretary, ex parte Brind [1991] 1 AC 696 ................ 80
R v Home Secretary, ex parte Fire Brigades Union [1995] 2 AC 567 ................ 66
R v Miah [1974] 1 WLR 683, 698 ................ 41
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 104 ................ 242, 257
Wheeler v Leicester City Council [1985] 1 AC 105 ................ 242, 257

UNITED STATES OF AMERICA

Filartiga v Pena-Irala 630 F 2d 876 (2d Cir June 1980) ................ 41
Humphrey's Executor v United States, 295 US 602, 55 S Ct 869, 79 L Ed 1611 (1935) ................ 241
Marbury v Madison 1 Cranch 5 (US) 137 (1803) ................ 63
Myers v United States, 272 US 52, 47 S Ct 21, 71 LEd160 (1926) ................ 241

ZIMBABWE

Catholic Commission for Justice and Peace and Others v Attorney-General of Zimbabwe and Others 1993 (1) ZLR 242 ................ 81
Catholic Commission for Justice and Peace v Attorney General and Others 1993 (4) SA 239 ..... 81
CFU v Minister of Justice, Legal and Parliamentary Affairs and Another SC 16/06 ................ 81
Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs 1986(1) SA 532 (ZS) ................ 81
Rattigan and Others v Chief Immigration Officer of Zimbabwe, Unreported judgment S-64-1994 ................ 81
Salem v Chief Immigration Officer, Zimbabwe and Another 1995 (4) SA 280 (ZS) ................ 81

INTERNATIONAL COURTS

**International Criminal Court**

ICC-01/09-02/11 The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/pretrial%20chamber%20ii/Pages/382.aspx>, accessed 31 March 2015 ................ 101

**International Court of Justice**

Application for Review of Judgment No 333 of the United Nations Administrative Tribunal Case 1987 ICJ 3 (27 May) 173 ................ 41
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) 1971 ICJ 12 ................ 41
Nottebhom Case (Liechtenstein v Guatemala); Second Phase 1955 ICJ 4 (6 April) ................ 41
South West Africa Case (Ethiopia v South Africa; Liberia v South Africa); Second Phase 1966 ICJ 6 (18 July) ................ 41

**European Court of Human Rights**

Decision 10-83674 of the Court of Cassation of France, 15 December 2010 ........ 371
Decision of the Court of Cassation of France, 10 March 1992 ........ 371
Medvedyev and Others v France (Application no 3394/03) 10 July 2008 ........ 371
Moulin v France (Application no 37104/06) 20 November 2010 ........ 371

**African Commission**

Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ibouldo & The Burkinabé Movement for Human and Peoples' Rights v Burkina Faso ACtHPR (Application No 013/11) Preliminary Ruling (21 November 2013) ........ 379
Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso Communication 204/97 (2001) AHRLR 51 (ACHPR 2001) ........ 378

# *Table of Legislation*

NATIONAL LEGISLATION

**Algeria**

Independence Constitution of Algeria 1963 . . . . 26

Constitution of Algeria 2008
- Art 2 . . . . 32
- Art 9 . . . . 33
- Art 76 . . . . 33

**Angola**

Constitution of the Republic of Angola, 1975
- Art 1 . . . . 183
- Art 2 . . . . 183
- Arts 31–52 . . . . 183

Constitution of the Republic of Angola, 1992
- Art 2(1) . . . . 187
- Art 158 . . . . 184
- Art 159 . . . . 186

Constitution of the Republic of Angola, 2010
- Arts 1–21 . . . . 188
- Art 2(1) . . . . 170
- Art 6(2) . . . . 170
- Art 14 . . . . 188
- Art 15 . . . . 188
- Art 16 . . . . 188
- Arts 89–98 . . . . 188
- Art 105(3) . . . . 170
- Art 108 . . . . 194
- Art 108(1) . . . . 165
- Art 109 . . . . 189
- Art 110(2) . . . . 173
- Art 111 . . . . 189
- Art 119(n) . . . . 179
- Art 119 . . . . 87, 177, 190
- Art 122 . . . . 190
- Art 124 . . . . 83
- Art 126 . . . . 191
- Art 128 . . . . 196
- Art 129 . . . . 84
- Art 131(2) . . . . 189
- Art 134 . . . . 194
- Art 137 . . . . 194
- Art 139(1) . . . . 82
- Art 145(1) . . . . 173
- Art 145(1)(a) . . . . 87
- Art 149(1) . . . . 173
- Art 161(g) . . . . 179
- Art 162 . . . . 84, 193
- Art 164 . . . . 190
- Art 164–172 . . . . 85
- Art 167(1) . . . . 85
- Art 167(2) . . . . 173
- Art 174(1) . . . . 161
- Art 174(2) . . . . 162
- Art 175 . . . . 171
- Art 176(1) . . . . 166
- Art 179(1) . . . . 173
- Art 179(2) . . . . 173
- Art 179(3) . . . . 173
- Art 179(6) . . . . 173
- Art 180 . . . . 166, 177
- Art 181 . . . . 166, 177
- Art 182 . . . . 166
- Art 183 . . . . 166
- Art 184 . . . . 166, 177
- Art 186 . . . . 166
- Art 190 . . . . 166
- Art 223(1) . . . . 163
- Arts 226–232 . . . . 86
- Art 236(i) . . . . 174
- Art 260 . . . . 192
- Art 261 . . . . 192
- Art 268 . . . . 192, 194
- Art 269 . . . . 192
- Art 270 . . . . 192
- Art 271 . . . . 192
- S IV . . . . 328

**Benin**

Codes for Criminal Procedure of Benin 1967 . . . . 370, 377

Constitution of the Republic of Benin, 1975
- Art 140 . . . . 28

Constitution of the Republic of Benin, 1990
- Art 54 . . . . 82, 84
- Art 57 . . . . 83
- Art 92 . . . . 82
- Art 98 . . . . 85
- Art 100 . . . . 85
- Art 102 . . . . 85
- Art 105 . . . . 85
- Art 113 . . . . 84
- Arts 114–124 . . . . 86
- Art 126 . . . . 85, 367
- Art 127 . . . . 86

Art 129 .... 366
Art 130 .... 87
Arts 135–136 .... 84
Loi portant Organisation Judiciaire en République du Bénin, Loi No. 2001-37 de 2001
Art 6(2) .... 368
Art 5 .... 367

**Botswana**

Botswana Constitution, 1966 .... 69, 79, 218
s39 .... 70
s42 .... 70
s43 .... 70
ss51–51A .... 73
ss53–55 .... 75
s58 .... 70
s86 .... 72
s87 .... 72
s87(6) .... 80
s95(6) .... 80
s96(1) .... 74
s100(1) .... 74
ss103–104 .... 73
s110 .... 76
s111 .... 76
Constitution Amendment Act, 2002 .... 72
Public Service Act, 1998 .... 76

**Burkina Faso**

Burkina Faso's Constitution of 1991
Art 131 .... 86
Burkina Faso's Constitution of 2009
Art 134 .... 366

**Burundi**

Burundi's Constitution of 2005
Art 113 .... 87
Arts 116–117 .... 84
Art 131 .... 84
Art 137 .... 82
Art 152 .... 82, 87
Art 155 .... 82
Arts 158–160 .... 85
Art 187 .... 84
Art 192 .... 85
Art 195 .... 85
Art 197 .... 83
Arts 202–204 .... 84
Art 209 .... 86, 371
Art 219 .... 86
Arts 225–32 .... 86
Arts 268–288 .... 328

**Cameroon**

Cameroon Constitution 1996
Art 1(2) .... 30
Art 8(7) .... 87
Art 8(12) .... 83
Art 11 .... 84
Art 13 .... 82
Art 25 .... 85
Arts 26–28 .... 85
Art 31 .... 83
Arts 34–35 .... 84
Art 37(2) .... 85, 371
Art 37(3) .... 86, 366, 367, 376
Arts 46–52 .... 86
Art 53 .... 84
Code Criminal Procedure 2005 .... 370, 377
Décret No 95/048 portant statut de la magistrature, 8 Mars 2005 .... 368
Law on Criminal Procedure 2005 (Cameroon) .... 362

**Cape Verde**

Constitution of Cape Verde 1992 .... 29
Art 2(1) .... 170
Art 2(2) .... 170
Art 3(2) .... 170
Art 135(1) .... 178, 179
Art 135(2) .... 178
Art 175(1) .... 179
Art 179(6) .... 174
Art 185 .... 166
Art 186 .... 166
Art 209 .... 162
Art 211(1) .... 171
Art 214 .... 166
Art 215 .... 166
Art 216 .... 166
Art 217 .... 166
Art 218 .... 166
Art 219 .... 166
Art 220 .... 166
Art 221 .... 166
Art 222(3) .... 174
Art 222(4) .... 174
Art 222(8) .... 174
Art 223 .... 166
Art 223(6) .... 166
Art 226 .... 166
Art 290 .... 174
Independence Constitution of Cape Verde 1975
Art 3 .... 26
Art 4 .... 26

**Democratic Republic of the Congo**

Constitution of the Congo Republic, 1969
Art 29 .... 28
Art 35 .... 19
Constitution of the Congo Republic, 1973
Art 70 .... 27
Constitution of the Congo Republic, 2002
Art 141 .... 367, 376
Art 136 .... 376
Constitution of the Democratic Republic of the Congo 2006
Art 1 .... 30
Art 82 .... 376
Art 87 .... 87
Art 91 .... 84
Art 108 .... 87
Arts 122–124 .... 85
Arts 128–9 .... 85
Art 130 .... 85
Art 137 .... 84
Art 148 .... 83
Art 151 .... 88
Art 151–2 .... 86
Art 152 .... 367
Arts 157–169 .... 86
Arts 164–167 .... 84
Art 197 .... 83

**Egypt**

Egyptian Constitution of 2012 .... 32
Egyptian Constitution of 2014 .... 31
Art 2 .... 32, 33
Art 50 .... 33

**Ethiopia**

Civil Code of Ethiopia, 1960
Art 1723 .... 272
Federal Constitution of Ethiopia, 1995
Art 19(6) .... 274
Art 40 .... 278
Art 50(2) .... 267
Art 50(7) .... 267
Art 62 .... 269
Art 78 .... 271
Art 78(1) .... 267
Art 78(2) .... 267
Art 78(4) .... 277
Art 79 .... 271
Art 79(1) .... 267
Art 79(3) .... 275
Art 79(6) .... 276
Art 80 .... 275, 267
Art 81 .... 275
Art 83 .... 269
Art 84 .... 269
Proclamation No 42/1993 .... 278
Proclamation No 47/1974 .... 280
Proclamation No 87/1994 .... 280
Proclamation No 97/1998 .... 279
Proclamation No 110/1995 .... 280
Proclamation No 193/2000 .... 280
Proclamation No 236/2001 .... 374
Proclamation No 272/2002 .... 278
Proclamation No 286/2002 .... 278
Proclamation No 434/2005 .... 274
Proclamation No 455/2005 .... 278
Proclamation No 639/2009 .... 273

**France**

Code of Criminal Instruction of 1808 .... 362
Code of Criminal Procedure of 15 June 2000 .... 364
Art 1 .... 363
Art 30 .... 370
Art 31 .... 363
Declaration of the Rights of Man and Citizens 1798
Art 16 .... 16, 58, 66
French Constitution of 1958 .... 16, 17, 66, 100
Art 34 .... 67
Art 37 .... 67
Art 64 .... 67
Art 65 .... 67

**Gabon**

Constitution of Gabon 1991
Art 14(b) .... 82
Art 17 .... 83
Art 19 .... 83
Art 23 .... 87
Art 32 .... 82
Arts 47–52 .... 85
Art 53 .... 85
Arts 61–64 .... 84
Art 68 .... 86, 371
Art 70 .... 86
Art 78 .... 84
Arts 83–93 .... 86

**Gambia**

Gambian Constitution of 1996
s7 .... 33
s137 .... 33

**Ghana**


Ghanaian Constitution of 1957 .............. 16
Ghanaian Constitution of 1960 ............. 227
Art 44(3) .............. 227
Art 45(3) .............. 227
Ghanaian Constitution of 1969 ............. 230
Art 102 .............. 231
Ghanaian Constitution of 1992 ......... 69, 227
Art 1(2) .............. 79
Art 2(1) .............. 232
Art 2(4) .............. 232
Art 3(3)(a) .............. 235
Art 3(4)(a) .............. 235
Art 21(1) .............. 237
Art 34(2) .............. 108
Art 41(b) .............. 235
Art 47 .............. 109
Art 55 .............. 109
Art 57(2) .............. 100
Art 57(4–6) .............. 101
Art 58 .............. 101
Art 58(5) .............. 107
Art 60 .............. 105
Art 63 .............. 102
Art 66 .............. 102
Art 66(4) .............. 111
Art 67 .............. 111
Art 69(11) .............. 108
Art 70 .............. 103
Art 71 .............. 103
Art 72 .............. 75, 105
Art 76 .............. 106
Art 77 .............. 106
Art 78 .............. 70, 111
Art 81 .............. 107
Art 82 .............. 108
Art 88 .............. 73
Art 89 .............. 103
Art 90 .............. 111
Art 93(1) .............. 109
Art 93(2) .............. 72, 109
Art 94(4) .............. 77
Art 95 .............. 111
Art 104(2) .............. 111
Art 106 .............. 72
Art 112 .............. 111
Art 125(1) .............. 233
Art 125(3) .............. 233
Art 127(2) .............. 74
Art 127(4) .............. 78
Art 127(5) .............. 78
Art 144 .............. 78
Arts 144–153 .............. 73
Art 278(3) .............. 77
Art 279 .............. 77


**Guinea-Bissau**


Constitution of 1993
Art 3 .............. 170
Art 8(1) .............. 170
Art 59(2) .............. 170
Art 68 .............. 178
Art 68(t) .............. 179
Art 85(n) .............. 179
Art 96(1) .............. 166
Art 119 .............. 161
Art 120 .............. 166, 178
Art 121 .............. 166
Art 123 .............. 171, 174
Art 125 .............. 166
Art 130 .............. 174


**Kenya**


Constitution of Kenya Amendment Act 4 of 1988 .............. 288
Constitution of Kenya Amendment Act No. 1 of 1990 .............. 289
Kenyan Constitution of 2010 .............. 69
Art 2 .............. 295
Art 2(1) .............. 79, 287
Art 2(2) .............. 287
Art 3 .............. 79
Art 4 .............. 79
Art 6 .............. 102
Art 22(3) .............. 80
Art 24(4) .............. 33
Art 50(2)(n) .............. 80
Art 70 .............. 33
Art 93(1) .............. 110
Art 94(1) .............. 72, 109
Art 95(5)(b) .............. 130
Arts 95(6) .............. 71
Art 97 .............. 125
Art 97(1) .............. 110
Art 98(1) .............. 110
Art 106(1) .............. 111
Arts 109–119 .............. 117
Arts 111–112 .............. 127
Art 114 .............. 127
Art 114(3) .............. 127
Art 129 .............. 287
Arts 129–158 .............. 117
Art 130(1) .............. 101, 106, 291
Arts 131–145 .............. 123
Art 131(2) .............. 101, 130

Art 132 ... 124
Art 132(1) ... 112
Art 132(2) ... 71, 103
Art 133 ... 105
Art 133(1) ... 75
Art 135 ... 107
Art 136 ... 102
Art 138 ... 102
Art 143 ... 101
Art 144 ... 112
Art 145 ... 108, 112
Art 152 ... 106
Art 152(1) ... 291
Art 152(3) ... 108, 112, 170
Art 153(2) ... 106
Art 155 ... 103, 112
Art 156 ... 73, 103
Art 157(10) ... 346
Art 157(11) ... 346
Art 159 ... 295
Art 159(1) ... 294
Art 160(1) ... 291, 294
Art 163(8) ... 80
Art 165(3) ... 287, 294
Art 166 ... 73
Art 166(1) ... 78, 292
Art 168(5) ... 293
Art 168(7) ... 293
Art 168(9) ... 293
Art 171(1) ... 291
Art 171(2) ... 292
Art 171(2)(h) ... 78
Art 171(4) ... 292
Art 172(1) ... 291
Art 173 ... 293
Arts 174–200 ... 117
Art 190(5)(d) ... 132
Art 192(4) ... 132
Art 240(8)(a)(b) ... 131
Art 245(2) ... 131
Arts 248–254 ... 328
Art 249(2) ... 292
Art 251(3) ... 292
Chapter 15 ... 328
Schedule 1 ... 102

**Madagascar**

Constitution of 1975
Art 8 ... 19
Art 9 ... 19
Art 16 ... 28
Art 30 ... 28
Art 31 ... 28
Art 32 ... 28
Art 40 ... 27
Art 55 ... 19, 27

**Morocco**

Constitution of 2011
Art 3 ... 32, 33
Constitution of 2012 ... 32

**Mozambique**

Constitution of 2004
Art 2(1) ... 170
Art 4 ... 163
Art 6(1) ... 170
Art 7 ... 170
Art 69(1) ... 170
Art 137(1) ... 175
Art 146(2) ... 167
Art 159 ... 178
Art 159(i) ... 179
Art 172(1) ... 175
Art 179 ... 178
Art 179(2) ... 179
Art 202(2) ... 167
Art 217(1) ... 171, 175
Art 217(2) ... 175
Art 217(3) ... 175
Art 218(1) ... 175
Art 220 ... 167
Art 223 ... 167
Art 224 ... 167
Arts 225–227 ... 167
Arts 228–231 ... 167
Art 232 ... 167
Art 236 ... 167
Art 241(1) ... 167
Art 292(i) ... 175

**Namibia**

Administrator-General Proclamation AG 9 of 1977 ... 303
Administrator-General Proclamation AG 26 of 1978 ... 302, 303, 304
Constitution of Namibia of 1990
Art 4(3)(a) ... 318
Art 10(2) ... 319
Art 13(1) ... 318
Art 14 ... 318
Art 27(1) ... 101
Art 27(3) ... 106, 107
Art 28 ... 102
Art 29 ... 102

Art 29(2) ... 108
Art 31(2) ... 101, 112
Art 32(1) ... 101
Art 32(3) ... 103, 105, 106
Art 32(4) ... 103
Art 32(8) ... 108
Art 34(1) ... 107
Art 35(1) ... 105
Art 35(3) ... 106
Art 36 ... 107, 108
Art 39 ... 108
Art 40 ... 112
Art 50 ... 112
Art 51 ... 111
Art 57 ... 112
Art 78(2) ... 313
Art 78(7) ... 316
Art 83(1) ... 313
Art 83(4) ... 316
Art 85 ... 103
Art 87(a) ... 311
Art 112 ... 103
Art 114 ... 103
Art 146(2)(a) ... 110
Criminal Procedure Act, Act 51 of 1977 ... 308, 311
Labour Act 6 of 1992 ... 317, 320
Labour Act 11 of 2007 ... 320
Magistrate's Court Act 32 of 1944 ... 314, 316
Public Service Act 13 of 1995 ... 313, 314
South West Africa Constitution Act, Act 39 of 1968 (South Africa) ... 301
South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985 ... 301, 303, 304
Supreme Court Act of 1990 ... 311


**Nigeria**


Constitution of the Federal Republic of Nigeria, 1979 ... 256
s1(1) and (3) ... 243
s132(7) ... 260
s170(5) ... 260
Constitution of the Federal Republic of Nigeria, 1999
s1(1)(3) ... 135
s4 ... 135, 140, 244
s4(1) ... 137
s4(2) ... 137, 152
s4(5) ... 138
s4(6) ... 137
s4(7) ... 137
s4(7)(a) ... 138
s4(8) ... 135
s5 ... 135, 140, 244
s5(1) ... 139
s5(1)(a) ... 241
s5(1)(b) ... 241, 242
s5(2) ... 140
s5(4)(a) ... 144
s5(4)(b) ... 144
s6 ... 135, 140, 244
s6(1) ... 243
s6(6) ... 243
s8(3) ... 258
ss13–24 ... 335
s14(2)(b) ... 152
s15(5) ... 147
s43 ... 137
s48 ... 137
s49 ... 137
s58 ... 142
s58(4) ... 142
s58(5) ... 143
s64(1) ... 140
s67(2) ... 144
s68(1)(d)(e) ... 141
s80 ... 145, 151
s80(2) ... 146
s81 ... 145
s81(1) ... 146
s81(3) ... 253, 255
s83 ... 146
s84(1) ... 255
s84(2) ... 255
s86(1) ... 151
s88(1) ... 148
s88(2) ... 146
s121(3) ... 254, 255
s132(1) ... 140
s135(2) ... 140
s142(a) ... 138
s143 ... 260
s145(5) ... 260
s147(2) ... 143
s147(4) ... 141
s148 ... 242
s150(1) ... 347
s150(2) ... 347
s153 ... 135
s154(1) ... 143
s158(1) ... 250
s161 ... 151
s162(5) ... 258
s188 ... 260
s188(2)(a) ... 151

s188(5) . . . . . 260
s217 . . . . . 151
s218(1) . . . . . 144
s231(1) . . . . . 246
s231(2) . . . . . 246
s233(2)(b) . . . . . 248
s237 . . . . . 33
s238 . . . . . 246
ss244–7 . . . . . 33
s250 . . . . . 246
s256 . . . . . 246
s271 . . . . . 246
s271(1) . . . . . 251
ss275–9 . . . . . 33
s276 . . . . . 246
s281 . . . . . 246
s292 . . . . . 246
s305(4) . . . . . 133
s305(6)(b) . . . . . 144
s313 . . . . . 151
s315(2) . . . . . 259
s318 . . . . . 143
1st schedule . . . . . 259
3rd Schedule . . . . 246, 247, 248, 249, 253, 255
Corrupt Practices (And Other Related Offences) Act, 2000 . . . . . 147
Economic and Financial Crimes Commission (Establishment) Act, 2004 . . . . . 147
Fiscal Responsibility Act, 2007 . . . . . 147
Public Procurement Act, 2007 . . . . . 147
State Security (Detention of Persons) Decree No 3 of 1966 . . . . . 150
The Clifford's Constitution of 1922 . . . . . 240
The Commonwealth Latimer House Principles on the Three Branches of Government . . . . . 247
The Constitution of the Federation, 1963 . . . . . 240, 245, 246
The Constitution of the Western Region 1960 . . . . . 261
The Federal Constitution of Nigeria 1954 . . . . . 240
The Independence Constitution of 1960 . . . . 240
The Macpherson Constitution of 1951 . . . . . 240
The Richards Constitution of 1946 . . . . . 240
Western Nigeria Constitution (Amendment) law, 1963 . . . . . 261

**Portugal**

Constitution of 1933 . . . . . 190
Constitution of 1976
Art 202(1) . . . . . 161
Art 202(2) . . . . . 161

**Säo Tomé and Príncipe**

Constitution of 2003
Art 80(f) . . . . . 179
Art 81 . . . . . 179
Art 81(c) . . . . . 167
Art 82(e) . . . . . 167
Art 97 . . . . . 179
Art 97(f) . . . . . 179
Art 108 . . . . . 167
Art 120(1) . . . . . 161
Art 120(2) . . . . . 161
Art 121 . . . . . 171
Art 125(1) . . . . . 176
Art 125(2) . . . . . 176
Art 126 . . . . . 167
Art 130 . . . . . 167
Art 154(h) . . . . . 176
Art 156 . . . . . 167
Art 223 . . . . . 167

**Senegal**

Code of Criminal Procedure, 2007 . . . . . 370, 377
Constitution, 2001
Art 38 . . . . . 82
Art 42 . . . . . 84
Art 47 . . . . . 87
Art 54 . . . . . 82
Arts 67–68 . . . . . 85
Art 72 . . . . . 83
Arts 76–78 . . . . . 85
Art 80 . . . . . 85
Arts 85–6 . . . . . 84
Art 87 . . . . . 83
Arts 89–93 . . . . . 86
Art 90 . . . . . 85, 366, 376
Art 101 . . . . . 84

**South Africa**

Constitution of the Republic of South Africa, 1996 . . . . . 21, 29, 69, 200, 219
s1(a) . . . . . 110
s2 . . . . . 79, 335
s7(2) . . . . . 338
s39(1)(b) . . . . . 338
s42 . . . . . 110
s42(5) . . . . . 113
s43 . . . . . 72
s46(1) . . . . . 110
s50(1) . . . . . 113
s51 . . . . . 111, 113
s54 . . . . . 112
s63 . . . . . 113

s73 ... 112
s79 ... 72, 111
s81 ... 111
s83(a) ... 101
s84(j) ... 75
s84(2)(i) ... 104
s84(2)(j) ... 105
s85(1)(a) ... 106
s85(2) ... 107
s86 ... 112
s86(1) ... 70, 101
s86(2) ... 76
s87 ... 70, 112
s89 ... 71
s91(1) ... 106
s91(2) ... 103
s91(3) ... 70, 112
s91(4) ... 108
s91(5) ... 108
ss101–2 ... 71, 108
s102 ... 108
s106 ... 108
s111 ... 111
s165 ... 74
s174 ... 73, 104
s174(3) ... 74, 78
s178 ... 327
s178(1)(b) ... 77
s178(1)(h) ... 78
s179 ... 348
s179(1)(a) ... 104
s179(5) ... 73
s181(2) ... 327
s191 ... 335
s196 ... 327
s200(1) ... 103
s207(1) ... 103
s209(2) ... 103
s231 ... 338
Chapter 9 ... 327
Defence Act, Act 44 of 1957 ... 300, 304
South African Constitution, 1889 ... 72

**Soviet Union**

Constitution of the Soviet Union, 1963 ... 27

**Swaziland**

Constitution, 2005 ... 30

**Tunisia**

Tunisian Constitution, 1959
Art 1 ... 31
Art 74 ... 33
Tunisian Constitution, 2014
Art 1 ... 31
Art 74 ... 31
Chapter 6 ... 328

**Uganda**

Constitution of Uganda, 1995
Art 29 ... 30
Art 123 ... 347
Art 124 ... 347
Art 129(1)(a) ... 33

**United Kingdom**

Constitutional Reform Act 2005 ... 66
House of Commons Disqualification Act 1975 ... 64
Human Rights Act 1998 ... 66

**United States of America**

Constitution of 1787 ... 60
Art 1 ... 62
Art 2 ... 62
Art 3 ... 62

**Zambia**

Constitution of Zambia, 1996
Art 56(7) ... 347

**Zimbabawe**

Zimbabwean Constitution, 2013 ... 69
Chapter 12 ... 328
s2 ... 79
s15(1) ... 81
s60(1) ... 30
s60(2) ... 30
s70(1)(k) ... 80
s97 ... 71
s109 ... 71
s112 ... 75
s114 ... 73
s143 ... 72
s164 ... 74
s169(3) ... 80
s171(2) ... 80
s180 ... 73
s188(3) ... 78
s188(4) ... 78
s189(2) ... 77
ss211–231 ... 76

INTERNATIONAL TREATIES

Constitutive Act of the African Union, 2000 ... 385

# *List of Abbreviations*

| | |
|---|---|
| ACA | anti-corruption agency |
| ACHPR | African Charter on Human and Peoples' Rights |
| AG | Attorney-General |
| ANC | African National Congress |
| AU | African Union |
| CKRC | Constitution of Kenya Review Commission |
| CoE | Committee of Experts |
| CSM | Conseil Supérieur de la Magistrature |
| DPP | Director of Public Prosecutions |
| ECHR | European Court of Human Rights |
| IAP | International Association of Prosecutors |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICLA | Institute for International and Comparative Law in Africa |
| JSC | Judicial Service Commission |
| LGBTI | Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed |
| | OAU |
| UDHR | Universal Declaration of Human Rights |

# *List of Contributors*

**Horace Segnonna Adjolohoun** is Senior Legal Expert at the African Commission on Human and Peoples' Rights.

**Fernando Loureiro Bastos** is Professor at the Faculty of Law, University of Lisbon.

**Conrad M. Bosire** is a Post-Doctoral Fellow at Strathmore University.

**Assefa Fiseha** is Professor at Addis Ababa University, Ethiopia.

**Charles Fombad** is Head of Comparative African Constitutional Law Unit at the Institute for International and Comparative Law in Africa.

**James Fowkes** is Senior Researcher at the Institute for International and Comparative Law, University of Pretoria.

**Ameze Guobadia** is Research Professor at the Nigerian Institute for Advanced Legal Studies, University of Lagos.

**Michaela Hailbronner** is Senior Researcher at the Institute for International and Comparative Law, University of Pretoria.

**Nico Horn** is Professor of Law at the University of Namibia.

**Jeffrey Jowell** is Director of the Bingham Centre for the Rule of Law and Professor Emeritus at University College London.

**Walter Khobe Ochieng** is a Lecturer at Moi University.

**Kofi Quashigah** is Dean of the Faculty of Law at the University of Ghana.

**Sylvester Shikyil** is Chair of the Department of Public Law at the University of Jos.

**André Thomashausen** is Chair of the Department of Public, Constitutional and International Law at the University of South Africa.

**Francois Venter** is a Research Associate at North-West University.

# Introduction

*James Fowkes and Charles M. Fombad*

The excessive concentration of powers and the abuses that go with it have been one of the greatest impediments to Africa's development and its attempts, especially in the last two decades, to establish polities which promote constitutionalism, good governance, democracy, and the rule of law. The stakes are very high and have global dimensions. On UN projections, four billion people will be added to the world's population between now and the year 2100. Three-quarters of them will be born in Africa. The kind of states in which these people will grow up is one of the key issues of the next century. It will, as ever, matter a great deal to the individuals themselves, but the decisions these states will make about how to govern their people, their resources, and their relations with the rest of the world will affect everyone.

It is for this reason that the first volume of this series of books on African constitutionalism starts with the old and very well-known issue of separation of powers and its contemporary characteristics on the continent. How do different systems in Africa understand and make use of the doctrine, and how successful are they in achieving its rationale of constraining the abuse of power? These questions are venerable for the good reason that they represent great and enduring problems for states to solve. Africa has long been troubled by excessive centralized power, and the separation of that power is a time-honoured response; as the continent turns increasingly to the task of building better states, the finer details of such responses take centre stage. The chapters in this volume consider how Africa's executives, legislatures, and judiciaries relate to one another; three also speak to the growing cast of other institutions that are joining the traditional tripartite picture in Africa, as elsewhere.

The state of the continent's inherited legal traditions represent one important variable in this picture, and today a lawyer's glance across Africa reveals important signs of progress. As Charles Fombad notes in the first chapter of this volume, African states wrote many constitutions in the years immediately after obtaining independence, but those efforts met with little success. In many states, an honest study of constitutionalism was often a matter of documenting its breach and its absence. It is only in the most recent generation that the continent has seen a trend towards constitutionalism that is often worth taking seriously. No longer is Africa a collection of states gone variously awry plus a Botswana exception: there are now many systems that merit sustained legal attention.

Given its far-reaching effects, there is some irony but no surprise in the fact that colonialism, a central cause of Africa's problems of authoritarianism and lack of stable structures of accountability, also sets many of the basic terms of the legal response to this situation today. As Fombad writes in Chapter 1, 'the most significant, if not

dominant influence' in African systems in this regard 'is the legal system within which they were adopted and operate'. Other big-picture themes also matter, as he goes on to discuss. The post-colonial pattern of concentration of power lives on in the high proportion of dominant party systems on the continent. This political structure draws strength from the one-party traditions of socialist revolution and the variants of African-style socialism, and will continue to be a crucial subject of discussion. Indigenous or customary law remains a matter of some uncertainty, with a complex relationship to the past and a contested relevance for the future. International human rights law has had an important impact in Africa (one that will be explored in more detail in contributions to the second volume of this series), and so has the chief regional instrument, the African Charter on Human and Peoples' Rights. Although it is not a focus of this volume, Islamic law is a pillar of many North and West African systems; indeed, increasingly so.

Given its legal focus, however, the starting point of the contributions to this volume is most often with membership of different legal families, and what this membership entails for the separation of powers and reformist efforts to promote it. As we will see, distinctions between civil and common law inheritors, between Anglophone and Francophone, Lusophone and Hispanophone states, matter a great deal, particularly when it comes to institutional structures, procedures, and the professional self-understandings and expectations of legal personnel. In Chapter 2, Fombad offers an overview of this issue to prepare the ground for the more specific enquiries to come. He considers what each tradition implies for understandings of the separation of powers and for the testing of its boundaries: how readily do different systems accept members of one branch performing tasks usually or conceptually associated with another, for example. The distance various African states have travelled from their colonial legal inheritance also varies, as he goes on to discuss. Anglophone states, in line with global trends, have broken with the unwritten constitutional traditions of their former colonial power. The constitution of the United States has been an important source for many systems, although the range of influences is naturally broader today as models of written constitutionalism have multiplied. Anglophone states, however, usually retain parliamentary systems; two (historically shifting) exceptions, Kenya and Nigeria, are discussed in later chapters. Francophone systems, meanwhile, generally take as their starting point the model of the executive-driven French Fifth Republic. They have therefore also run into its problems, including its apparently unrealistic assumption that the party of the separately elected president will also control the legislature. Some African states (like the French themselves) have made important reforms, including the area of judicial review; this is true of Benin, Francophone Africa's most obvious legal success story. Others still resemble something close to the traditional Gaullist model, with the executive generally allowed to prevail when he decides this is necessary and the other branches assigned, at best, the status of second among equals.

After this introductory Part, the three chapters of Part II address the relationship between the legislative and executive branches in Anglophone Africa. Francois Venter's examination of this relationship in four Anglophone systems, including a survey of relevant textual details, reflects both the tensions between the inherited Westminster model and the borrowed US one, on the one hand, and the differences between the

British and US systems and African ones, on the other. Since African systems had no national monarchies, the separate British powers of head of state and head of government have been concentrated in strong presidencies. Since no African constitution (and its associated founding myth) has yet attained the status of the American one, appeals to the 'will of the people' are more likely to be harnessed in the name of executive rather than constitutional power. The result, argues Venter, is a hybrid arrangement in need of its own theoretical conceptualization. Westminster parliamentary supremacy has been displaced by constitutional supremacy, to the extent that appeals to popular sovereignty are not used to support strong executives and dominant parties. However, those constitutions usually continue to understand parliaments in the Westminster tradition as the central institutional check on the executive, a role that appears to be attracting increased textual support, albeit with patchy realization in practice. The switch to constitutional supremacy might now be a foregone conclusion as a technical matter, and this Venter sees as 'significant progress', but the tangle of institutional inheritances reflects what remains to be worked out.

Conrad Bosire devotes Chapter 4 to an examination of the striking case of the 2010 Kenyan constitution, which reflects the mix of US and Westminster elements. He sets out its drafting history, recording how a late political settlement led to the decision to establish a presidential system instead of the parliamentary system that previous drafts and public discussions had contemplated. That said, the original motive of limiting executive power has had several important impacts on the details of the presidential system that ultimately emerged. Presidential powers have been reduced: as Bosire concludes, 'Parliament now controls its own agenda and calendar without any direct controls by the national executive as was the case in the past'. Power has also been delegated downwards to forty-seven county governments, and a unicameral legislature has been replaced by a bicameral system with a Senate representing federal interests. In addition, while the shift to a presidential system may have been produced by a political settlement, it comes with its own motivations for reducing executive power. As in its US home, presidentialism at least aims to reduce executive powers by a stricter separation of powers; in Kenya, with its history of executive control of the legislature, there is a reason to keep the president separate from parliament. Although Bosire notes the differences between the US Senate and its new Kenyan counterpart, two chambers make it harder for the president to control the legislature, and he notes perverse confirmation of this in the early moves by the president, with the connivance of his fellow party majority leader in the National Assembly, to side-step the Senate instead. The judiciary has, however, shown its willingness to resist this and vindicate the Senate's status, while the National Assembly, which recently rejected a presidential nominee, has signalled its own independent status as well.

Sylvester Shikyll concludes the Part with an examination of another presidentialist Anglophone case, Nigeria. In line with Venter's argument, Shikyll notes that the 1999 constitution places a high premium on the representative legislature in light of the idea that power in the state is derived from the people, but that in practice the legislature has not been very effective as a check on the executive. He describes the strength of the Nigerian executive and identifies causes both in the colonial and post-colonial history of the country, including the institutionally erosive influence of the military on

government, and the presidential nature of its system: Nigeria is another instance where US presidentialism has not travelled well. Surveying various aspects of the relationship between the executive and legislature in Nigerian constitutional arrangements, Shikyll emphasizes that to work at its best, presidentialism requires some cooperation between the separated powers of the two branches, and that to the country's great cost this has often been absent. This experience stands as an important datum for the younger presidentialist system in Kenya.

Part III examines relationships between the political branches and the judiciary. It begins with Fernando Loureiro Bastos' overview of judicial–executive relationships in Africa's Lusophone systems, Angola, Mozambique, Guinea-Bissau, and the island nations of Cape Verde and São Tomé and Príncipe, which are often neglected in the English-language literature. As a result not only of their colonial background but also an ongoing process in which Portuguese sources are widely used and judicial officers and academics often receive training in Portugal, these systems continue to follow the Portuguese system closely even today. The result, Loureiro Bastos argues, is the persistence of a view of the separation of powers in which the judiciary is subordinate to the legislature and the executive, and to the law that those branches alone create, and in which its role is understood chiefly as a resolver of disputes between private parties. A further constraint on judicial operations is practical: staffing and other problems, especially at the lowest levels, cause delays both directly and by increasing the workload of the judges and magistrates who are in place. Finally, while the constitutions of these states offer textual protection for the judiciary's independence, only Cape Verde has made important strides to realizing this in practice. Executive influence over the judiciary is strong, including in the crucial matter of appointments: the Angolan Constitutional Court has upheld this view of judicial appointments on the basis of the judiciary's limited democratic legitimacy, in keeping with a system that, as Loureiro Bastos notes, has a strong understanding of the executive even by the standards of Portugal's semi-presidential system.

André Thomashausen picks up this thread in his discussion of Angola in Chapter 7, another rare English-language analysis focused on Lusophone Africa. After recounting the history of constitutional developments in Angola leading up to the 2010 constitution, he discusses the relationship between the Constitutional Court, created by statute in 2008, and the powerful 'hyper-presidentialist' executive. The executive merits the epithet because it combines indirect election with very strong presidentialist powers. The first name on the party list in parliamentary elections is deemed elected as the president—functionally the same as in parliamentary systems where one party commands a clear majority—but the president may only be removed by impeachment and has considerable powers, including, following an older Portuguese tradition, the ability to legislate by decree in some areas. In a recent decision, which Thomashausen quotes and analyses in detail, the Court substantially supported this hyper-presidentialist model. It held that the 2010 constitution had reduced the powers of parliament as compared to the previous text and that parliament now lacked the power to put questions to the executive or to summon ministers to hearings before it. Since these are presidential powers, the Court held, parliament may not appropriate them, though it may request the president to supply information or order his ministers to appear

before it. While criticizing the interpretative techniques behind the decision and noting the politically suspect events surrounding it, Thomashausen offers several defences of it. In context, strong presidentialism is seen by some Angolans as preferable to granting too much power to a sharply fractured party system. More pragmatically, some may prefer to leave intact President Dos Santos' 34-year rule rather than risk instability or a return to civil war. They may look to the instability in some other African systems as a reason to prefer incremental, cautious reforms. Thomashausen goes as far as to suggest that in such conditions the Chinese system may offer an important model of governance for African states like Angola; he also notes, however, that the Court's decision, despite the criticisms, has the merit of confirming the supremacy of the constitutional text.

In Chapter 8, James Fowkes identifies a particular tendency in African scholarship to see the executive as, at best, a potential threat, and the judiciary as the body that should serve as guardian against it. This therefore prompts calls for more constitutional protections, greater insulation of judges from politics, and bolder judicial activity. Given the often sad history of the rule of law in Africa and the general dominance of executive power on the continent, this focus is both understandable and far from misplaced. But the chapter argues that it should not blind us to other configurations the separation of powers can assume. Comparative experience suggests that judicial power can escalate rapidly, a possibility that deserves the attention in the African context it already commands elsewhere, especially lest reform efforts aiming to strengthen the courts lose sight of the possibility that the judiciary, too, may need to be checked in time. Executives may also pursue more admirable constitutional goals, and in that case a relationship of substantial cooperation, rather than conflict, will be possible without sacrificing judicial independence or other constitutional goals. Case studies, including of Africa's most successful constitutional states, suggest that this situation may be important to that success, and if so a reflex position of distrust will not always be appropriate or prudent. A distorting focus on executive dominance to the exclusion of these other dynamics is therefore likely to mislead, and separation of powers thinking should be adjusted accordingly.

In Chapter 9, Kofi Quashigah offers a succinct overview of the post-independence constitutional history of the important case of Ghana. In his account, the story begins in 1960 with the subordination of the judiciary by the executive, a relationship effectively conceded by the judges of the time. Judges were therefore complicit in the descent of the Nkrumah government into dictatorship, but began to assert more power under the 1969 constitution, which expressly entrenched the power of judicial review for the first time. This continued under the subsequent military regimes, against which the judiciary offered some protection. With the return to civilian rule, the new 1992 constitution goes so far as to provide that the failure of the president or vice-president to respect a Supreme Court order constitutes high treason. In the years since, the judiciary has made bold orders against the government and these have generally been upheld. Quashigah concludes by observing the extent to which meaningful judicial power is possible given the confluence of adequate textual protection of the judiciary's authority, a conducive political environment, and a commitment on the part of the judges themselves to uphold the rule of law impartially.

Complementing Shikyll's earlier discussion of legislative–executive relations in Nigeria is Ameze Guobadia's Chapter 10, focusing on judicial relationships. She sketches the history of assertions of judicial power by Nigerian courts, including the bold, though promptly reversed, 1966 action by the Supreme Court to assert the continued validity of the 1963 constitution in the face of a military coup. Central to her analysis are questions of the role of the National Judicial Council in appointing and disciplining judges, an important contemporary issue in many systems. She recounts the saga surrounding a president of the Court of Appeal, Justice Salami, which raises the troubling prospect of the Chief Justice 'packing' the Council and possibly colluding with the executive to pursue political goals, and discusses the issue of Council disputes with state governors over the appointment of state chief justices, who are appointed by governors on the Council's recommendation. She also offers the Nigerian perspective on control over judicial budgets and administration, another issue of wider importance, noting that current arrangements are rather better at safeguarding judicial independence in relation to the latter than the former. The chapter concludes with a review of some significant cases, revealing a mixed pattern: assertions of judicial power and some erosion of the political question doctrine, coupled with examples of open non-compliance by the executive and some signs that the judiciary may practise self-imposed restraint in some sensitive cases.

In Chapter 11, Assefa Fiseha introduces the position of the judiciary in Ethiopia. The country adopted a parliamentary system of government, but by contemporary standards, it has some unusual features. Its governments have historically blended judicial and executive functions, and today final authority in constitutional matters lies not with the courts but the House of Federation, the second legislative chamber whose members are in practice indirectly elected by the states. This leaves the position and role of the judiciary somewhat unclear, and the Supreme Court has not tended to assert its power: as Fiseha argues, 'the highest court has taken the position that whatever the legislature takes away remains valid and courts are mandated to interpret whatever is left'. Although independent and fiscally accountable only to parliament on the face of the text, the judiciary in fact submits budgets to the executive, which also has substantial control over appointments. There are signs of the use of legislative overrides to reverse individual decisions, and of ouster clauses to transfer jurisdiction on various issues from the courts to administrative tribunals within the executive. Although lower courts have attempted to review decisions of these tribunals, the Supreme Court has overruled them on the basis that they lack jurisdiction. The highest ranks of the judiciary therefore seem to be accepting of a vision of the separation of powers in which other branches define the judicial role.

Walter Khobe Ochieng discusses the Kenyan executive–judicial relationship in Chapter 12. As he explains, Kenya has long seen a deferent, politically controlled judiciary. The 2010 constitution, however, takes a number of steps to safeguard judicial independence, in line with the general concern to limit executive power that was also a theme of Conrad Bosire's chapter on executive–legislative relationships in the new system. The 2010 reforms include the creation of a Judicial Services Commission that aims to end the previous presidential control of appointments and the insulation of judicial funding from executive control. Several aspects of the new appointment

procedures have already been defended in decisions of the High Court. Ochieng concludes his discussion by examining a number of important recent cases which demonstrate, as he says, how 'the Courts have reformed to the extent of boldly questioning executive decisions'. His cases also show executive compliance, although as he notes the executive has sometimes been slow to comply with decisions that go against it, and several prominent political leaders, including the president, have criticized the courts for 'activism'. The work of establishing and enforcing the 2010 constitution is only just beginning, but the chapter reflects that important early steps have been taken.

Nico Horn concludes Part III with a discussion of judicial power in Namibia. He begins with the assertiveness of the judicial bench during the 1980s, when Namibia was still controlled by the South African apartheid government. Namibian judges relied on the rights contained in a quasi-constitutional transitional instrument (of lesser legal status) and on the common law to invalidate several abuses of power, though the South African Appellate Division, deferent to the apartheid regime here as in many other contexts, generally reversed these decisions. As Namibia moved towards transition, this record bolstered the judiciary, but it did not escape the politics surrounding a largely white judiciary inherited by the new black government, nor did these tensions disappear as more black judges were appointed to the bench. Horn's conclusion, however, is that while non-trivial, these tensions have not reached the point of representing a genuine threat to judicial independence. His examples include decisions on the important structural issues of the constitutional status of prosecutorial decisions (a topic of Part IV of this volume) and protections for the independence of magistrates. He also discusses the influence that public homophobic statements by senior officials had on the Supreme Court's failure to protect Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed (LGBTI) rights. The Court here acted apparently as willing partner, taking the statements as evidence of the values of the Namibian people.

Part IV concerns issues lying at the borders of the traditional doctrine of the separation of powers, or entirely outside it. Charles Fombad opens this Part with a discussion of hybrid institutions: bodies like auditors general and election commissions. As he notes, such bodies have long existed around the world, but they have traditionally been created by legislation. A number of recent African constitutions have begun to extend them formal constitutional status; he pays particular attention to the important South African case, which has influenced several other more recent African constitutions in this regard. Fombad welcomes this trend as a timely re-imagining of the traditional separation of powers, but emphasizes the need to ensure the budgetary and political independence of such bodies, and also warns against the temptation of creating a plethora of expensive new hybrid bodies as a reflex paper solution to stubborn problems.

In Chapter 15, Jeffrey Jowell addresses the important question of the precise constitutional status and role of the public prosecutor. As he notes, this has not only been an area of recent controversy in several jurisdictions but 'bristles with problems about divisions of functions that are necessary in a constitutional democracy'. On the one hand, public prosecutors are legal officials supposed to be independent and impartial; on the other hand, their decisions may legitimately take account of public policy and

therefore may in principle be legitimately influenced by elected officials and the stance of the government of the day. Jowell links debates on these issues in Anglophone Africa to those in other Commonwealth jurisdictions and to the growing body of soft law on the point in international and European instruments. He argues that public prosecutors should be permitted to take public policy into account and should therefore be permitted to consult elected officials, but should not consider themselves bound by the advice received. He notes the concerns about undue political influence, as well as the difficulties that arise when courts are called upon to review decisions that implicate this prosecutorial discretion. Such exercises in review, like other efforts to ensure transparency and accountability here, may be facilitated by the giving of reasons for specific decisions not to prosecute (or at least the presence of public general guidelines), and by the possibility for input from victims and their families. Jowell's chapter shows that both these areas, like the broader problem itself, merit more attention.

Charles Fombad and Horace Adjolohoun ask the corresponding question about public prosecutors in Francophone Africa in Chapter 16, in a discussion that also has relevance to countries that inherited other continental European legal systems. They note that the French themselves have implemented significant reforms in this area in response to rulings of the European Court of Human Rights (ECHR), but that Francophone African countries have only followed suit to a limited extent and still largely follow the old French system. (As they note, African regional bodies have done much less to date in this area than the ECHR, so a corresponding regional influence has not yet materialized.) What reforms have occurred give judges a greater role in some prosecutorial decisions, but the independence of prosecutors remains an area of significant concern. Their appointment is generally subject to substantial political control, and although they receive identical training to judges and are similarly judicial officers, they enjoy fewer institutional protections, for example against transfers by the executive. Their decisions are also ultimately subject to the Minister of Justice, and given both continental traditions of bureaucratic obedience and African ones of submission to a powerful executive, this can be a powerful constraint on independent prosecutorial activity. Fombad and Adjolohoun offer a number of case studies of the concerns and abuses that have arisen in practice. They conclude that the issue of the tangled roles of the Francophone prosecutor, who must represent multiple interests before and during trials and who institutionally serves multiple masters, merit the same concern and reform in Africa that it has been receiving in the European systems from which these arrangements originated.

Michaela Hailbronner rounds off the volume by interrogating the emphasis on the separation of powers as a device for curbing power, especially executive power, and reflecting on the persistent theme of legitimacy, especially judicial legitimacy. She notes that while some African systems can be plausibly understood as exercises in revolutionary constitutionalism, as in the United States, most probably cannot. Their constitutions today often reflect important reforms, but commonly feature similar groups and people in power after the constitution as before it. Revolutionary legitimacy may not be available for courts to draw upon, but they may still rely on the reformist imperative to avoid past mistakes as a source of legitimate authority—something several African courts in this volume may be observed doing. She also notes that the

separation of powers is a device intended to underpin an efficient allocation of tasks to the branches that can best perform them. This aspect is neglected by arguments focusing on limiting executive power, but it should be important in African systems. It may provide a more appropriate paradigm for parts of the new texts, such as socio-economic rights, since the strong developmental states African constitutions aspire to be are imperfect fits for traditional negative understandings of constitutions and courts as restraints on power. Following through on this line of reasoning, she argues that African systems may plausibly place an emphasis on judges as checks on executive abuses but would also do well to develop doctrines of legitimate judicial deference on the basis that another branch is better suited to perform a particular task. Models from similarly situated countries in the Global South, or from modern constitutional exemplars such as Germany, may be better guides here than the United States and the former colonial powers which are the traditional focus.

These seventeen chapters offer a wealth of local detail on the current state of power relations in African constitutional systems, and taken together offer a valuable perspective on the current state of the state in Africa. The view is certainly a mixed one, as we should expect: as some systems succeed, and different systems succeed in different areas, generalizations, including the generalization that is Afro-pessimism, will become less and less useful. Such a result, however, is itself far more useful than its indeterminacy can make it appear. It is when the picture is mixed that comparison becomes most feasible and instructive, and opportunities for mutual learning by those inside and outside Africa most plentiful, and thus when the value of inclusive scholarly conversations promises to be greatest.

# PART I

# OVERVIEW

# 1

# The Evolution of Modern African Constitutions

## A Retrospective Perspective

*Charles M. Fombad*

## 1. Introduction

Until the last two decades, there were no serious efforts by scholars to study African constitutions. This was because many felt that these constitutions bore little reflection not only of the will of the people but also of the system of governance and political realities of the continent.[1] This has however significantly changed since the so-called 'third wave of democratization' swept through the continent from the 1990s and unleashed what is turning out to be an endemic fever of constitution-building.[2] Constitutions have today become an essential foundation for attempts to design a comprehensive new agenda for modernization and political reconstruction on the African continent. They are no longer merely instruments that aim to regulate and limit the exercise of governmental power but are increasingly becoming the tools that Africans can use individually and collectively to liberate themselves and expand their own ability to achieve their personal and collective goals. Constitutions are now beginning to play a more meaningful role in the daily realities in both governance and politics in Africa.

To appreciate the nature, scope, and direction of constitutional developments and constitutionalism on the continent today, it is necessary to undertake a brief historical overview. One of the most remarkable developments has been the move away from wholly imported or imposed constitutions, towards constitutions made within Africa. This raises several interesting questions. What are the elements that are influencing the content of African constitutions? Can we talk of an African constitutional genre? If not, how can we situate modern African constitutions in the context of the different constitutional systems that operate in the world?

The rest of this chapter is divided into four sections. Section 2 briefly examines the different generations of constitution-building that have taken place as African countries have attempted to adopt effective and durable home-made constitutions. Section 3 examines the different influences that have shaped the structure, scope, and content of

[1] See Hastings Winston Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Issa Shivji (ed), *State and Constitutionalism in Africa* (SAPES 1991) 3.

[2] As regards the third wave of democratization, see Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991). This is also referred to by Larry Diamond as a 'second liberation' in Larry Diamond, 'Developing Democracy in Africa: African and International Perspectives' <http://www.democracy.standford.edu/Seminar/Diamondafrica.htm> accessed 21 April 2015.

African constitutions. Section 4 looks at the main patterns that are emerging. The last section provides some concluding remarks.

## 2. Generations of Constitution-building in Africa

Africa's experience with constitution-building is quite short.[3] From a global perspective, Jon Elster has identified seven 'waves' of constitution-making. His analysis associates Africa with only the fifth and seventh of these waves.[4] From an internal African perspective, it is perhaps more apposite to say that Africa has gone through three generations of constitution-building viz, the post-colonial or independence constitutions of the 1950s and 1960s, the post-independence constitutions from the late 1960s to 1989, and the post-1990 constitutions.[5]

It is worthwhile pointing out that the colonialists hardly pretended, or even attempted, to govern their colonial possessions under anything that is remotely close to a constitution. The goal of maintaining social peace at all cost in order to exploit the colonies to their fullest mattered more than the niceties of constitutional governance. Under no colonial system in Africa was political organization based on any principles of constitutionalism such as the separation of the branches of government or checks

[3] The concept of constitution-building that is now increasingly being used in the literature is much broader than the more frequently used term, constitution-making. The former describes a long-term process in which a political entity commits itself to the establishment or adoption of the basic rules, principles, and values that will regulate economic, social, political, and other aspects of life within it. The actual processes involved may include several activities such as negotiating a peace agreement, reaching agreement on transitional issues, drafting, discussing, and adopting a constitutional text, and other activities that entail a process of systematic and systemic entrenchment of a culture of constitutionalism.

[4] See Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' 45 *Duke Law Journal* (1995) 364, 368–76. He points out that the first wave of constitution-making began in the late eighteenth century between 1780 and 1791 when constitutions were written for the various American states including the United States, Poland, and France. The second wave occurred during the 1848 revolutions in Europe and the third broke out after the First World War. The fourth wave occurred after the Second World War when the defeated powers, Japan, Germany, and Italy adopted new constitutions. The breakup of the British and French empires marked the beginning of the fifth wave which began with the independence of India and Pakistan in the 1940s but reached its peak in the 1960s as most African countries gained independence and modelled their constitutions on that of their former colonial powers. The next wave is associated with the fall of the dictatorships in Southern Europe in the 1970s and the adoption of democratic constitutions by Greece, Portugal, and Spain. Elster's seventh wave, the second in which African countries were involved, started with the fall of the Berlin Wall in 1989 and the collapse of communism and the adoption by the former communist countries of Eastern and Central Europe of new constitutions. This wave of constitution-making also swept across Africa and appears to continue until today.

[5] See Charles Manga Fombad, 'Constitutional Reforms in Africa and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007. But there are some authors who suggest more phases. For example, Steve Odero Ouma, 'Constitution-making and Constitutional Reform in Fledgling Democracies: An East African Appraisal' in the Kenyan Section of the International Commission of Jurists, *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (Konrad Adenauer Stiftung 2007) 41–61, suggests five historical phases of constitutionalism in Africa viz, pre-colonial, colonial, immediate post-colonial, modern, and contemporary. See also JM Breton, 'Trente Ans de Constitutionnalisme d'importation dans les pays d'Afrique Noire Francophone entre Mimetisme et Reception Critique: Coherences et Incoherneces (1960–1990)' <http://www.slideshare.net/Nomadaid/trente-ans-de-constitutionalisme-dimportation-dans-les-pays-dafrique-noire-1960-1990> accessed 21 April 2015; and André Cabanis and Michel Louis Martin, *Le Constitutionnalisme de la Troisième Vague en Afrique Francophone* (Bruylant-Academia SA 2010).

and balances.[6] The powerful colonial administrators who ran the colonies like private farms, were given wide discretionary powers which they regularly abused with impunity. Much has been written about the atrocities that were committed in Africa during the colonial period under the guise of benevolent paternalism (*mission civilisatrice*).[7] Although Belgium and France gained notoriety for the brutality of their colonial policies, the record of the former was notorious. For example, Joseph Conrad in his *Heart of Darkness* describes Belgian rule in today's DR Congo as the vilest scramble for loot that had ever disfigured the history of human conscience.[8] This is the background against which African colonies became independent.

The first generation of African constitutions served as a basis for the transfer of power from the colonialist to the national elites who had led the struggle for independence in the late 1950s and early 1960s. These constitutions were crafted mainly by the departing colonial powers, the Belgians, the British, and the French in Brussels, London, and Paris, with fairly limited consultations with the emerging African political leaders and hardly any involvement of the ordinary Africans.[9] They were therefore more or less imposed and since the people, apart from a few elites, had not been involved in the constitution-building process, they hardly reflected the general will of the people. Nevertheless, these constitutions, for the first time introduced European liberal democracy and constitutionalism with important features such as the diffusion of powers, checks and balances, limited government, and the protection of individual and minority rights. But in spite of the introduction of these important Western liberal democratic values, the foundations on which they were laid were rather too shallow to prevent the prolongation of the colonial authoritarian system into the post-colonial period.

The Western experts who crafted these first-generation constitutions had little knowledge of the local realities of Africa and were more concerned with maintaining the status quo ante in which the interests of the former colonial powers and the white settlers left behind were well-protected. For example, the early constitutions drafted by the British for their non-African colonial possessions initially reflected the traditional English scepticism towards the entrenchment of rights and did not contain any comprehensive statement of fundamental rights.[10] It was therefore no surprise that

[6] See Filip Reyntjens, 'Authoritarianism in Francophone Africa from the Colonial to the Postcolonial State' (1988) 7 *Third World Legal Studies* 59.

[7] See, for example, Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Houghton Miffin Co 1998); Henk Wesseling, *Divide and Rule: The Partition of Africa, 1880–1914* (Arnold Pomerans tr, Praeger 1996); Frantz Fanon, *The Wretched of the Earth* (Grove 1963); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).

[8] Joseph Conrad, *Heart of Darkness* (Dover Publications 1990). During King Leopold II's reign, authoritarianism, terror, violence, wanton exploitation, and slavery were the hallmark and it is no surprise that more than 10 million people died and countless women were raped.

[9] The concept of civil society was hardly known at the time because there were very few Africans occupying positions usually associated with civil society such as civil servants, lawyers, engineers, doctors, journalists, and university lecturers.

[10] This attitude had been influenced by scholars such as Jeremy Bentham who, in commenting on the French Declaration of the Rights of Man and of the Citizen, is quoted by Nihal Jayawickrama, *The Judicial Application of Human Rights: National, Regional and International Jurisprudence* (Cambridge University Press 2002) 106 to have described constitutionally entrenched human rights as 'rhetorical nonsense—

as Ghana (then known as Gold Coast) was prepared for independence, the draft independence constitution which included seven articles for the protection of fundamental rights was rejected by the British government. As a result, the Ghanaian constitution of 1957 had no bill of rights. There was however a dramatic change at the dawn of the 1960s.[11] It is not improbable that one of the reasons was the hope by the British government that a constitutional guarantee of fundamental rights, including the prohibition of discrimination would protect the British citizens who had settled in large numbers in certain African countries such as Kenya, Uganda, and Tanzania.[12] In December 1959, Nigeria became the first former British colony in Africa to be provided with a constitutional bill of rights. Thereafter, it became standard for the constitutions of other British colonies in Africa to have a bill of rights based on the Nigerian model. The French by contrast refer to human rights parenthetically, by means of the preamble to the 1958 constitution, which in turn refers to the preamble of the 1946 constitution and the somewhat rhetorical 1789 Declaration of the Rights of Man and the Citizen. The recitations contained in these documents were interpreted by the French Constitutional Council as a bill of rights.[13] The French legacy of not guaranteeing fundamental rights and freedoms in the substantive provisions of the constitution was, with a number of exceptions, replicated in the constitutions that it handed down to its former colonial territories in Africa. The effect of this was a weak and unpredictable system of human rights protection because unlike in France, the preambles to these constitutions were not regarded as a substantive part of the constitution.

Generally, since the main aim of the independence constitutions was to transfer powers to the national elites, more attention was paid to the exercise of powers than to their limitations.[14] There was thus no effort to ensure a smooth transition from the repressive and harsh colonial system of administration to constitutional rule subject to the rule of law in a state of freedom. Hence, notwithstanding the number of liberal principles on human rights and political freedom contained in these new constitutions, the new elites had learned the colonial lessons of repression and authoritarianism rather too well to change so suddenly. Besides this, for the inexperienced Africans assuming the role of leadership, these constitutional documents were simply too complex and perceived to be ill-adapted to address the immediate problems they

nonsense upon stilts'. Albert Dicey in his famous, *An Introduction to the Study of the Constitution* (10th edn, Macmillan 1959) 199 was able to boast that *habeas corpus* is 'for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.

[11] See Jayawickrama (n 10) 10–109; and Peter Wesley-Smith, 'Protecting Human Rights in Hong Kong' in Raymond Wacks (ed), *Human Rights in Hong Kong* (Oxford University Press 1992) 39–43.

[12] For example, the British, having 'bought' what became known as the 'white highlands', one of the most fertile parts of the country, from Maasai leaders who hardly understood the dubious treaties they were signing, the British had to introduce very strong property rights guarantees in the independence constitution. For other possible reasons, see the account of Jayawickrama (n 10) 105–9.

[13] See Andre Cabanis and Michel Martin, *Le Constitutionnalisme de la Troisième Vague en Afrique Francophone* (Bruylant-Academia SA 2010); YA Fauré, 'Les Constitutions et l'exercise du Pouvoir en Afrique Noire' <http://www.politique-africaine.com/numeros/pdf/001034.pdf> accessed 20 April 2015.

[14] For example, many of the fundamental rights provisions in the constitutions that were prepared by the British allowed the governments a free hand to introduce necessary limitations to the exercise of these rights by law with no restrictions to ensure that the limitations did not effectively erode the rights granted under the constitution.

were confronted with. This was exacerbated by the extreme haste with which many European powers withdrew without advance planning for a transition.[15] For example, in Belgian Congo (today's DR Congo), the first legislative elections in which the population as a whole participated were held in May 1960, barely one month before independence.[16]

The fact that the colonialists sought to establish in the former colonies, the only system of government which they knew and rightly or wrongly assumed was the best and not necessarily that adapted to the needs and peculiarities of the particular country, was a problem. The British, although they themselves had no formal written constitution, already had a good record of writing constitutions for their former colonies.[17] However, the parliamentary systems of government headed by a prime minister did not pave the way for strong governments to emerge and as we shall soon see, led to early changes by the nationalist leaders to consolidate powers in the same manner as the colonial governors had done. By way of contrast the French Fifth Republic Constitution of 1958, which mixed some elements of both the parliamentary and presidential systems, was imposed on Francophone Africa in the early 1960s when it had hardly been tested in France itself. Worse still, the French had no reason to think that it would work well, because it was specifically designed under enormous pressure to prevent the collapse of the country and correct the problems that had bedevilled the 1946 constitution.[18] Whilst, in retrospect, the strong executive it created certainly corrected the structural weaknesses that led to a dysfunctional system in France under the 1946 constitution, the excessive concentration of powers in the office of the president which it created, was widely copied in Francophone Africa. Although it provided a more suitable starting point for the emergence of strong governments, the absence of sufficient checks on the exorbitant powers conferred on the executive easily facilitated the rise of dictatorships. For the former Belgian colonies of Burundi, DR Congo, and Rwanda, not only was the introduction of constitutionalism more sudden but the parliamentary systems of government introduced were weak and contained the seeds of political instability that was easily exploited by the new elites to consolidate their hold on power. Thus in spite of the liberal underpinnings of the independence

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

[16] In fact, Reyntjens (n 6) 67 has suggested that the very short experience which the Congolese had with the use of political parties as vehicles for mobilization and communication explains the ease with which the late President Mobutu, on assuming power in 1965, was able to easily assume the apolitical style of his Belgian colonial predecessors.

[17] For example, McPetrie records that by the end of June 1960, the Colonial Office in London had already drafted ninety-two constitutional instruments. Cited in JND Anderson (ed), *Changing Law in Developing Countries* (George Allen & Unwin Ltd 1963) 29.

[18] The power imbalance caused by the overbearing legislature established under the 1946 French Fourth Republic Constitution had led to economic difficulties, colonial problems, parliamentary logjams, deadlocks, and futile coalitions that resulted in twenty-three changes of government in twelve years. The 1958 constitution swung the pendulum of power away from an overbearing legislature in favour of an extremely powerful executive and this is what the French left for Africans to test for themselves. See further, Samuel Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions* (Clarendon Press 1995) 8–9.

constitutions, all analysts are agreed that they were marked more by continuities than discontinuities in relation to the colonial state.[19]

The second generation of constitution-building in Africa started soon after independence when African leaders and the ruling elites started questioning the underlying assumptions of the independence constitutions. There was a feeling that concepts such as democracy, multi-party competition, and separation of powers did not address the urgent needs of the newly independent countries. Under the pretext of promoting national unity from the diverse communities that had been artificially forced together as states from the partition of the continent in 1884, and to promote a sense of political identity and thus facilitate nation-building and development, many of the liberal principles contained in the independence constitutions were progressively repealed. In spite of the different approaches to governance manifested in the independence constitutions crafted by the colonial powers, there was a progressive convergence towards presidential systems of government through the extreme concentration of powers in a personalized executive who controlled both the legislature and the judiciary. Because little attention had been paid by the colonialists to build the judiciary or train judicial personnel to handle disputes, a situation which was particularly acute in the former Belgian and Portuguese colonies,[20] this combined with the impetus for the concentration of power in the executive to make authoritarian rule inevitable. Flagrant violations of human rights which had been a common pattern of colonial administration continued unabated in spite of the bill of rights or provisions purporting to recognize and protect human rights. The retort by the late President Mobutu of Zaire (present day DR Congo) to international protest against human rights violations reflects the attitude of many African leaders. He is reported to have said:

> . . . we are often accused of violating human rights. Today it is Amnesty International and tomorrow it is a human rights league and so forth. During the entire colonial period, the universal conscience never thought it necessary to have a human rights organization when indignities, humiliations and inhuman treatment inflicted in those days against the people of the colonies should have been condemned. It is rather odd. Everybody waited until we became independent suddenly to wake up and start moralizing all day long to our young states.[21]

The inability of the weak judiciaries to check against abuse of powers was aggravated by the introduction of one-party systems in most countries and the replacement of constitutional rule by military dictatorships in many others.[22] There is a voluminous

[19] See Filip Reyntjens, 'Authoritarianism in Francophone Africa' (n 6) 59; and Yash Ghai, 'A Journey Around Constitutions: Reflections on Contemporary Constitutions' (2005) 122 *South African Law Journal* 810.

[20] See Sandra Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 *Journal of Modern African Studies* 571, especially at 581 where the author points out that by the time Belgian and Portuguese colonies gained independence, they had virtually no trained legal professionals. See also Kristen Mann and Richard Roberts, *Law in Colonial Africa* (Heinemann 1991).

[21] Reported in *Agence Zairoise de Presse (AZAP)* (8 December 1982) and quoted by TM Callaghy in Reyntjens (n 6) 74.

[22] It is however important to note some rare exceptions to the one-party phenomenon that swept through the continent, such as Botswana, Mauritius, and Senegal, which were able to maintain multipartyism from independence.

amount of literature written from the 1960s to justify the introduction of the one-party system in Africa. There is no need to repeat or review these justifications here.[23] Nevertheless, some are worth mentioning. The main argument against multi-partyism was that it would promote division and tribalism, and entail a waste of national resources at a time when the newly independent states, with little resources and constituted of many culturally and religious heterogeneous groups, needed to focus on national unity, political stability, and rapid economic development. It was also argued that the one-party system was the only one that fairly corresponded with African traditional systems of governance.[24] One of the strongest and most articulate proponents of this view, the late President Julius Nyerere of Tanzania argued that in the African traditional society, there were no strong issues or private interests that could form the basis upon which parties could emerge to defend one or the other of those interests. As he put it:

> The European and American parties came into being as the result of existing social and economic divisions—the second party being formed to challenge the monopoly of political power by some aristocratic or capitalist group. Our own parties had a very different origin. They were not formed to challenge any ruling group of our own people; they were formed to challenge the foreigners who ruled over us. They were not, therefore, political 'parties'—ie factions—but nationalist movements. And from the outset they represented the interests and aspirations of the whole nation.[25]

According to this argument, since parties reflected class divisions of which there were none in Africa, the appearance of an opposition party must be prevented in order to avoid the development of a class struggle.[26] Another line of argument was purely ideological and was relied upon by the large number of African countries that adopted or flirted with Marxism–Leninism at one stage or another such as Angola, Benin, Burkina Faso, Congo Republic, Ethiopia, and Madagascar. Many of them constitutionally entrenched the party as the vanguard organization for leading the people to national liberation and the construction of scientific socialism.[27] Although there were many equally powerful counter-arguments made by critics of the one-party system,[28] the justifications given in their historical context were perhaps, understandable.

[23] See, for example, Kiven Tuteng, 'Towards a Theory of One-Party Government in Africa' (1973) 13 *Cahiers d'Etudes Africaines* 649; Lawrence Zimba, 'The Origins and Spread of the One-party States in Commonwealth Africa, Their Impact on Personal Liberties: A Case Study of the Zambian Model' <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDsQFjAC&url=http%3A%2F%2Fsaipar.org%2Fwpcontent%2Fuploads%2F2013%2F10%2FCHP_05_Law_in_Zambia.pdf&ei=r3xWU6nrAYSr7AaduIDQBA&usg=AFQjCNG5hUw9CN7Qy6WPdV9t6uXj_Ru0EQ&sig2=rRttKnWI2n7RdpN_DdebBQ&bvm=bv.65177938,d.Yms> accessed January 2015; and Peter Anyang' Nyong'o, 'Africa: The Failure of One Party Rule' (1992) 3 *Journal of Democracy* 90.

[24] See Kenneth Robinson, *Autochthony and Transfer of Power* (Oxford University Press 1968).

[25] Quoted in BH Selassie, *The Executive in African Governments* (Heinemann 1994) 149.

[26] ibid 150.

[27] See, for example, art 35 of the Constitution of the Republic of Congo of 1969; and arts 8, 9, and 55 of the Madagascar Constitution of 1975.

[28] For different views on this see, for example, Benjamin Nwabueze, *Presidentialism in Commonwealth Africa* (Hurst & Co 1974) 217–22.

Be that as it may, the one-party system hardly delivered on any of its main goals, viz, national unity and integration, political stability, and economic development. With weak and ineffective judiciaries and one-party parliaments effectively controlled by the executive there was hardly any means to check against abuses of powers and the human rights violations that had become commonplace. Once again, ordinary citizens were hardly involved in the reform processes that saw African leaders and the ruling elites consolidate and centralize power whilst progressively closing all avenues for open debate. By the 1990s, this system of governance had not only bred some of the worst dictators and repressive and authoritarian regimes that the continent has ever seen[29] but had led to political instability, severe economic crisis, unemployment, civil wars, famine, and other ills from which Africa is yet to recover. Like the first generation of African constitution-building processes, the second one also failed to provide constitutions which promoted constitutionalism or a firm basis for the social peace, coercion, and stability which was needed for development. By the end of the 1980s the second generation of constitutions had done no more than perpetuate the authoritarian and paternalistic style of colonial rule and resulted in what one writer rightly referred to as 'constitutions without constitutionalism'.[30] It is little wonder that by the end of this period the continent was ripe for revolution. And it must also be added that the process of constitutionalizing dictatorship and authoritarianism in Africa was often done with the full complicity of some of the former colonial powers. They had not limited themselves to imposing the independence constitutions but in some cases supervised and controlled the process of its implementation and subsequent amendments. For example, the French grip over its former colonies was so strong that until the late 1990s, it tolerated only such constitutional changes that did not threaten its economic and other interests in these countries. It regularly intervened to depose and install leaders according to how they protected these French interests regardless of the hardship this inflicted on the local population.[31]

The third generation of constitution-building coincided with the so-called 'third wave'[32] of democratization that reached the African shores in the early 1990s. This led

[29] For example, Idi Dada Amin of Uganda, Emperor Jean Bedel Bokassa of Central African Empire (Central African Republic), and Mobutu Sese Seko of Zaire (today DR Congo).

[30] In Okoth-Ogendo (n 1) and for a more general account, see GN Barrie, 'Paradise Lost: The History of Constitutionalism in Africa Post Independence' (2009) 2 *TSAR* 290.

[31] See generally Anton Andereggen, *France's Relationship with Subsaharan Africa* (Praeger 1994) and Filip Reyntjens, 'The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990–1991' (1991) 35 *Journal of African Law* 44.

[32] Huntingdon coined the expression in *The Third Wave: Democratization in the Late Twentieth Century* (n 2) 15–16. He defines a 'wave of democratization' simply as 'a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly out-number transitions in the opposite direction during that period'. He identifies two previous waves of democratization: a long, slow wave from 1828–1926, and a second wave from 1943–62. Most consider the 'third wave' to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Diamond and others such as Ihonvbere and Turner call 'second liberation' or 'second revolution'. Larry Diamond, 'Developing Democracy in Africa: African and International Perspectives' presented at the Workshop on Democracy in Africa in comparative perspective (Stanford University, 27 April 2001) <http://democracy.stanford.edu/Seminar/DiamondAfrica.htm> accessed 21 April 2015; see also Larry Diamond, 'Is the Third Wave Over?' (1996) 7 *Journal of Democracy* 20, 20–1 and Larry Diamond et al (eds), *Consolidating the Third Wave of Democracies* (John Hopkins University Press 1997); Julius Ihonvbere and Terisa Turner, 'Africa's Second Revolution in the 1990s' *Security Dialogue* (1993) 349–52.

to a fever of constitutional changes that shows no sign of abating. It is supposed to have brought Africa into a new age of constitutionalism through a process of constitution-building that is informed by the hard lessons learnt from the failures of the first two generations of constitutions. This new era, for many good reasons, began with high hopes. In many countries, both in Anglophone and Francophone Africa, and in the latter case, through the phenomenon of national conferences which began in Benin and spread to many other Francophone countries, the ordinary citizens were for the first time actually involved in the constitution-building process.[33] Nevertheless, the nature and extent of popular participation varied considerably from country to country. For instance, it ranged from the symbolic, as was the case in the Cameroonian process that led to the 1996 constitutional revision as opposed to that which unfolded in South Africa in a run up to the final 1996 constitution, which remains one of the most extensive instances of popular participation in constitution-building on the continent.[34] In many instances, foreign experts continued to play a role but they did not control proceedings or play the decisive role that they played in the past. Instead African experts have not only been prominent within their own countries but many of them, especially South African constitutional experts, have been widely used in other African countries. There is therefore no reason why these constitutions, from this perspective, cannot be described as 'made in Africa'.[35] But whether their structure and content warrants such a conclusion is an issue we will consider later. The focus in these new constitutions has been to attempt to address some of the structural weaknesses that had made repressive and autocratic rule almost inevitable in Africa. The recognition and protection of human rights, the legitimization of multi-partyism, the deconcentration of power, the decentralization of power structures, and the introduction of institutions to promote transparency and accountability have become the common pattern. In short, most of the post-1990 African constitutions have now entrenched the core principles of modern constitutionalism. However, after a promising start which saw some of the old dictators removed from power in the early multi-party elections, the last decade has been marked by ominous signs of a revival of the old dictatorships.[36] But in spite of the significant and in some cases, radical constitutional changes that have taken place since the 1990s, there remain serious problems. The crux of the

[33] National conferences were held in nine Francophone countries namely, Benin, Chad, Comoros, Congo, Gabon, Mali, Niger, Togo, and Zaire between 1990 and 1993. Similar bodies were also convened in three other African countries viz, Ethiopia in July 1991, South Africa in December 1991, and Guinea-Bissau in 1992. Attempts to organize national conferences in Burkina Faso, Cameroon, Central African Republic, and Guinea failed. Although a typically Francophone phenomenon, some other non-Francophone countries, such as Ethiopia in 1991 and Guinea-Bissau in 1992 also held national conferences. See further, Pearl T Robinson, 'The National Conference Phenomenon in Francophone Africa' (1994) 36 *Comparative Studies in Society and History* 575.

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

[35] See Stéphane Bolle, 'Des Constitution "Made In" Afrique' (Maître de conférences à l'Université Paul Valéry-Montpellier III) <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.droitconstitutionnel.org%2Fcongresmtp%2Ftextes7%2FBOLLE.pdf&ei=5WnqUoGdMuey7AbviIHAAg&usg=AFQjCNG_KHccjuXhzczYPJGVZEAcbJEcyA&sig2=_nt2XFc95xV7XqkQIjKEZA&bvm=bv.60444564,d.ZGU> accessed 21 April 2015.

[36] For an elaborate discussion of this, see Fombad (n 5).

problem appears to be the inability to restrain African leaders from abusing the exorbitant powers that have been granted to them or that they have assumed for themselves. Most studies of post-1990 constitutional changes noted the progressive reinforcement of presidential powers and the corresponding weakening of the powers of the other two branches of government, especially the legislature.[37]

Two significant developments which, to use the language of 'waves', can be described as 'two parallel waves' have operated within this period of the third generation of constitution-building in Africa. The first is the fact that since 2010 a number of African countries are now beginning to take another more serious look at their constitutions. For example, since 2010, there have been new constitutions crafted in Angola, Kenya, Madagascar, Somalia, and more recently, in Zimbabwe. Each of them not only entailed much broader participation of the people in the various processes but also showed more determined efforts to enhance constitutionalism, the rule of law, and good governance. There are also ongoing processes in Ghana, South Sudan, Tanzania, and Zambia. The second development is what is now referred to as the 'Arab Spring'. Until 2010, the pressure that had forced many dictators in sub-Saharan Africa to make concessions and accept constitutional reforms had largely left the dictators in Arabophone Africa unperturbed. But in 2011, this all changed in the so-called Arab Spring which saw widespread protests that forced ruthless and long-term dictators like Ben Ali of Tunisia, Hosni Mubarak of Egypt, and Muammar Gadaffi of Libya out of power. Suffice it to point out that this has led to extensive national consultations and the adoption of new constitutions. Morocco more or less pre-empted the nationwide disturbances by adopting a new constitution in 2011. Most of the countries in the region are still politically unstable. Libya adopted a new constitution in 2011 and Tunisia did so in 2014 whilst the Egyptians have within a period of two years (2012 to 2014), adopted two new constitutions.

The current wave of the making, remaking, and unmaking of constitutions is still in full swing. It may perhaps be too early, especially when considering the unstable situation in Arabophone Africa, to say where these developments are leading Africa, nevertheless one can at least ascertain where African constitutional systems fit in within the context of global constitutional systems. To do this, it is necessary to appreciate the different influences on the content of African constitutions.

## 3. Influences on African Constitutions

Constitutions are not written in a vacuum nor do they fall from the sky. They are often prepared in a particular political context and with particular social aims. In the late 1950s and early 1960s it was almost taken as axiomatic by African states clamouring for independence that a constitution was a condition or a concomitant of independence. In the absence of a dominant model constitution which could act as guide, it was understandable that the emerging independent states simply accepted and adapted the models prepared by the colonial powers based on their own legal systems. Therefore,

[37] See Fauré (n 13).

the first main and perhaps dominant influence on African constitutions was the colonial legal system within which these constitutions were crafted. In framing these constitutions, the colonialists did not completely ignore the African social, legal, and political cultures that were in place. Several aspects of the indigenous political systems as well as religious beliefs, such as Islam, were incorporated in diverse ways in these constitutions. Since these constitutions were adopted, like all modern constitutions, their development has been influenced by the borrowing of ideas, concepts, principles, and institutions from other jurisdictions, especially the states with which they share a common legal heritage.[38] At some stage, many African constitutions were influenced by socialist ideology. However, in the last two decades, regional and international influences have played a very significant role in the considerable strides that have been made to entrench constitutionalism in Africa. It is now necessary to see to what extent each of these diverse influences has shaped the form and structure of these constitutions over the last five decades.

## 3.1 The colonial influence

The colonial powers, in order to exercise effective control as well as maintain the law and order necessary to facilitate maximum exploitation of their colonial territories, imposed their legal systems on the colonies. Even those countries managed under the League of Nations Mandates and subsequently the UN trusteeship agreements were authorized to apply their laws to these territories.[39] It was during this period that the English common law was exported to Anglophone Africa, French civil law to Francophone Africa, and Portuguese and Spanish civil law to Lusophone and Hispanophone Africa respectively.

The diverse efforts over the years to group jurisdictions around the world into a handful of legal families, systems, or traditions have become a hotly contested issue amongst comparatists in recent years.[40] In spite of the criticisms levelled against the different taxonomies it is argued that it would be a mistake to ignore the legal tradition in which a country's constitution was crafted and within which it actually operates.

[38] This process, referred to as the migration of constitutional ideas, is a complex and contentious one. See in general the seminal works of Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006); and Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

[39] For example, art 5(a) of the Trusteeship Agreement for the Administration of the Territory of Cameroons under British Administration which states that the Administering Authority, '*shall have full powers of legislation,* administration and jurisdiction in the territory and *shall administer it in accordance with the Authority's own laws* as an integral part of its territory with such modifications as may be required by local conditions and subject to the provisions of the United Nations Charter and this Agreement' (emphasis added). See <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEEQFjAE&url=http%3A%2F%2Fwww.cameroun50.cm%2Ftelechargement%2Ftrusteeship_agreement_under_british_administration.pdf&ei=n6LvUs2ZCO2v7AbImoGABA&usg=AFQjCNHf_vEj68Ndudt-EMStjn0wBrqLZQ&sig2=Q0rTgzaLFEi8f50uWNHXcQ&bvm=bv.60444564,d.ZGU> accessed 21 April 2015.

[40] For a discussion of this, see Mariana Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 *American Journal of Comparative Law* 1043 and H Patrick Glenn, *Legal Traditions of the World* (4th edn, Oxford University Press 2010).

Although some writers argue otherwise,[41] a critical look at African constitutions will show that there is a strong correlation between the constitutional 'system' and the legal system from which it has emerged. This reality has not been diminished by the dramatic constitutional changes taking place, not only in Africa but globally, which show that there are many signs of convergence of national constitutional systems.[42] There remain however many differences, sometimes quite significant, which can be explained only by the legal tradition from which the constitution was crafted and has evolved. In this respect, it is to be noted that two main legal traditions have taken hold on the continent, the common law tradition in Anglophone Africa and the civil law tradition in Francophone, Lusophone, and Hispanophone Africa. But as we shall see later, it is not merely these two legal traditions but also others which have influenced the evolution of African constitutions.

All Anglophone African countries inherited Westminster-type constitutions which were mainly drafted at Whitehall. By contrast, the French simply transplanted the Fifth Republic Constitution of 1958 to all its colonies, with the exception of Guinea, which at independence had opted out of any association with France. In present day DR Congo, their constitution, in the form of the *Loi Fondamentale* of 1960 was strongly influenced by the Belgian constitution.[43] So too was the autochthonous constitution of Burundi. In spite of the tremendous developments that have taken place since these constitutions were adopted at independence, the present generation of African constitutions, still bears clear and distinctive features of the legal tradition from which it emerged. A number of examples which will illustrate both the continuous influence of the colonial legal heritage and the distinctive features of each of the systems will be discussed in some depth. From this discussion, it will be seen that the colonial influences on the different African constitutions have not necessarily been exactly the same.

In spite of the post-1990 reforms being very closely linked to the inherited colonial patterns, there are some indications that these colonial influences may be reduced with time especially if, as we will see later, the African Union (AU) plays a more proactive role in promoting the adoption of common constitutional standards. This is however just one of the several other important influences on modern African constitutions which cuts across the Francophone, Anglophone, Lusophone, Hispanophone, and Arabophone divides which we shall now proceed to consider, starting with ideological influences.

## 3.2 Ideological influences

By the time African countries were being granted independence in the early 1960s, in many cases after armed struggle against the colonial powers, the former Soviet Union

[41] See, for example, Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *American Journal of Comparative Law* 5, who opines, 'It is quite obvious that, in comparing constitutional orders, the common law vs civil law opposition may be less useful than the federal vs unitary one' (see 8).

[42] See generally Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 *National Taiwan University Law Review* 1 and David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652.

[43] In fact it was an Act of the Belgian parliament.

as a superpower and socialism as an alternative ideology were at the height of their appeal to Third World countries. In fact, by the end of the Second World War, China and the Soviet Union as the main promoters of the Marxist–Leninist ideologies, had thrown their weight behind all the different independence movements across Africa and became identified with anti-colonial ideologies, especially in the Portuguese colonial territories.[44] As a result of this, at the time of independence or at some later stage, many African countries adopted constitutions that were influenced by socialist ideology, or what are sometimes referred to as ideological constitutions.[45]

Ideological constitutions were influenced by the socialist constitutional models then in vogue in both China and the former Soviet Union. The socialist constitutional models were instruments that were supposed to be designed for social transformation and incorporated ideological goals intended to map the historical progress of society, charting its movement toward the final state of communism.[46] It is however necessary to distinguish the 'socialism' espoused by some of these constitutions from the 'African socialism' that was promoted by some African leaders like Julius Nyerere and Leopold Sedar Senghor.[47] Although the term is borrowed from Marxist–Leninist thinking, many forms of this so-called African socialism had more to do with populism and African communitarian traditions than socialism in its strict sense.[48] In fact, attempts were made by the proponents of African socialism to distinguish it from non-African socialism. One of its most eminent promoters, Senghor, boasted thus: 'We have rejected prefabricated models. We have not let ourselves be seduced by Russian, Chinese, or Scandinavian models.' He then went further to describe the communist blueprint as a 'soul-less monster' whose 'purely materialistic and deterministic postulates' ill accords with the African environment and argued that the communist thesis of the class struggle would tend to produce and accentuate social divisions at a time when national unity was the key to national construction.[49] In almost similar terms, his contemporary, Julius Nyerere rejected what he referred to as 'European' or 'doctrinaire socialism' for seeking to build a society on a philosophy of inevitable conflict between man and man and an illogical form of socialism which can only co-exist with its

[44] The bitterness caused by the violent attempts by some of the colonial powers, especially Portugal, which was the first European country to come to Africa and the last to leave, drove many anti-colonial movements into the waiting and open arms of the Soviet Union and China.

[45] See Saïd Amir Arjomand, 'Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions' (1992) 33 *European Journal of Sociology* 46, where he points out that the adoption of the Soviet constitution of 1918 saw the advent of a new genre, the ideological constitution, whose central goal was not to limit government but to transform society according to a revolutionary ideology.

[46] See Julian Go, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 *International Sociology* 76.

[47] See Julius Nyerere, 'Ujamaa—The Basis of African Socialism' (April 1962) <http://www.juliusnyerere.info/index.php/resources/speeches/ujamaa_the_basis_of_african_socialism_julius_k._nyerere/> accessed 21 April 2015; Walter Skurnik, 'Leopold Sedar Senghor and African Socialism' (1965) 3 *Journal of Modern African Studies* (1965) 349.

[48] See further Filip Reyntjens, 'Recent Developments in the Public Law of Francophone African States' (1986) 30 *Journal of African Law* 84.

[49] These are from two of his works: Leopold Senghor, *Développement et Socialisme* (Présence Africaine, 3–8 December 1962; Paris 1963) 11 and *Nation et Voie Africaine du Socialisme* (Présence Africaine 1961) 51, both of which are cited by Skurnik (n 47) 354; and more generally, see one of the main compilations of his thoughts on the topic in, *Nation et Voie Africaine du Socialisme* (Seuil 1971).

'father—capitalism'.[50] Some of the main features of this African socialism included the ownership of land by the community rather than individuals, the sharing of the wealth of the community, and the recognition of the whole society as an extension of the basic family unit. One common feature which it shared with the so-called doctrinaire socialism was the primacy of the ruling party as the vanguard of the people. This led in most cases to a blurring of the distinction between party and government.[51] Some countries even claimed to have evolved to a point where they had replaced African socialism with what they termed scientific socialism, which was a euphemism for the adoption of non-African socialism.[52]

Generally, the few countries that adopted socialism and socialist-style constitutions at independence often corresponded with those which had achieved independence through violent and protracted struggle such as Algeria, under the French, and the former Portuguese colonies of Angola, Cape Verde, Guinea Bissau, Mozambique and Sao Tome, and Principe. Besides this, numerous other African countries such as Benin, the Central African Republic, Comoros, Egypt, Ghana, Guinea, Mali, the Republic of Congo, Tanzania, Togo, and Tunisia at one stage or another became subject to the socialist influence or adopted elements of the socialist constitutional model. A number of concepts originating mainly from the former Soviet Union and sometimes Chinese socialist constitutionalism found their way into many of the pre-1990 African constitutions.[53]

It will suffice to mention a few of those socialist ideological influences on African constitutional developments. The first feature was the language, the style, and the developmental and programmatic formulation of these constitutions. The texts often proceeded in the historicist mode by narrating the exploitative past, the socialist present, and the communist future of the country.[54] A typical example of such an approach could be seen in the preamble to the independence constitution of Algeria of 1963[55] and articles 3 and 4 of the 1975 independence Constitution of Cape Verde.[56]

[50] Nyerere (n 47) 8.

[51] It must be added here that although Senghor stood out amongst African statesmen and even intellectuals for his contribution towards this African socialism and in supporting the primacy of the party, he argued that total equality between the three branches of government was not feasible. He was, however, one of the few leaders who throughout his reign allowed some minor opposition parties to continue operating. See further Skurnik (n 47) 357.

[52] These claims were made by Benin, Congo (Republic), and Madagascar.

[53] However, in 'Constitutionalism and Socialism: Hot Potatoes' (*China Digital Times*, 16 August 2013) <http://www.chinadigitaltimes.net/2013/08/constitutionalism-and-socialism-two-hot-potatoes-for-2013/> accessed 21 April 2015, it is baldly declared: 'Constitutionalism only belongs to capitalism, and it is not compatible with socialism.'

[54] See Go (n 46).

[55] The preamble to the constitution declares inter alia: 'Algerian people have waged an unceasing armed, moral and political struggle against the invader and all his forms of oppression . . . In March 1962 the Algerian people emerged victorious from the seven and half year's struggle waged by the National Liberation Front . . . Faithful to the programme adopted by the National Council of the Algerian Revolution in Tripoli, the democratic and popular Algerian Republic will direct its activities towards the creation of the country in accordance with the principles of socialism and with the effective exercise of power by the people, among whom the fellahs, the labouring masses and the revolutionary intellectuals shall constitute the vanguard.'

[56] The text of the constitution declares the country to be a 'revolutionary national democratic state', calls for the 'building of a society free from the exploitation of man by man' and names the African Party for the Independence of Cape Verde as the 'guiding political forces of the society and the state'.

The idea behind this approach is to underscore the fact that the constitutions were to be used as instruments of transformation to guide the development of the country in accordance with socialist principles in order to eliminate the exploitation of one citizen by another and pave the way for a pure communist classless society in the future.

A second feature was the constitutional entrenchment of the dominant and all pervasive role of the ruling party based on the theory of democratic centralism. Although during this period, almost all African countries had adopted the single-party system either *de facto* or *de jure*, this was hardly spelt out in such clear and elaborate terms as was done in the constitutions adopted by those countries that had openly declared themselves as socialist.[57] For example, article 35 of the 1969 Constitution of Congo Republic had declared the new single party, the Congolese Labour Party to be the 'vanguard organisation . . . created in order to lead the Congolese people to national liberation and to the construction of scientific socialism . . . ' Articles 23 and 27 of the constitution of Algeria of 1963, declared the single party as the 'vanguard party' that would ensure stability and serve as the only 'powerful organ of impulsion'. The duties of the party were also laid out: the party 'will mobilize, form and educate the popular masses', 'perceive and reflect the aspirations of the masses', and 'draw up and define the policy of the nation and supervises its implementation'. The effect of this was that socialist-type constitutions were not so much intended to limit government as they were designed to express the idea that the constitution was, in a sense, limited by the ruling party.[58] This effectively ensured that in all these countries the party controlled the executive and the government as a whole.[59] Even under the Algerian socialist-style constitution which adopted a French-style presidential system, there were provisions in the constitution which gave the party, the National Council of the Algerian Revolution, full control over the National Assembly and the president: in fact, the party was given the powers to nominate Assembly candidates and presidential candidates and thus effectively dominate both branches of government.[60]

Another feature of socialist-styled constitutions was the approach to dealing with human rights. Many of them contained provisions that purported to recognize and protect fundamental human rights. They were however couched in heavily qualified language which allowed such rights to be enjoyed only if they did not, for example, 'hinder the emergence of the socialist state', 'combat the revolution', 'encroach upon the interests of the collectivity', or 'threaten the interest of the state, the people or the

[57] For a more detailed discussion of this, see Onésimo Silveira, *Africa South of the Sahara: Party Systems and Ideologies of Socialism* (Rabén & Sjögren 1976).

[58] See Jan Triska, 'Introduction' in Jan Triska (ed), *Constitutions of the Communist Party-States* (Hoover Institution on War, Revolution and Peace 1968) xi–xiii.

[59] The inspiration for this approach first appeared in the 1936 constitution of the Soviet Union which distinguished between the power of the state and the power of the administration. In the Madagascar constitution of 1975, the holder of the supreme power of the state was the Supreme Council of the Revolution who according to art 55, had as its main function to act as 'guardian of the Malagasy socialist revolution'. The most important political acts had to be decided upon by the president upon hearing from this Council whilst, under art 40, the government was merely 'the supreme organ of the administration of the state'. The 1973 constitution of Congo Republic had a similar partition of power under art 70.

[60] See arts 27 and 39 of the Algerian Constitution of 1963; and more generally, see Saïd Arjomand (n 45) 62–64.

revolution'.[61] The right to private property was also restricted in many of these constitutions. For example, the Benin constitution of 1975 did not recognize the right to private property whereas this was recognized, albeit subject to numerous qualifications under some constitutions like those of Congo and Madagascar.[62] Generally, most of these constitutions were either silent or contained very few provisions on economic, social, and cultural rights.[63]

Although examples of these socialist-inspired influences on so-called socialist countries in Africa before the 1990s could be multiplied, the reality was that there were numerous contradictions. For example, the substratum of the legal system within which these socialist constitutional principles had to operate was from the Western legal systems. This was because the structure and organization of courts in most of these countries remained closer to what had been left behind by the Western colonial powers than anything that was copied from the socialist system. This gave rise to challenges between the liberal legalism of the inherited Western legal systems and the supremacy and dominance of the ruling parties. It was a contradiction that was easily resolved by the control exercised by the party and the executive over the judiciary. And besides, the programmatic nature of these socialist constitutions, with provisions which read more like political manifestoes and programmes of action, did not yield a set of justiciable rules of law. The repressive one-party system, although grounded in socialist theories of democratic centralism, did not only reflect a logical continuation of colonial authoritarianism but as we have seen, found some justification in African social and cultural tradition.

In spite of the widespread flirtation with socialism in Africa, apart from what was stated in the constitutions and the addition of the symbolic phrase 'People's Republic' to the country's name, there was in substance little that could distinguish many socialist from other non-socialist states in pre-1990 Africa. In fact, the commitment of some countries who toyed around with socialism at one stage or another, such as Ghana and Benin, was palpably shallow and rhetorical, and was often contrived to play the West against the East for foreign aid. Even those countries, like Algeria, which adopted socialist constitutions right from independence, still incorporated some elements of their former colonial master's system, France, by introducing a presidential system and a National Assembly elected by universal suffrage.[64] It was therefore no surprise that on the demise of the Soviet Union, the former socialist countries in Africa quickly and easily changed their constitutional 'coats' with hardly any of the hangovers that the

[61] See, for example, art 140 of the constitution of Benin of 1975; art 29 of the 1969 constitution of Congo Republic; and art 16 of the 1975 constitution of Madagascar.

[62] Under art 31 of the 1969 constitution of Congo Republic, 'land is the property of the people', but art 33 adds that 'no one may use his right to private property at the expense of the collective'. Under art 30 of the Madagascar constitution of 1975, 'the law guarantees the right of individual property, in particular the dwelling-house of the members of the family, consumer goods, the elements contributing to the comfort and material well-being and to family and craft economic exploitation, within the limits imposed by the property of the collectivity, the needs of nationalisation measures and the expropriation in the public interest'. But arts 31 and 32 add that the right of individual property may not be exercised in a way contrary to social usefulness, but must contribute to the good of the community.

[63] See further Reyntjens (n 48).

[64] By contrast, the closest to an executive branch in the Soviet model was not the president but rather a Council of Ministers elected by the Supreme Soviet, which served as the legislature.

former Soviet Republics experienced. For example, Benin, which from 1975 to 1990 operated under a typical socialist constitution, was at the forefront of the new wave of constitutionalism in Francophone Africa and today has one of the most liberal French Fifth Republic constitutional models in Francophone Africa. Nevertheless, although the socialist constitutional model seems to have substantially lost the influence it once had on African constitution-builders, there remain traces of socialist ideological influences in some of the former socialist states which have now apparently adopted the Western concept of liberal constitutionalism. For example, the constitutional entrenchment of lay judges, whose role is limited to dealing with issues of fact and not law, emanated from the socialist ideology of popular justice and citizens' participation in the justice system.[65] In fact, the socialist orientation has remained a dominant feature of Mozambique's post-independence legal landscape.[66] The historicist approach of formulating a preamble which bemoans the ills and mistakes of the past and looks positively to the future has not only survived in some of the old socialist constitutions, such as the preamble to the 1992 constitution of Cape Verde,[67] but also features in others such as the preamble to the 1996 constitution of South Africa.[68] Whilst it is clear that the era of the theory of democratic centralism at the heart of which is a single party which is supposed to act as the vanguard and voice of the people is gone, the ghost of excessive centralization and one-party mentality lingers on, but this is so both in states that were once identified as socialist and, those that were not.[69] Unlike other factors that have influenced modern African constitutionalism such as religion, to which we shall now turn, the socialist constitutional model appears to have suffered a fatal blow with the collapse of the Soviet Union and the increasing retreat of

[65] See arts 170–71 of the 1990 Mozambique constitution which provides for elected judges.

[66] See Gift Manyatera, 'A Critique of the Superior Courts' Judicial Selection Mechanism in Africa: The Case of Mozambique, South Africa and Zimbabwe' (Unpublished LLD thesis, University of Pretoria 2015) chs 4 and 5.

[67] The preamble to the new constitution bemoans the fact that the 'affirmation of Cape Verde as an independent state did not coincide with the setting up of a regime of pluralist democracy, and instead the organisation of political power obeyed the philosophy and principles which characterise one party rule regimes'. It then states that 'The present constitution is designed to equip the country with a normative framework, the value of which is based on the establishment of the new model and not particularly on the harmony imprinted on the text. The choice of a Constitution laying down the structuring principles of a pluralistic democracy, leaving out the conjectural options of governance, shall allow for the necessary stability of a country of meagre resources and for political alternation without disruptions'. In a sense, some elements of the genre of socialist constitutions have been retained in spite of the radical reconstruction that saw the adoption of pluralist politics and the introduction of neoliberal modes of economic development.

[68] It inter alia 'recognises the injustices' of the past, honours 'those who suffered for justice and freedom', and strives to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights'. A more recent example is the 2014 Tunisian constitution which in its preamble refers to the pride in the struggle to gain independence and free the people from tyranny and achieve the objectives of the revolution for freedom and dignity, 'the revolution of December 17, 2010 through January 14, 2011, with loyalty to the blood of our virtuous martyrs, to the sacrifices of Tunisian men and women over the course of generations, and breaking with injustice, inequity, and corruption'.

[69] For a discussion of the growing phenomenon of one-party dominance in Africa, see Daniel Young, 'Party Dominance in Africa's Multiparty Elections' (UCLA College) <http://www.sscnet.ucla.edu> accessed January 2015; Nicolas van de Walle 'Presidentialism and Clientelism in Africa's Emerging Party Systems' (2003) 41 *Journal of Modern African Studies* 297; Nicola de Jager and Pierre du Toit, *Friend or Foe? Dominant Party Systems in Southern Africa: Insights from the Developing World* (United Nations University Press 2013); and Raymond Suttner, 'Party Dominance "Theory": Of What Value' (2006) 33 *Politikon* 277.

China from its rigid socialist ideological stance in the new globalized world.[70] The socialist model has clearly lost whatever influence it once had, especially because of popular scepticism towards the concentration of powers and the dictatorship associated with it as African constitutionalism has increasingly come under the globalizing hegemony of neoliberal and Western democratic principles.

### 3.3 Religious influences

The only religion that has since independence influenced the content of many African constitutions has been Islam. Its impact has depended, predictably, on whether or not the country has a predominantly Muslim population. In non-Muslim countries or in those countries where Muslims do not constitute a significant part of the population, the constitutional provisions on religion have usually been limited to recognizing the freedom of worship and state neutrality in religious matters.[71]

Although a detailed examination of the influence of Islam on modern African constitutions is beyond the scope of this chapter,[72] the role it has played in shaping the evolution of constitutionalism in Africa, even if limited, cannot be ignored. This is particularly so since the rise of Islamic fundamentalism in the wake of the 11 September 2001 attacks in the United States. However, it is the Arab uprisings which began in Tunisia in December 2010 and quickly spread to other countries in the region that has made the inclusion or reinforcement of sharia in the constitutions of African countries with dominant or significant Muslim populations a *cause célèbre.* Militant groups have since sprung up both in countries with dominant Muslim majorities such as Algeria, Egypt, Morocco, and Tunisia and those with fairly significant Muslim populations such as Burkina Faso, Mali, Niger, Nigeria, and Senegal advocating for Muslim states based entirely on the Koran and sharia law. Some of the continent's longest serving dictators in Northern Africa, most of whom had gone to great lengths to reduce the influence of Islam on the constitution and their societies in general, were swept aside and the opportunity was provided for the numerous Islamic political groups that had been at the forefront of this revolution to reshape the constitutions of these countries. Other extremist Jihadist groups who have sought to achieve their ends through terror have sprung up elsewhere. Two of the most notorious ones, Boko Haram and Al-Shabaab, have actually taken control of large territories in certain countries and brought them under their rule. Boko Haram[73] is based in northeast Nigeria but also operates in

[70] After the collapse of the Soviet Union, the new Republics that emerged, especially Russia, were too busy trying to re-organize themselves and restructure their economies to concern themselves with promoting socialism in Africa. Similarly, China was in the throes of a major reform of its economy with the introduction of market principles under what it referred to as 'Socialism with Chinese characteristics', and was no longer inclined to sponsoring weak socialist regimes in Africa.

[71] Whilst the constitutions of Anglophone African countries have tended to limit themselves to recognizing freedom of religion or belief (for example, art 29 of the 1995 constitution of Uganda, s 23 of the 2005 Swaziland Constitution and s 60(1) and (2) of the Zimbabwe constitution of 2013), the constitutions of Francophone African countries go further to emphasize the secular nature of the state (see, for example, art 1(2) of the Cameroon Constitution of 1996 and art 1 of the DR Congo Constitution of 2006).

[72] See discussion of this in Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press 2006).

[73] Which means 'Western education is sin'.

Cameroon, Chad, and Niger. It controls some territory in north eastern Nigeria where it has established a so-called 'Islamic caliphate'.[74] The other Jihadist group, Al-Shabaab,[75] has at various stages controlled large parts of central and southern Somalia which it rules under strict sharia law.[76] In spite of the resurgence of Islamic fundamentalism and the efforts of these militant groups to establish Islamic states through coercion and terror, the influence of Islam on modern African constitutions has not changed fundamentally from what it was before 2010. In fact, the new Egyptian and Tunisian constitutions of 2014 underscore this point.

During the drafting of the Tunisian constitution, three main topics created tension between the Islamic political groups, who dominated the Constituent Assembly and secular movements. These were: the role of Islamic law in the constitution and in domestic legislation; the prohibition of blasphemy in both the constitution and in the Penal Code; and the constitutional rights of women. Proposals that provisions should be included in the constitution which made Islam the main source of legislation, criminalized blasphemy, and stated that women had a complementary role to men in family life rather than being their equal, were rejected after fierce opposition in the Assembly supported by protests in the streets.[77] A comparison of the influence of Islam in Tunisia's 1959 independence constitution and its 2014 constitution will give an idea of what appears to be happening. The preambles to both constitutions are fairly similar in their references to Islam. Article 1 of both constitutions declares Islam to be the state religion. The only difference is the addition to the 2014 constitution provision stating that 'this article cannot be amended'. In the 1959 constitution, article 37 declared that the religion of the president of the Republic is Islam. In similar but perhaps more emphatic language, article 74 of the 2014 constitution declares that only Tunisian nationals 'whose religion is Islam shall have the right to stand for election to the position of President of the Republic'. There is therefore no practical difference insofar as Islamic provisions in the two constitutions are concerned.

By way of contrast, in Egypt, after the ousting of Mubarak and the election of Mohamed Morsi of the Muslim Brotherhood as president in December 2012, the latter proceeded to replace the 1971 Egyptian constitution with one based on Islam with the support of a parliament which was dominated by the Muslim Brotherhood. Concern over the role Islam was going to play in the political life of Egyptians was one of the reasons for the overthrow of Morsi and the replacement of the 2012 constitution with a new one in 2013 but which was approved by a referendum and took effect in 2014.

[74] The dream of most Muslim fundamentalists is to unite all Muslims in an empire in the form of a caliphate. The caliphate is thus an Islamic form of government representing the political unity and leadership of the Muslim world. The head of the caliph (state) is assumed to act as successor to Muhammad's political authority. The goal is not only to unite all Muslims in this caliph but to build a massive army that will conduct Jihad against all infidel states.

[75] The word simply means 'youth' in Arabic.

[76] Both Boko Haram and Al-Shabaab are offshoots of al-Qaeda which was responsible for the 2001 terrorist attacks in the United States as well as numerous other attacks in other parts of the world. There are also other similar militant Jihadist groups in Africa such as the Ansar al-Sharia organizations based in Libya and Tunisia which advocate for the implementation of strict sharia law.

[77] See George Sadek, 'The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring' (*Library of Congress,* May 2013)<http://www.loc.gov/law/help/tunisia.php accessed 20 April 2015.

A brief comparison of the influence of Islam in the two constitutions is indicative of the impact Islam is having in the content of present constitutions.[78] First, the 2014 constitution removed one of the most radical and controversial changes introduced by the 2012 constitution viz, the legislative role reserved for Al-Azhar. The 2012 constitution made it imperative that the Al-Azhar, one of the Islamic world's most venerable institutions, had to be consulted in all matters pertaining to Islamic law. There were concerns because although the courts retained the power to interpret and apply the law, it was unclear what weight was to be given to the opinions of the Al-Azhar, especially where the courts disagreed with them. Second, the 2014 constitution removed an article in the 2012 constitution which made it a crime to 'insult any messengers or prophets'. Third, both constitutions recognize Islamic law as the principal source of legislation but the 2014 constitution eliminated an article which sought to define Islamic law in language which many feared could be used to impose a specific vision of Islamic law. Fourth, the preamble to the 2012 constitution called women 'the sisters of men', but the 2014 constitution is more explicit and states that women are equal to men and commits the state to the 'protection of women against all forms of violence'. Finally, the 2014 constitution explicitly forbids the establishment of political parties 'formed on the basis of religion'.[79] This latter approach is similar to that adopted in the earlier Moroccan constitution of 2012 which declares Islam a state religion and also includes a provision which prohibits political parties founded on a religious basis.[80]

Generally, the role given to Islam in present African constitutions, especially the new ones adopted since the beginning of the Arab uprisings differs according to whether the country has a dominant Muslim population or not. In most countries with a dominant Muslim majority, the preamble to the constitutions often refers to Allah and principles of sharia law.[81] The constitutions also usually have an explicit reference to Islam as the official state religion.[82] Some of the more tolerant states in this category expressly allow

[78] See further 'Comparing Egypt's 2012 and 2013 Constitutions' (*Al Jazeera*, 14 January 2014) <http://www.aljazeera.com/news/middleeast/2014/01/comparing-egypt-2012-2013-constitutions-20141144363151347.html> accessed January 2015; Michael Lipin, 'Egypt's New Constitution: How it Differs from Old Version' (*Voice of America News*, 25 December 2012) <http://www.voanews.com/content/egypt-constitution/1572169.html accessed 21 April 2015; and Zaid Al-Ali, 'The New Egyptian Constitution: An Initial Assessment of its Merits and Flaws' (*OpenDemocracy*, 26 December 2012) <http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws> accessed 21 April 2015.

[79] So far the most significant effect of these prohibitions has been to drive the extremist Islamic parties with a rigid and uncompromising religious agenda underground whilst the moderate parties have either renounced or denied their Islamist proclivities. See further, Walaa Hussein, 'Egypt's New Draft Constitution Threatens Islamist Parties' (*Al Monitor*, 4 September 2012) <http://www.al-monitor.com/pulse/originals/2013/09/egypt-new-draft-constitution-ban-islamist-parties.html> accessed 21 April 2015.

[80] See arts 3 and 7.

[81] For example, the opening part of the Tunisian constitution of 2014 states, 'In the name of God, merciful, the compassionate', and the preamble states, inter alia, '. . . Expressing our people's commitment to the teachings of Islam'. Along similar lines, the Egyptian constitution of 2014 starts with the words, 'In the name of Allah, most gracious, most merciful', and the preamble states, inter alia, '. . . We are drafting a Constitution that affirms that the principles of Islamic sharia are the principal source of legislation . . .' See also the preambles to the constitutions of Algeria of 2008 and Morocco of 2011.

[82] See art 2 of the constitution of Algeria of 2008, art 2 of the constitution of Egypt of 2014, art 3 of the constitution of Morocco of 2011, and art 1 of the constitution of Tunisia of 2014.

for freedom of worship.[83] In some of these countries, believers sometimes do not have the same rights as non-believers.[84] In addition to this, some of these constitutions also directly or indirectly refer to Islam as the main source of law.[85] By way of contrast, the main constitutional concession made by countries with a significant or minority Muslim population has been with respect to the recognition of sharia law in regulating matters of personal status such as marriage, divorce, and inheritance, and the establishment of Islamic courts.[86] The possible reason for the absence of any references to Islamic courts in the constitutions of countries with dominant Muslim constitutions could be that such courts are assumed to be part and parcel of the Muslim way of life that need not be expressly spelt out.

Be that as it may, it would seem that in spite of the rise of Islamic fundamentalism and activism and attempts to establish Islamic republics in many African countries with the backing of al-Qaeda-affiliated groups, the majority of Africans, even in countries where Muslims are the dominant majority, like Egypt and Tunisia, are not yet ready for Islamic states or radical constitutional changes based on Islam. Thus, although the populations of both Egypt and Tunisia were happy to vote for Islamic parties, they opposed the introduction of constitutional provisions which could lead to Islamic states in which amongst other radical changes, the rights of women would be forfeited. It seems increasingly unlikely, therefore, that the limited role that Islam has played in determining the content of African constitutions will change significantly.[87]

### 3.4 Indigenous influences

Before colonial rule, African indigenous institutions of administration in which the traditional ruler and his traditional council exercised executive, legislative, and judicial powers were firmly in place to ensure peace, security, and stability. These were however

[83] For example, art 3 of the constitution of Morocco of 2011 expressly 'guarantees to all the free exercise of beliefs'. Art 50 of the constitution of Egypt of 2014, does this indirectly when it states that Egyptian cultural heritage and diversity including its Coptic religion is a national and human wealth which must be respected. This provision makes it a crime punishable by law for anyone to violate this provision. By contrast, art 9 of the constitution of Algeria of 2008 prohibits any practices which are contrary to Islamic ethics and to the value of the November Revolution. It is an obscure provision which could be interpreted narrowly to limit or even exclude freedom of worship.

[84] The main instance of this occurs, where, as in art 74 of the constitution of Tunisia of 2014, it is expressly stated that only those whose religion is 'Islam shall have the right to stand for election to the position of President of the Republic'. It may be indirect as in art 76 of the constitution of Algeria of 2008 which requires the president in taking office to swear an oath to 'respect and glorify the Islamic religion . . . '.

[85] See, for example, art 2 of the constitution of Egypt of 2014.

[86] In the Gambia constitution of 1996, s 7 recognizes sharia as a source of personal law and s 137 provides for the Cadi Court. Sections 237, 244–7, 260–4, and 275–9 of the 1999 constitution of Nigeria also recognize sharia law in Nigeria and provide for the establishment of Sharia courts. Art 170 of the Kenya constitution of 2010 provides for Khadhis' courts to deal with issues of Muslim law but rather oddly, states in art 24(4) which appears in the chapter containing the bill of rights that: 'The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Khadhis' courts . . . 'Art 129(1)(d) of the 1995 constitution of Uganda provides for the establishment of Qadhis courts to deal with matters such as 'marriage, divorce, inheritance of property and guardianship . . . '.

[87] In saying so, there are often some surprising developments with the dubious wording of art 24(4) of the constitution of Kenya of 2010 noted earlier. This is a dangerously obscure provision that could easily be used to compromise the goal of gender equality.

quickly dismantled by the colonial powers.[88] Although written constitutions were introduced into Africa only during the colonial period, not every aspect of their content was based only on Western ideas.[89] A number of constitutional institutions and principles which have their roots in African indigenous culture and traditions found their way into some of the early constitutions and have now become a common feature of modern African constitutionalism. There is however considerable variety in how these institutions look and what effective role they play today and are likely to continue to play in the future.

With respect to institutions, the limited powers that the colonialist allowed traditional rulers to exercise was not out of any particular desire to protect the cultural heritage of the people but rather because it was consistent with the general colonial policy of indirect rule. By collaborating with the traditional rulers, the exploitation of the colonies was made cheaper and more effective. Besides some limited powers of administration, traditional rulers retained much of their judicial powers which were exercised through the traditional dispute settlement agencies. Many aspects of the traditional dispute settlement institutions and processes survived the ravages of colonial rule. The traditional courts had jurisdiction only over Africans and their powers during the colonial period were progressively reduced. As such, by the end of this period, these traditional courts hardly had any jurisdiction over criminal offences. Furthermore, the scope of application of customary law was restricted to the local population but by the end of the colonial period, the traditional courts were in most instances relegated to mere informal and optional methods of settling disputes because the imposed European-style formal court system had become completely dominant. Besides this, customary law was recognized and lawfully enforced only if it was not repugnant to natural justice, equity, and good conscience or incompatible directly or indirectly with any written law in Anglophone Africa (the so-called repugnancy test) or contrary to *ordre public* (public order and good morals) in Francophone Africa.[90] Post-colonial African states for a long time retained the colonial attitude towards traditional African institutions, especially customary courts. Some states for a short while abolished these traditional courts shortly after independence whilst many retained them as an inferior system to the imposed colonial justice system, very much as it had been

[88] George Ayittey, *Indigenous African Institutions* (Transnational Publishers Inc 1991) 386–94, points out that most of the colonial authorities in trying to impose their authority and mode of government removed and exiled many of the traditional African chiefs and kings and replaced them with other individuals whom they felt they could control. He however points out that the French and Belgians went much further in trying to destroy the great rulerships and kingdoms which they met. The Belgians in particular tried to do away with everything African in the Congo and ran the country with laws, edicts, and directives coming directly from Brussels.

[89] Claude-Hélène Perrot, 'Le Contrôle du Pouvoir Royal dans les Etats Akan aux XVIIIe et XIXe Siècles' in Gérard Conac (ed), *L'Afrique en Transition vers le Pluralisme Politique* (Economica 1993) 149, points out that in several pre-colonial kingdoms in sub-Saharan Africa, the kings operated and were guided by a number of unwritten laws which defined the limits of their powers.

[90] See generally Anthony Allott, 'The Extent of the Operation of Native Customary Law: Applicability and Repugnancy' (1950) 2 *Journal of African Administration* 4; and Michel Alliot, 'The Role of the Application of the Law in Francophone States of Africa' in Thierry Verhelst, 'Safeguarding African Customary Law: Judicial and Legislative Processes for its Adoption and Integration' University of California, Occasional Paper No 7 (1968) 74–8.

during the colonial period.[91] For example, in Burundi and Zambia, the traditional courts for a long time had no official links with the formal judicial system and were merely tolerated. In Botswana, some of the traditional courts are officially recognized and integrated into the formal judicial system whilst others operate outside this system.[92]

The issue of whether and to what extent traditional institutions should be incorporated into modern African constitutions has generated intense and sometimes acrimonious debate between the so-called 'traditionalists' and the 'modernists', or sceptics as they are sometimes referred to.[93] After decades of manipulation by the colonial and post-colonial governments and their complicity in the repression of the local population, some of the modernists feel that there are too many questions about what is really 'traditional' and how historically rooted these traditional institutions are. To the modernists, the traditional African institutions are an historical relic that belongs to antiquity because in many instances they act as a hindrance to the development and transformation of the continent. In many instances, they are undemocratic, divisive, and costly. For example, in South Africa, the collaboration of many traditional rulers with the apartheid regime[94] and elsewhere in Africa, their collaboration with some of the worst dictators and human rights abusers today has profoundly discredited them and paved the way for their loss of legitimacy, loyalty, and support amongst the younger generation. Many now wonder whether they have any place in a modern

[91] Countries like Côte d'Ivoire and Senegal, with the encouragement of France, initially abandoned their traditional dispute settlement systems. See further Cédric Milhat, 'Le Constitutionnalisme en Afrique Francophone. Variations Hétérodoxes sur un Réquim' (April 2005) <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.droitconstitutionnel.org%2Fcongresmtp%2Ftextes7%2FMILHAT.pdf&ei=T3V0U6auOOeO7AaZvIEQ&usg=AFQjCNHEKFvVlK3nk2mx3Y9AudqgrQssPA&sig2=j2Esu7SRhg_TBLzREuW3w&bvm=bv.66699033,d.ZWU> accessed 21 April 2015. See also EI Nwogugu, 'Abolition of Customary Courts—The Nigerian Experiment' (1976) 20 *Journal of African Law* 1; and Sandra Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 *Journal of Modern African Studies* 571.

[92] See Charles Manga Fombad, 'Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspectives' (2004) 15 *Stellenbosch Law Review* 166.

[93] For a good discussion of this debate, see Carolyn Logan, 'Traditional Leaders in Modern Africa: Can Democracy and the Chief Co-exist?' (Afrobarometer Working Paper No 93, February 2008) <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Ffiles%2Fdocuments%2Fworking_papers%2FAfropaperNo93.pdf&ei=Yul5U6zqHLKV7AatzoAI&usg=AFQjCNE2x2ZXIepOmpXRMcOcZwYjtJwsdg&sig2=4wXCvHRdmRW4bKYMOmFlg&bvm=bv.66917471,d.ZGU> accessed January 2015; and the Economic Commission for Africa, 'Relevance of African Traditional Institutions of Governance' (2007) <http://www.uneca.org/sites/default/files/publications/relevance_africantradinstgov.pdf> accessed 21 April 2015; and more generally, Ayittey (n 88); Mahmood Mamdani, *Citizens and Subjects: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996); and Sandra Dusing, *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia, and South Africa* (DIT 2002).

[94] Whilst this is generally true, it must however be noted that there were also many South African chiefs who not only firmly opposed apartheid by leading rural revolts in the 1950s and 1960s against various policies of the regime but were also amongst the founding members of the African National Congress. See further Christina Murray, 'South Africa's Troubled Royalty: Traditional Leaders after Democracy' Law and Policy Paper 23 (2004) <http://www.publiclaw.uct.ac.za/usr/public_law/staff/Troubled%20Royalty%20LPP%20No%2023%20Murray.pdf> accessed 20 April 2015; and William Beinart, 'Chieftaincy and the Concept of Articulation: South Africa ca. 1900–1950' (1985) 19 *Canadian Journal of African Studies* 91.

Africa still grappling with the challenges of entrenching an ethos of constitutionalism and respect for the rule of law.[95]

The 'traditionalists' on the other hand, see African traditional institutions as part of an enduring heritage which not only play a critical role as custodians of African culture and traditions but also represent the best link between the government and the grassroots. In doing so, they act as a valuable instrument for maintaining peace, order, and stability. In spite of these debates, the reality is that many modern African constitution-builders, but by no means all, have in diverse ways blended traditional African institutions with those usually associated with modern liberal constitutional democracies.[96] There is however considerable variation in what these traditional institutions look like and the role that they play.

Generally, many contemporary constitutions specifically recognize and entrench the role of customary law and traditional courts as well as that of some of the pre-colonial traditional institutions. Some constitutions have retained the pre-colonial dual system of courts but formally integrated the traditional courts with the formal modern courts in a hierarchy which sees the former as the lowest courts.[97] Some have in addition given constitutional recognition to traditional rulers and specified inter alia, the principles under which they will operate, their functions, and the basis for their appointment and removal as well as their remuneration.[98] Botswana is one of the few African countries that have provided for a second chamber of parliament, called the *Ntlo ya Dikgosi* (House of Chiefs), composed only of traditional rulers. It is not and does not however play the role normally associated with a second chamber of parliament and is consulted only on issues pertaining to customary law[99] and bills relating to tribal land and chieftainship.[100] Like Botswana, Ghana in its 1992 constitution also provided for the establishment of a National House of Chiefs and Regional Houses of Chiefs.[101] Although they have more powers than the Botswana House of Chiefs, they also do

[95] For example, the hereditary nature of African traditional leadership renders it incompatible with democratic governance which has as one of its important cornerstones, open, regular, and competitive elections.

[96] Between the traditionalist and the modernist or sceptics is a third view which tries to balance both extremes by pointing out some of the potential benefits of traditional institutions. These include the fact that these institutions can provide the bedrock upon which to construct new mixed governance structures since traditional leaders serve as custodians of and advocates for the interests of local communities within the broader political structure. Furthermore, the conception of traditional institutions which has as its raison d'etre of power, the collective good of all members of society, arguably provides a strong platform for establishing and consolidating democratic and accountable governance. See further, the Economic Commission for Africa (n 93) 11.

[97] See, for example, s 88(2) of the Botswana constitution of 1966; numerous provisions in the Nigerian 1999 constitution such as ss 280–3 and 292; and s 18(6) of the Zimbabwe constitution of 2013.

[98] The most elaborate provision on this is found in ss 280–7 of the Zimbabwe constitution of 2013 but this is also covered by ss 211 and 212 of the South African constitution of 1996 and also elaborately by the 2005 Swaziland constitution. In the latter, s 115 lists several matters that are regulated by Swazi law and custom and ss 227–35 list several traditional institutions.

[99] This involves issues such as the organization, powers, or administration of customary courts and the ascertainment or recording of customary law.

[100] See generally ss 77–85 of the Botswana constitution of 1966.

[101] See arts 270–7 of the constitution and generally, Ernest Abotsi and Paolo Galizzi, 'Traditional Institutions and Governance in Modern African Democracies: History, Challenges and Opportunities in Ghana' in Jeanmaries Fenrich, Paolo Galizzi, and Tracy Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011) 266–92.

not act as a legislative body.[102] Perhaps the most significant aspect of the Ghanaian approach is that the constitution expressly insulates traditional chiefs from partisan politics but allows any chief who wants to take part in active politics to abdicate from his position.[103] Swaziland illustrates an example of the failure to reconcile certain fundamental institutions of Swazi indigenous constitutional practices and customs with modern African constitutionalism. Its 2005 constitution, despite all appearances, does no more than give a veneer of constitutional legitimacy to what is at best a system of absolute monarchy supposedly based on Swazi culture.[104]

However, the absence of formal constitutional recognition of traditional institutions in any African constitution does not necessarily mean that they have no role to play in the governance of the country. A typical example of this is Nigeria. Although the 1999 Nigerian constitution, unlike previous constitutions, does not formally recognize the institution of traditional rulers, they nevertheless exercise enormous influence over the lives and well-being of millions of Nigerians.[105] It can be said that the role of traditional rulers in constitutional governance has been treated in a pragmatic manner that gives them some *de jure* or *de facto* recognition depending on the possible influence that the particular traditional ruler has over his local community. Nevertheless, one of the few traditional institutions that appear to be experiencing a resurgence or revival is the traditional dispute settlement process. When considered as a part of the informal justice system, a recent study has indicated that they constitute a 'cornerstone of dispute resolution and access to justice for the majority of the populations in developing countries because they usually resolve between 80 to 90% of disputes'.[106] For example, in Malawi, it is estimated that between 80 to 90 per cent of disputes are processed through traditional courts, and in the case of Burundi, the figure is about 80 per cent which goes through its *Bashingantahe* institution as a court of first or sometimes only instance.[107] The growing popularity of the traditional justice system is not surprising; it is more easily accessible (especially to the poor, uneducated, and marginalized), quicker, and provides affordable remedies. Although some recent African constitutions have retained and formally recognized the dual legal system

[102] The National House of Chiefs can act as an advisory body on any matter affecting chieftaincy, undertake the progressive study, interpretation, and codification of customary law, undertake an evaluation of traditional customs and usages in order to eliminate those which are outmoded or harmful to society, and perform any such other functions that parliament may assign to it. The powers of the Regional House of Chiefs are also specified but an important aspect of the powers assigned to both bodies is their appellate jurisdiction with respect to appeals on customary law matters.

[103] See art 276 of the constitution of Ghana 1992. Other examples of the involvement of traditional rulers in the governance system can be seen in ss 68(1)(b), 110(3), and 146(4) of the Malawi constitution of 1994 and several articles in the 1995 Ugandan constitution, such as art 246(3)(e); and s 281(2) of the 2013 Zimbabwe constitution which provides for a National Council of Chiefs and a Provincial Assembly of Chiefs.

[104] See generally Charles Manga Fombad, 'The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?' (2007) 23 *South African Journal of Human Rights* 93.

[105] See further Pita Ogaba Agbese, 'Chiefs, Constitutions and Policies in Nigeria' (2004) 6 *West Africa Review* 1.

[106] See Ewa Wojkowska, *Doing Justice: How Informal Justice Systems can Contribute* (UNDP, December 2006) 5 <http://www.democraciaejustica.org/cienciapolitica3/sites/default/files/doingjusticeewawojkowska130307.pdf> accessed January 2015.

[107] ibid.

which places traditional courts at the bottom of the hierarchy of ordinary courts,[108] others have been silent. As in the case with traditional governance institutions, the non-constitutionalization of the role of traditional courts in a country does not necessarily mean that such courts are not in operation.

Perhaps the most controversial problem concerning customary law in the immediate post-independence period was the failure of constitution-makers to boldly deal with those customary law principles and practices which actually or potentially discriminated against women and the youth or could not be reconciled with fundamental human rights principles. Many post-independence constitutions either glossed over this or dealt with it in an evasive and unhelpful manner by stating that customary law rules and practices constituted an exception to the constitutional prohibition of discrimination.[109] With perhaps the exception of Zambia,[110] the constitutions of most Anglophone African countries now expressly retain customary law only to the extent to which it is consistent with the constitution.[111] This is a positive development that provides an opportunity for judges, especially those in the superior courts, to contribute to the modernization of customary law and aligning it to contemporary human rights standards.

Turning now to the indigenous African contribution to constitutional law principles, doctrines, and theory, this is more often than not, reflected in constitutional interpretation and application rather than the constitutional texts. One of the best examples of this appeared in the South African interim constitution of 1993. It is one of the first to use an important African constitutional concept, *ubuntu*, in the constitution.[112] It is

[108] See, for example, ss 110(3) and 204 of the Malawi constitution of 1994; ss 236, 245, and 266 of the constitution of Nigeria of 1999; arts 143 and 152 which creates the Gacaca courts specifically to deal with the genocide committed between 1990 and 1994; and ss 18(7), 46(2), 162, and 174 of the Zimbabwe constitution of 2013.

[109] A typical example of this approach is still found in Botswana's 1966 constitution. Its bill of rights recognizes and protects several human rights including protection from discrimination in s 15. But then s 15(4)(c) and (d) excludes the application of this section to matters dealing with 'adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law', and customary law. In other words, the prohibition against discrimination does not apply to matters covered by customary law. This approach was adopted by most post-independence Anglophone African constitutions, for example, s 82(4)(b) and (c) of the Kenyan constitution of 1963; s 29(3)(c) and (d) of the Ugandan constitution of 1963; and s 23(3)(b) and (3a) of the 1980 Zimbabwean constitution.

[110] Rather unusually, the customary law exception to the constitutional prohibition of discrimination was retained in art 23(c) and (d) of the 1991 constitution.

[111] See, for example, arts 7 and 223 of the constitution of Angola of 2010; arts 26 and 156–8 of the constitution of Chad of 2005; s 10(2) of the Malawi constitution of 1994; art 2(2) of the 1995 constitution of Uganda and s 46(2) of the 2013 Zimbabwean constitution. But also see art 201 of the 2004 Rwandan constitution which adopts a similar approach. Perhaps the most significant is the approach adopted in arts 2(4) and 159(3) of the 2010 Kenyan constitution. Art 2(4) states that 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency . . . '. Art 159(3) states that 'traditional dispute resolution mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law'.

[112] See s 251 of the constitution of the Republic of South Africa, 1996 under 'National Unity and Reconciliation', where it says: 'The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.' As

not clear why this concept was excluded from the final constitution;[113] nevertheless, the courts have repeatedly underscored its relevance not just in the interpretation and application of the constitution but also in dealing with South African law in general.[114] Thus, in *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court said:

> We are not islands unto ourselves. *The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy.* It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[115]

The exact meaning and scope of the concept of *ubuntu* remains a matter of considerable debate but its application as an important constitutional principle deeply rooted in African practice and culture is no longer in doubt. For example, *ubuntu* has frequently been invoked as an analogous concept to dignity.[116] Besides this, several studies have shown that there were traditional checks and balances to ensure that African traditional rulers do not abuse their powers.[117] Most of the traditional mechanisms for disciplining errant rulers were removed or curtailed by the colonial powers through the

Christof Heyns, 'Where is the Voice of Africa in Our Constitution?' <http://www.chr.up.ac.za/images/files/about/archive/occasional_paper_8.pdf> accessed 21 April 2015, rightly points out, the *ubuntu* concept was introduced right at the end of the interim constitution, 'almost as an afterthought in a section with an uncertain title'.

[113] Could it be because, like African customary law in general, it was felt that its oral nature should be maintained?

[114] For a discussion of this, see Tom Bennett, 'Ubuntu: An African Equity' (2011) 14 *PER* 30.

[115] 2005 (1) SA 217 (CC) para 37 (emphasis added).

[116] For example, in *S v Makwanyane* 1995 (3) SA 391 (CC) para 225, the Constitutional Court said: 'An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. The heinous crimes are the antithesis of *ubuntu*.' For one of the papers that tries to explain the concept of *ubuntu*, see Justice Yvonne Mokgoro, '*UBUNTU* and the Law in South Africa' <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDgQFjAC&url=http%3A%2F%2Fwww.ajol.info%2Findex.php%2Fpelj%2Farticle%2Fdownload%2F43567%2F27090&ei=5_91U-T_PMTg7QbVpICABQ&usg=AFQjCNGZDDcHqTRiY_TKRhuMQ4_RPAb0Cw&sig2=v1Mxt3vffVV5c0P5YZOcAA> accessed 21 April 2015.

[117] In pre-colonial Africa, subjects of a ruler who had become despotic, cruel, or tyrannical could react in several ways to show their disapproval. They could, for example, stop visiting his court and in this way isolate him. They could move to another settlement and transfer their loyalty to another ruler. They could also in some cases, remove him or even assassinate him and replace him with another kith and kin. For example, Edward Kofi Quashigah, 'Legitimate Governance: The Pre-colonial African Perspective' in Edward Kofi Quashigah and Obiora Chinedu Okafor (eds), *Legitimate Governance in Africa: International and Domestic Legal Perspective* (Kluwer Law International 1999) 46–7 points out that the Ewes of present day Ghana migrated there from the then Notsie tribe in present day Togo, in order to escape from the despotic behaviour of their then leader, King Agokoli I. The author also mentions the destoolement (removal from the throne) and subsequent execution of King Kofi Adzanu Fiayidziehe by his subjects. John Londsdale, 'Political Accountability in African History' in Patrick Chabal (eds), *Political Domination in Africa: Reflections on the Limits of Powers* (Cambridge University Press 1986) points out that concepts like government by consent, responsible rule, and accountability are rooted in traditional African societies and that African history abounds with examples of rebellions against arbitrary rule. See further Perrot (n 89) and Ayittey (n 88).

arbitrary removal and appointment of traditional rulers under appointment letters spelling out their powers and functions. The letters made these rulers serve at the pleasure of the colonial authorities and depend on them rather than on the wishes of their subjects.[118] Generally, the colonial authorities deposed and executed traditional rulers when the latter failed to serve the need of the colonial government.[119]

Looking to the future, the scope for African indigenous ideas and institutions influencing future constitutional developments does not look particularly promising. Besides growing reservations about traditional rulers and their commitment to their people rather than opportunistic alliances with governments, many people now live in towns and have little contact, attachment, or loyalty to these rulers and even less to the institutions that they represent.[120] For example, the South African government has struggled for more than six years to introduce a Traditional Courts law aimed at giving traditional rulers an enhanced role to exercise certain judicial powers over those living within their communities, but it keeps coming up against serious opposition from many civil society and human rights organizations. In commenting on this, Christina Murray warns:

> We must guard against the possibility that a new order revelling in its emancipation from (neo) colonial rule will abrogate its responsibility to its citizens in the name of a new Africanisation. The danger is that settlement with the lobby of traditional leaders will be a smokescreen for the failure to implement democracy where it really matters: at grassroots, in the material conditions of the ordinary existence of women and men.[121]

Another problem is that traditional institutions were suited to the rural and agrarian communities of the past not the modern communities where the chiefs hardly have any effective administrative powers. For the foreseeable future, and with perhaps the exception of traditional courts, the role that will be formally and expressly reserved for indigenous traditional institutions in modern African constitutions will be very limited. However, it must also be acknowledged that there are still many far-flung remote rural communities in Africa who have little access to government administrative and judicial services and thus by default still have to depend on their traditional administrative and dispute settlement systems.[122] This is also the case in some conflict ridden countries, such as Somalia, South Sudan, and parts of DR Congo and Uganda where traditional institutions still dominate due to limited or no access to central

[118] See further, Agbese (n 105) 7.
[119] See further, K Shillington, *History of Africa* (rev edn, St Martin's Press 1989) 354–7; Adam (n 7).
[120] In fact, in 2010 it was estimated that over a third of Africa's one billion inhabitants currently live and will spend almost all their life in urban areas. By 2030 the proportion of those who live in towns is expected to rise to half. See 'The Urbanisation of Africa: Growth Areas' (*The Economist*, 13 December 2010) <http://www.economist.com/blogs/dailychart/2010/12/urbanisation_africa> accessed 21 April 2015. This increasing urbanization and resulting detachment from rural communities where traditional institutions still hold sway has a negative impact on both knowledge and interest in these institutions. See further, Charles Manga Fombad, 'Gender Equality in African Customary Law: Has the Male Ultimogeniture Rule any Future in Botswana?' (2014) 52 *Journal of Modern African Studies* 475.
[121] In Murray (n 94). [122] See Agbese (n 105) 2.

government services.[123] In the absence of such exceptional circumstances, indigenous African influence on the form and content of modern constitutions is reducing at a time when the influence of external factors, through the process of internationalization, to which we must now turn, is increasing.

## 3.5 The impact of the process of internationalization

The last two decades of constitution-building in Africa have also been influenced by the process of internationalization or denationalization of constitutional law resulting from the phenomena of globalization, liberalization, and regionalization. These processes have resulted in the adoption in national constitutional law of many shared norms whose origins can be traced to international and regional supranational laws. As a result of these processes, certain constitutional law concepts, practices, institutions, and doctrines have been reshaped and in some instances even replaced by international or supranational norms in several ways.[124] The impact of the process of internationalization on the provisions of modern African constitutions can briefly be gauged from two perspectives, first at the global level, and second at the regional level.

### *3.5.1 Internationalization at the global level*

Numerous international instruments, both global and regional, have since 1945 prescribed certain minimum standards of human rights protection which states must comply with. The most important and influential of these instruments is the Universal Declaration of Human Rights (UDHR). Although merely a 'Declaration', and thus not binding, its provisions have over the years been so extensively incorporated into other international and regional instruments as well as national constitutions that its provisions are now considered to express principles of customary international law.[125] Four

[123] See further, Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' UNDP Oslo Governance Centre (2006) 5 <http;//www.democraciaejustica.org/cienciapolitica3/sites/default/files/doingjustice ewawojkowska130307.pdf> accessed 20 April 2015.

[124] For a fuller discussion of this see Charles Manga Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60 *American Journal of Comparative Law* 439.

[125] Sir Humphrey Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' (1965) 11 *International and Comparative Law Quarterly* 15 where he opines that 'the constant and widespread recognition of the principles of the Universal Declaration clothes it in the character of customary law.' On several occasions, the judges in the International Court of Justice and even in some national courts have stated unequivocally that most of the principles contained in the UDHR are now part of customary international law. For example, Judge Ammoun in his separate opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Notwithstanding the Security Council Resolution 276) 1971 ICJ Rep 12 at 76 observed that 'although the affirmations of the Declaration are not binding qua international convention . . . they can bind the states on the basis of custom . . . or because they have acquired the force of custom through a general practice accepted as law . . . '. See also the dissenting opinion of Judge Guggenheim in the *Nottebhom Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4, 63; Judge Tanaka in his dissenting opinion in the *South West Africa Case (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, 293; and the dissenting opinion of Judge Evensen in the *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal* [1987] ICJ Rep 3, 173. At the domestic level, an important example is the decision of the US Federal Court of Appeals in *Filartiga v Pena-Irala,* 630 F 2d 876 (2d Cir June 1980) and Lord Reid in the English case of *R v Miah* [1974] 1 WLR 683, 698.

other international instruments which have been similarly influential and, together with the UDHR, constitute the international bill of rights are: the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; the International Covenant on Civil and Political Rights (ICCPR) 1966; the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights. Most of the provisions recognizing and protecting human rights in modern African constitutions have been substantially influenced by these international human rights instruments and standards, especially the UDHR. Some of the constitutional provisions go even further and expressly make reference to international human rights instruments. This is done in several ways.

One approach is that taken in the Cameroonian constitution of 1996 where the preamble 'affirm(s)' the constitution's attachment to the fundamental freedoms enshrined in the UDHR, the UN Charter, the African Charter on Human and Peoples' Rights (ACHPR) 'and all duly ratified international conventions relating thereto'. This does not however render any of these instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution. This can however be done under the Beninese constitution of 1990 which in its preamble refers to these international instruments and then states that their provisions 'make up an integral part of this present Constitution and of Beninese law and have a value superior to the internal law'. This is repeated in article 7, and article 40 imposes on the state a duty to teach its citizens about the constitution, the UDHR, the ACHPR, and any other 'international instruments duly ratified and relative to human rights'. In fact, the ACHPR is attached as an annex to the constitution of Benin.[126]

The most significant direct incorporation of international human rights instruments into national constitutions appears in the Angolan and Kenyan constitutions adopted in 2010. Several provisions in the Angolan constitution underscore the importance and relevance of international instruments in interpreting and applying the constitution.[127] But then, articles 26 and 27 go much further to state:

> 26(1) The fundamental rights established in this constitution shall not exclude others contained in the laws and applicable rules of international law.
>
> (2) Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in keeping with the Universal Declaration of the Rights of Man, (sic) the African Charter on the Rights of Man and Peoples' (sic) and other international treaties on the subject ratified by the Republic of Angola.
>
> (3) *In the consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.* (Emphasis added.)

[126] In fact, Benin is one of the few countries in Africa that has expressly incorporated the UDHR and the ACHPR into its domestic law.

[127] Other provisions which make express reference to the applicability of international law are arts 12 and 13.

> 27 The principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the constitution or are enshrined in law or international conventions.

In the Kenyan constitution, article 2(5) provides that 'the general rules of international law shall form part of the law of Kenya', and article 2(6) states that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.[128]

The bills of rights in many other African constitutions also expressly incorporate some international human rights instruments.[129] It would seem, and the matter is not entirely free from doubt, that those countries whose constitutions not only contain a bill of rights or provisions recognizing and protecting human rights, but also expressly incorporate, as an integral part of national law, certain international human rights instruments thereby providing additional protection of those rights not covered in the constitution but provided for in the international instruments. Where this is the case, then the effect of these international instruments is to complement and reinforce the human rights provisions in the national constitution.[130]

### *3.5.2 Internationalization at the regional level*

The AU and its predecessor, the Organisation of African Unity (OAU) have in diverse ways made strident efforts to promote and sustain constitutionalism in Africa, especially after the 1990s.[131] By the mid-1990s, the OAU could no longer pretend to be indifferent to the wind of democratization blowing over the continent. Although by 1981, it had adopted the African Charter on Human and Peoples' Rights (or African Charter for short), which recognized a number of fundamental human, civil, and political rights, the organization itself stuck to its policy of not intervening to condemn human rights abuses in the different countries. Between 1990 and the establishment of the AU in 2002, the OAU introduced a number of documents designed to enhance constitutional governance in Africa. Since the establishment of the AU, a basic framework for promoting constitutional governance, democracy, and respect for the rule of law amongst member states has been laid down in the Constitutive Act setting up the Union and as well as a number of treaties, declarations, and other instruments.

[128] Under the 2013 constitution of Zimbabwe, s 46(1)(c) states that in interpreting the bill of rights, a court, forum, or body 'must take into account international law and all treaties and conventions to which Zimbabwe is a party'. Section 326 goes further to state:

> (1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.
>
> (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.

[129] See, for example, art 19 of the constitution of Burundi of 2005; art 17(3) of the constitution of Cape Verde of 1999; and s 11(2) of the Malawi constitution of 1994.

[130] This however raises more complex issues which will be dealt with in a subsequent volume of this series.

[131] See fuller discussion of this in Charles Manga Fombad, 'The African Union and Democratization' in Jeffrey Haynes (ed), *Routledge Handbook of Democratization* (Routledge 2012) 322–36.

There are five major instruments that contain the basic democratic principles of the AU democracy agenda, namely, the Constitutive Act itself, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government, the Declaration Governing the Democratic Elections in Africa, the Declaration on Election Observation and Monitoring, and the most recent, the African Charter on Democracy, Elections and Governance. All these instruments emphasize the important place given by the AU to democracy and the determination of member states to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. For the past two decades the AU has struggled to promote a culture of constitutional governance amongst its member states. Due to the fact that many of these important instruments are non-binding and even those that are binding are often ratified but hardly domesticated, the impact on the present provisions of constitutions is rather minimal.

In spite of this, the African Charter is one of the few AU/OAU instruments that has had some impact on modern African constitutions. It introduced a number of rights with distinctly 'African' characteristics which have been incorporated, especially after the 1990s in many African constitutions.[132] One of these is the concept of 'peoples' rights', which, although originating in UN international human rights instruments, has been given prominence and practical application within the African system.[133] The term 'peoples' rights' itself, perhaps because of a lack of clarity, appears only in the Ethiopian constitution of 1994.[134] Nevertheless, the Charter attaches a number of rights to people, such as the right to existence, the right to self-determination, the right to freely dispose of their resources, the right to development, the right to international peace and security as well as a right to a generally satisfactory environment.[135] The African Charter is in fact the first binding international human rights instrument to provide for a right to development.[136] According to Frans Viljoen, it makes the collective (peoples) and not the individual as holder of this right.[137] Several African constitutions, but by no means all, have incorporated some aspects of these collective peoples' rights in one form or another.[138] The most significant impact that the concept of 'people' or 'group' appears to have had so far has been to come through a couple of decisions made by the African Commission on Human and Peoples' Rights.[139] However, it has been argued that the two concepts do play an indirect role

[132] See generally Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 219–28.

[133] For a discussion of the concept of peoples, see Richard N Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80.

[134] See art 43(1) of the constitution.

[135] See arts 19–24 of the African Charter.

[136] See art 22 of the African Charter.

[137] Viljoen (n 131) 226.

[138] See, for example, arts 47 and 49 of the Rwandan constitution of 2003; arts 40, 43, 44, and 45 of the draft Tanzanian constitution of 2014; IX, XXVII, XXIX and ss 33, 36, and 39 of the Ugandan constitution of 1995; and ss 13, 73, 270, and 289 of the Zimbabwean constitution of 2013.

[139] For a discussion of the cases that came before the African Commission on Human and Peoples' Rights, see Serges Alain Kamga and Charles Manga Fombad, 'A Critical Review of the Jurisprudence of the African Commission on the Right to Development' (2013) 57 *Journal of African Law* 196.

in human rights jurisprudence through another important notion that features in many African constitutions, namely the notion of duties.[140]

The concept of duties appears to have originated from arts 27 to 29 of the African Charter. Although the concept of duties on its own is not unique,[141] it has been suggested that African constitutions were the first to recognize the concept in a substantive sense.[142] The concept of duties or responsibilities and obligations, as they are sometimes referred to, is quite complex and it will suffice here to point out that duties arise in several ways and means, such as moral duties, legal duties, parental duties, societal duties, and civil duties. Some distinctions are made between natural and acquired duties, positive and negative duties, and perfect and imperfect duties.[143] The common types of duties that feature in African constitutions are positive duties, which require citizens to do specific things[144] and negative duties which require people to refrain from doing something.[145] Perhaps the main feature of the African approach to duties is that they are juxtaposed and listed alongside rights in such a manner that in most cases, they operate as a sort of limitation or qualification to the exercise of the rights listed in the bill of rights.[146] Ultimately, the effect of duties will depend on how the courts balance the rights with the duties in any given situation. Nevertheless, it is plausible to argue, as Christof Heyns puts it, that 'the explicit recognition of duties in African human rights instruments is in fact a different way of expressing respect for the role of the group'.[147]

In the light of the diverse influences, it is now necessary to see whether there are any distinctive emerging features and trends.

[140] See Christof Heyns, 'Where is the Voice of Africa in our Constitution?' Centre for Human Rights Paper 8 (1996) 5 <http://www.chr.up.ac.za/images/files/about/archive/occasional_paper_8.pdf> accessed 20 April 2015.

[141] For example, it appears in art 19(3) of the International Covenant on Civil and Political Rights 1966.

[142] See Heyns (n 140) 2. And for African constitutions that have incorporated the concept, see arts 22(3), 35, and 46(2) of the Angolan constitution of 2010; art 7 of the Benin constitution of 1990 which incorporates the African Charter; art 23 of the Burkina Faso constitution of 1991; art 19 of the Burundian constitution of 2005 which incorporates the African Charter; art 80(2) of the Cape Verde constitution of 1992; arts 62–7 of the Congo DR constitution of 2005; art 41 of the Ghanaian constitution of 1992; and s 3 of the Swaziland constitution of 2005.

[143] See further, TSN Sastry, *Introduction to Human Rights and Duties* (University of Pune Press 2011) <http://www.unipune.ac.in/pdf_files/Final%20Book_03042012.pdf> accessed January 2015.

[144] See, for example, art 33 of the Benin constitution of 1990, which states that 'All citizens of the Republic of Benin have the duty to work for the common good, to fulfil all of their civic and professional obligations, and to pay their fiscal contributions'. Art 41(a)–(k) of the 1992 constitution of Ghana contains a long list of positive duties which include the duties of upholding and defending the constitution, protecting and preserving public property, and contributing to the welfare of the community. Also see arts 17 and 29 of the 1995 constitution of Uganda as well as s 35(4) of the 2013 constitution of Zimbabwe.

[145] An example of this is art 41(d) of the 1992 constitution of Ghana, which inter alia states that citizens should refrain from doing acts detrimental to the welfare of other persons. See also s 196(3) of the 2013 constitution of Zimbabwe.

[146] For example, art 41 of the 1992 constitution of Ghana starts by stating thus: 'The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations . . .'. Similarly worded is art 29 of the 1995 constitution of Uganda, but a slightly different approach but with the same effect is adopted in arts 22(1) and 20, 35(3), 56(2), and 83(1) of the 2010 constitution of Angola.

[147] In Heyns (n 140) 5.

## 4. Emerging Features and Trends

As the writers, Finer, Bogdanor, and Rudden rightly point out, constitutions differ widely because 'different historical contexts have generated different preoccupations and priorities, and these in turn have led to quite different constitutional structures'.[148] Most African countries have gone through a fairly similar historical experience even if the colonizers were different. Because of this similarity of historical experience, the legal and constitutional traditions that were inherited have also been alike. The post-independence constitutional challenges have been comparable; so too have the efforts since the 1990s, to revive and entrench a culture of constitutionalism and respect for the rule of law. We will see how the colonial context has left an enduring impact and the main features that are emerging.

### 4.1 The colonial context as dominant influence

The colonial influence on African constitutions continues to be strong. It is not surprising that Michel Rosenfeld, using 'prototypes constructed with reference to actual historical experiences', distinguishes between seven distinct constitutional models, one of which is the post-colonial constitutional model.[149] African constitutions are all grouped under the post-colonial constitutional model, which he describes as comprising of 'all constitutions adopted by former colonies in Africa and Asia that achieved independence after World War Two . . . '.[150] In the light of the diverse influences to constitutional development discussed earlier, the question does arise as to whether there are any common patterns amongst African constitutions or some of them, which can justify placing them in a specific category, sub-category, system, or sub-system beyond the general categorization of 'post-colonial constitutional model'.

From the various influences on the nature, content, and scope of African constitutions examined earlier, it is contended that the most significant, if not dominant influence, is the legal tradition within which they were adopted and operate. As noted earlier, this will mean classifying them into those derived from the common law tradition and those derived from the civil law tradition. There is indeed a strong case for arguing that African constitutions are inextricably linked with the legal system within which they were adopted and have operated since independence. This is mainly because, as we have seen, the independence constitutions were imposed by the departing colonial powers and in many cases, a typical example being the French, who simply transplanted the 1958 Fifth Republic Constitution with very few changes.[151] It is also

[148] In Samuel Finer et al, *Comparing Constitutions* (Clarendon Press 1995) 7.

[149] The others are the German, the French, the American, the British, the Spanish, and the European transnational constitutional model. See generally his book: Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge 2010) 149–83.

[150] ibid 179.

[151] See, for example, Fleur Dargent, 'Les Echecs du Mimetisme Constitutionnel en Afrique Noire Francophone' <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.droitconstitutionnel.org%2FcongresNancy%2;FcomN4%2FdargentT4.pdf&ei=8C6HU1qjne4G5_6BoAo&usg=AFQjCNF6erF5HqYb9UNxEazEI3FHy7Cjbw&sig2=IODbpD3EuFBUIHeoAYTXZw> accessed 21 April 2015.

because, since independence, most African constitutions have been revised within the inherited colonial models. From this, it would seem that a classification based on the legal tradition is quite compelling, for as Cheryl Saunders rightly points out, the legal and constitutional systems complement each other.[152] However, this conclusion is subject to a number of caveats.

First, Britain, without a written constitution itself, hardly transferred an exact replica of the British constitutional system to its African colonies. Second, perhaps because of the strong role of national history and culture in constitutional form, there is no automatic and inevitable link between the legal tradition and the constitutional system. For example, the American legal system, although based on the common law, has developed its own distinct constitutional system to cater for its peculiar concerns. In fact, the distinctive American approach underscores the fact that other factors such as the historical context, the ethnic, linguistic, and religious diversity of the country, and the fundamental concerns and preoccupations of the people also have a major impact on constitutional design and model.[153]

Mindful of these caveats, it can be said therefore that a careful analysis of modern African constitutions suggests that although they cannot strictly be classified based on the legal system within which they operate, this legal tradition has in most countries been the dominant influence on the constitution. However, whereas the French legal tradition has given rise to a peculiar French constitutional tradition that was transplanted to Africa, only certain elements of the English constitutional tradition could for obvious reasons be incorporated into the written constitutions that were drafted in Whitehall for Anglophone Africa. Many other elements, as we shall see in other chapters of this book, were borrowed from the American constitutional system. To this extent it can be said that what was effectively adopted in Anglophone Africa was a mix of the English and American constitutional tradition. The constitutions adopted in Lusophone and Hispanophone Africa were also substantially influenced by the civilian traditions within which they were adopted. It could therefore be said that, from a taxonomic point of view, whilst African constitutional systems are not necessarily co-extensive with the legal traditions within which they were adopted, they are closely linked. If one were to adopt Patrick Glenn's concept of 'fuzzy' boundaries[154]—one could classify modern African constitutional systems into two main traditions—the civilian and the common law or Anglo-American model.

A majority of the African constitutions based on the civilian tradition, have been influenced by the French constitutional tradition. This category will include not only all of Francophone African constitutions but should also include those of Hispanophone and Lusophone Africa because of their deeply rooted civilian foundation.[155] The others can be described as belonging to the Anglo-American constitutional tradition because,

[152] Saunders (n 42) 11. [153] See generally Law (n 42).

[154] In Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 425.

[155] About twenty-five of Africa's fifty-four countries are Francophone, five Lusophone (Angola, Cape Verde, Guinea Bissau, Mozambique, and Sao Tome & Principe), whilst two (Equatorial Guinea and Western Sahara) are Hispanophone.

although based largely on English constitutional law principles, institutions, and practices, many aspects of these constitutional institutions, principles, and practices have been borrowed from the American constitutional system. References to the common law constitutional tradition in Africa must therefore be mindful of the considerable elements of American constitutional law that have been incorporated into the post-independence Anglophone African constitutions. In a similar manner, references to the civilian constitutional tradition include not only the Francophone African constitutions based on the French Fifth Republic Constitution of 1958 but also Lusophone and Hispanophone African constitutions which incorporated elements of Portuguese and Spanish constitutional practices respectively. Such a broad classification is reasonable for as Cheryl Saunders has cautioned, 'constitutional classificatory systems should err on the side of inclusion', and thus allow for evolution and not freeze understanding around certain patterns.[156] It is necessary to see to what extent these two dominant influences have made African constitutional patterns distinctive vis-à-vis each other.

## 4.2 Distinctive features of the emerging common law and civil law constitutional traditions in Africa

Although the features that justify making a distinction in modern African constitutions between those that belong to the common law constitutional tradition and those that belong to the civil law tradition warrant a separate detailed treatment, in this chapter it will suffice just to briefly illustrate this with a number of examples. In the main, these constitutions can be distinguished from each other in terms of their general structure and their approaches to issues such as the judiciary, separation of powers, and independent regulatory and watchdog organizations.

As regards the overall structure, since the 1960s, the constitutions of Anglophone African countries have generally been much longer, more detailed, and explicit as compared to other constitutions, especially those of Francophone African countries which were usually shorter and often set out issues in broad outline, leaving the details to be fleshed out in 'organic laws'.[157] Since the 1990s, most constitutions both civilian and common law models, have increased in length to reflect new issues such as the wide range of human rights recognized and protected, environmental protection, and as we shall soon see, new institutions designed to promote democracy and accountability.[158] Nevertheless, Anglophone constitutions have remained quite long, for

[156] Saunders (n 42) 29.

[157] Organic laws in the civilian system have an intermediate status between the ordinary law and the constitution itself. They have a constitutional scope and force and therefore override ordinary statutes. They are however more flexible because they can be enacted by parliament without going through the cumbrous process of amending the constitution. See further, Francis Haman and Michel Troper, *Droit Constitutionnel* (31st edn, LGDJ 2009) 41. For an example of such a provision, see art 8 of the constitution of DR Congo of 2005 which states inter alia that, 'An organic law establishes the status of the political opposition'.

[158] These independent institutions of accountability are discussed in Ch 14 of this volume. For the increase in the number and scope of provisions recognizing and protecting human rights, see Waruguru Kaguongo and Christof Heyns, 'Constitutional Human Rights Law in Africa' (2006) 22 *African Human Rights Law Journal* 673.

example the 2013 constitution of Zimbabwe with 345 sections, Nigeria's 1999 constitution with 320 sections, Ghana's 1992 constitution with 299 articles, Kenya's 2010 constitution with 264 articles and South Africa's 1996 constitution with 243 sections. Although some civilian constitutions have now increased considerably in length as compared to the past, with the constitutions of Burundi (2005), Angola (2010), DR Congo (2005), and Rwanda (2003) having 307, 244, 229, and 203 articles respectively, they are still relatively shorter, with some being very short, such as Cameroon's 1996 constitution which has only sixty-nine articles. Even for those post-1990 civilian style constitutions that have become lengthy, this increase in length is mostly in terms of the number of provisions adopted, not with respect to their scope, depth, or the details of issues covered.[159] One reason for the continuous differences in length and details seems to be that most modern Anglophone constitutions have in different ways copied the interventionist approach started in the South African constitution of 1996. It provided detailed provisions designed not merely to restructure power but also to facilitate societal change in what is now referred to as transformative constitutionalism. Key elements of this agenda of transformative constitutionalism,[160] which has also necessitated long and detailed constitutional provisions, are: broadly worded provisions recognizing a wide range of fundamental human rights which are enforceable vertically and horizontally, broad access to justice rules, and wide ranging institutions of accountability.[161]

Another area of differences concerns the structure and role of the judiciary. Three significant differences stand out when comparing common law- and civil law-styled constitutions in Africa. First, most Anglophone constitutions have maintained the common law approach of a single hierarchy of courts with jurisdiction to deal with all types of disputes but with specific courts to deal with certain matters such as labour and family disputes. By contrast, most constitutions with civilian roots provide for a hierarchy of at least three streams of courts viz, ordinary courts, administrative courts, and audit courts.[162] The ordinary courts deal with disputes between private individuals, the administrative courts deal with disputes between private individuals and the state or quasi-public agencies, and the audit courts deal with disputes concerning financial matters. Sometimes, a court of conflicts is provided to deal with disputes over which one of these three jurisdictions has the power to deal with a certain matter. Such conflict may arise where for example, more than one of them claims jurisdiction over the matter or declines jurisdiction to entertain the matter. Second, whereas the courts that have powers to entertain disputes concerning the interpretation and application of

[159] Except perhaps the Angolan constitution of 2010.

[160] On transformative constitutionalism, see Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 and Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 *Stellenbosch Law Review* 258.

[161] As noted earlier, the issue of hybrid independent institutions of accountability is discussed in Ch 14, whilst the important topic of constitutional justice will be covered in vol 2 of this series.

[162] For examples of provisions regulating ordinary courts, administrative courts, and audit courts, see arts 176–8 and 183 of the constitution of Angola of 2010, arts 38–40 of the constitution of Cameroon of 1996, arts 153–6 and 178 of the constitution of DR Congo (2006), and arts 115–17 of the constitution of Tunisia of 2014.

the constitution in Anglophone constitutions are usually part of the ordinary hierarchy of courts, in the civilian-style constitutions, the courts that have exclusive jurisdiction to deal with these disputes are specialized centralized courts which do not form part of the hierarchy of courts.[163] Third, whilst some recent Anglophone constitutions, the best examples being those of South Africa and Zimbabwe,[164] have gone to considerable lengths to recognize and protect the independence of the judiciary, civilian-style constitutions do no more than pay lip service to this concept. Almost all these constitutions provide that the president will act as guarantor of the independence of the judiciary and in doing so, will be assisted by the *Conseil Supérieur de la Magistrature* (a body with some limited functional resemblance to the judicial service commissions in Anglophone Africa).[165] Since the president often controls this body both in terms of composition and agenda setting, this effectively limits the ability of the judiciary to operate independently.

Two other important area of differences, which are discussed in other chapters of this book concern the approaches to the doctrine of separation of powers and the hybrid institutions of accountability which complement it, which are becoming increasingly common.[166] As regards the approach to separation of powers, most Anglophone constitutions have adopted the English approach but with some elements of the American approach, whilst the approach adopted in the civilian jurisdictions is mainly based on the French 1958 Fifth Republic Constitution's approach.[167] With respect to independent watchdog institutions to promote transparency and accountability, this is becoming a common feature of post-1996 Anglophone constitutions and actually started with the 1996 South African constitution.[168] The most elaborate examples of similar institutions now appear in articles 248–54 of the 2010 constitution of Kenya and sections 232–63 of the 2013 constitution of Zimbabwe. By contrast, it is

[163] In Anglophone Africa, constitutional disputes are handled by ordinary courts or even specialized courts operating within the hierarchy of ordinary courts. For example, see s 18 of the Botswana constitution of 1966; art 165(2)(b) and (d) of the constitution of Kenya 2010; and s 171(1)(c) of the constitution of Zimbabwe 2013. Contrast this with the position of the constitutional courts provided for under arts 226–32 of the constitution of Angola of 2010; arts 225–32 of the constitution of Burundi of 2005; arts 157–69 of the constitution of DR Congo of 2006; arts 94–7 of the constitution of Equatorial Guinea of 1998; and arts 118–24 of the constitution of Tunisia of 2014.

[164] See s 165 of the constitution of South Africa of 1996; and ss 164–5 of the Zimbabwe constitution of 2013.

[165] See, for example, art 127 of the constitution of Benin of 1990; art 37(3) of the constitution of Cameroon of 1996; art 140 of the constitution of Congo Rep of 2002; art 86 of the constitution of Equatorial Guinea of 1998 (which actually states that the president is the 'First Magistrate of the Nation and guarantees the independence of the judiciary').

[166] See Ch 14 of this volume. [167] See Ch 2 of this volume.

[168] These are usually referred to as chapter 9 institutions and appear in ss 181–94 of the 1996 constitution and consist of: the Public Protector (which is without a doubt the most widely known and effective check on bad governance especially under the Zuma government); the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Independent Authority to Regulate Broadcasting. The four general principles designed to shield them from partisan abuse appear in s 181 and are as follows: i) the institutions are independent and subject only to the constitution and must perform their functions without fear, favour, or prejudice; ii) other state organs must assist and protect them to ensure their impartiality, dignity, and effectiveness; iii) no person or organ of state may interfere with their functioning; and iv) the institutions are only accountable to parliament to whom they must send reports at least once a year.

only fairly recently that some civilian-style constitutions are beginning to entrench such institutions. However, apart from articles 126–30 of the 2014 constitution of Tunisia which contain a list of what it refers to as 'independent constitutional bodies' the practice is not well developed in the civilian jurisdictions.

In spite of these distinctive features there is also considerable evidence from the trend in most recent constitutions, especially those crafted after 2010 that as a result of the internationalization of constitutional law principles and the cross-fertilization of ideas there is increasing similarity and even possible convergence in terms of content and approaches in constitutional content in Africa today. This is particularly evident from the last point made above, which is the emerging trend of entrenching independent institutions to support the fledgling attempts to establish democratic and accountable governments. It is also evident from the fact that unlike in the past, most African constitutional courts have powers of both abstract and concrete review.[169] The approach to human rights protection has also changed. Whereas before the 1990s, most civilian-styled constitutions mentioned human rights mainly in their preambles, today, save for a few exceptions,[170] there are elaborate provisions recognizing and protecting human rights. In spite of these areas of convergence of approach, it is unlikely that this will lead to complete uniformity of constitutional content and approach in all African countries. Besides, as has been rightly noted: '[C]onvergence in form does not necessarily mean convergence in understanding, in values and priorities or in the operation of constitutional arrangements in practice in the face of a plethora of local contextual factors.'[171]

## 5. Conclusion

Modern African constitutions, like those of most other countries in the world are sediments of diverse historical processes shaped and re-shaped by borrowings, imitations, and adaptation to meet changing circumstances. The first generation of constitutions had little prospects of succeeding in establishing a firm basis for constitutionalism, democracy, and respect for the rule of law because they were largely imposed by the departing colonial powers with minimal local input and the new African leaders were ill equipped to enforce them. The 1990s provided an opportunity for the mistakes of the past to be corrected in inclusive processes that will ensure that the history, concerns, fears, desires, hopes, and aspirations of the people are reflected in the new or revised constitutions that were adopted.

An overview of the constitutional developments since independence shows that there is a strong connection in terms of form, structure, and content between modern African constitutions and the diverse elements that have influenced them. It was shown that these constitutions have been influenced by factors such as the legal tradition within which they operate, ideology, religion, indigenous culture, as well as

[169] The issue of constitutional adjudication is dealt with in vol 2 of this series.

[170] The best example of a country where human rights protection is provided only in the preamble rather than the substantive part of the constitution is the Cameroon constitution of 1996.

[171] See Saunders (n 42) 12.

international and intra-African developments on issues of human rights protection and good governance. Although no constitutional model has reached the point of global dominance, it was however noted that the radical constitutional changes that have taken place since the 1990s have been influenced by and remained within the framework of the legal and constitutional traditions inherited at independence. In this regard, two constitutional traditions, closely linked to the legal systems within which they were developed or have evolved, have been dominant and substantially influenced most current constitutional developments on the continent. One is the common law constitutional tradition based on the Westminster constitutional system with many elements of the US constitutional system crafted onto it which has been widely adopted in Anglophone Africa. The other is the civil law constitutional tradition mainly based on the French Fifth Republic Constitution of 1958, which has been widely adopted in Francophone Africa and to some extent, Lusophone and Hispanophone Africa. The chapter showed that there were significant differences in approaches between these two received dominant constitutional traditions in dealing with issues such as judicial independence, separation of powers, and judicial review. Some of the differences might be more apparent than real. For instance in spite of the different approaches to law-making, it is a practical reality that in both constitutional traditions, most laws are initiated by the executive.[172]

It is also worth noting that the reforms have, as a result of the increasing process of internationalization and the borrowing of ideas showed some areas of increasing convergence. Such is the case with the adoption of abstract (usually associated with the civilian tradition) and concrete (usually associated with the common law tradition) reviews and the trend towards entrenching institutions to promote and support democracy and good governance, which could be attributed to some extent to the democracy promoting efforts of the AU.

Although there is no clear sign of an emerging distinctive African constitutional genre, it can be said that there are signs of more serious attempts being made to address the peculiar problems that have confronted the continent over the last five decades. The expansion in the scope, number, and range of human rights, the increasing importance being given to constitutional values and principles, and the expansion of constitution-enforcing and protecting institutions are clear signs that the lessons of the past are being used to shape and prepare for the future. What comes through most clearly in most African constitutions today are the numerous attempts to free the state and the people from the authoritarian and repressive logic of the colonial state which post-independence leaders perpetuated in order to maintain, like the colonial authorities did, a firm grip over everything and everybody within the state. One of the main ways in which they tried to do this has been by trying to balance and share powers through the separation of powers. It is to these attempts to address the root causes of authoritarianism and abuse of power through the separation of powers that we shall now turn.

[172] The differences in approach to law-making are discussed in Ch 2 of this volume.

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# 2

# An Overview of Separation of Powers under Modern African Constitutions

*Charles M. Fombad*

## 1. Introduction

One of the fundamental preoccupations of constitutionalists right from antiquity to modern times has been the attempt to design institutions that will prevent the risks of arbitrary and tyrannical government. Of the numerous theories of government that have been devised to deal with this evil, the most enduring has been the doctrine of separation of powers. This doctrine is considered so important that all post-1990 African constitutions, probably to display a commitment to constitutionalism, have provisions which expressly or implicitly entrench it.[1] It could not have been otherwise, for as long ago as the eighteenth century, French revolutionaries considered the separation of powers so important that they declared in article 16 of their Declaration of the Rights of Man and of the Citizen of 1789, that any society in which the separation of powers is not observed, 'has no constitution'.

The excessive concentration of powers is arguably one of the greatest impediments to the promotion of constitutionalism, good governance, democracy, and the rule of law in Africa. This is manifested in numerous ways and cuts across many facets of constitutional governance. The question that arises is whether the separation of powers in modern African constitutions will help to check against the abuses of powers that usually go with concentration of powers? It is not an easy question to answer because in spite of its long history and highly respected pedigree, the abundant literature that it has spawned shows that the doctrine of separation of powers is by no means a simple, immediately recognizable and unambiguous set of generally accepted concepts. Many scholars, past and present, are not only unable to agree as to exactly what the doctrine means but also its relevance to contemporary institutional ordering. For example, Geoffrey Marshall, one of its strongest critics, feels that the doctrine is far too imprecise and incoherent to be of any use in the analysis or critique of constitutions.[2] Meanwhile the famous British constitutionalist, AV Dicey had referred to it as being 'the offspring of a double misconception'.[3]

[1] The chapter draws from my earlier paper, Charles Manga Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301.

[2] In fact, he concludes in his book, Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1971) 124, that the doctrine is 'infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds'.

[3] Albert Dicey in his book John Allison (ed), *The Law of the Constitution* (Oxford University Press 2013) 338.

At the heart of the separation of powers is the division of powers between three branches—the executive, the legislative, and the judiciary—in order to repel the different threats to liberty that come with the concentration of powers. Some critics of the doctrine argue that the classic triad division of powers no longer reflects the political, social, and constitutional changes that have taken place since the doctrine was formulated several centuries ago. Besides this, it is sometimes felt that the checks and balances associated with this traditional approach are no longer effective in combatting abuses of powers. This has led to the introduction of other institutions of a hybrid nature, such as the ombudsman, the Auditor-General, and anti-corruption agencies, which operate between the traditional triad aimed at enhancing accountability, transparency, and integrity in government.

This introductory section aims to provide an overview of the operation of the doctrine of separation of powers under modern African constitutions. Section 2 briefly discusses the origins and nature of the doctrine. Section 3 looks at the main models of separation of powers that have influenced developments in Africa. Section 4 looks at the approach in Anglophone Africa and Section 5 the approach in the civilian jurisdictions in Africa. The emerging new patterns of hybrid institutions which have considerable potential to enhance accountability are briefly discussed in Section 6.[4] In the concluding remarks in Section 7, it is argued that whatever the reservations about the doctrine of separation of powers, it remains a critical instrument for limiting governmental arbitrariness. Although constitutions today no longer merely focus on outlining the mechanisms of government but also respond to other broader challenges caused by issues of inclusion and protection of minorities, equitable resource allocation, corruption, and a host of others, the problem of separation of powers is critical to dealing with all these other issues. It is therefore contended that an effective system of separation of powers that limits the possibilities of an excessive concentration of powers and the abuse of powers that go with it provide a solid platform for dealing with other challenges to constitutionalism, rule of law, and good governance in Africa.

## 2. Brief Overview of the Origins and Nature of the Doctrine

Early traces of some forms of separation of powers can be found in the works of many writers and thinkers of the medieval period and middle ages, in their search for the secrets of good government. Plato's ideas of a 'mixed state' set forth in *The Republic*,[5] and Aristotle's early classification of governmental functions into three: the deliberative, the magisterial, and the judicative,[6] are sometimes considered as the early ancestors of the doctrine. However, the main debate about the origins of the doctrine is between those who trace it to John Locke and those who see Montesquieu as the originator.

[4] These are fully discussed in Ch 14.

[5] See George H Sabine, *A History of Political Theory* (Henry Hold & Co 1950) 79.

[6] This has led some writers to suggest that he is the originator of the doctrine. See, for example, William Bondy, *The Separation of Governmental Powers* (Columbia College 1896) 12 and others cited by Arthur T Vanderbilt, *The Doctrine of the Separation of Powers and its Present-day Significance* (University of Nebraska Press 1963) 39 fn 119.

It will suffice for our purposes here to point out that the view that currently enjoys broad support is that whilst the roots of the doctrine can be traced to numerous English writers and philosophers before John Locke, the latter in his famous *Second Treatise*,[7] is the author of the modern doctrine. However, Locke's twofold division of power between the federative and executive overlooked the importance of the independence of the judicial branch and stopped short of what may be called the 'pure' theory of separation of powers.

Credit for putting the doctrine in its modern scientific form goes to Montesquieu in his book, *The Spirit of the Laws: Book XI*.[8] His ideas were later to substantially influence the French and American revolutions.[9] Although his claim that the formulation of the doctrine was based on the British constitution at the time has been questioned,[10] he can be considered to have made two main contributions to the doctrine. First, he was the first person who categorized governmental functions into the legislative, the executive, and the judicial. Second, in his analysis of the relationship between the separation of powers and the balance of powers he underscored the need for checks and balances. Arguing that those possessing power will grasp for more powers unless checked by other power holders, he maintained that a separation of powers could only be maintained if this was accompanied by a system of checks and balances. Unlike John Locke, Montesquieu appeared to have been advocating for what could be termed a 'pure' form of separation of powers, but his theory of checks and balances shows that he was not advocating a rigid separation in which the different organs work in isolation of each other but rather a system in which they were working 'in concert' with each other.[11] It is the American revolutionaries in drafting the US constitution who provided the high noon in the development of the doctrine of separation of powers.[12] They were influenced by writers such as John Adams and the authors of *The Federalist*, described as 'the greatest work of American constitutionalism'.[13] Although they advocated for the doctrine in its pure form, as the best institutional structure of government,[14] disagreements during the drafting of the federal constitution, led to a compromise based on a moderate rather than a 'pure' form of separation of powers, tempered by the idea of checks and balances.

[7] For a discussion of this see William Gwyn, *The Meaning of Separation of Powers* (Tulane University 1965) ch 5; and MJC Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967) 58–67.

[8] See Baron de Montesquieu, *The Spirit of the Law: Book XI* (JV Pritchard ed, Thomas Nugent tr, Littleton, Rothman & Co 1991); and also WB Gwyn, 'The Separation of Powers and Modern Forms of Democratic Government' in Robert A Goldwin and Art Kaufman (eds), *Separation of Powers—Does it still Work?* (American Enterprise Institute for Public Policy Research 1986) 100–28; and Vile (n 7) 76–97.

[9] For fuller discussion of this, see Gwyn (n 7) ch 7 and Vile (n 7) ch 4.

[10] This claim is now regarded as flawed because the eighteenth-century English constitution did not observe the separation of powers in the form that he propounded. See Eric Barendt, 'The Separation of Powers and Constitutional Government' (1995) *Public Law* 600. This is why, as was pointed out earlier, Dicey (n 3) argued that the doctrine was the 'offspring of a double misconception'.

[11] Quoted by Sharp, and cited by Gwyn (n 7) 110.

[12] See David G Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997) 5.

[13] See Gwyn (n 7) 66.

[14] See generally Malcolm Sharp, 'The Classical American Doctrine of Separation of Powers' (1935) 2 *University of Chicago LR* 385; Gerhard Caspar, 'An Essay in Separation of Powers: Some Early Versions and Practices' (1989) 30 *William and Mary LR* 211; Vile (n 7) ch 6 and Gwyn (n 7) 116–28.

In its 'pure' and classic form, the doctrine of separation of powers is based on the fundamental idea that there are three separate, distinct, and independent functions of government—the legislative, the executive, and the judicial—which should be discharged by three separate and distinct organs—the legislature, the executive (or government), and the judiciary (or the courts). In this 'pure' sense, the doctrine, according to AW Bradley and KD Ewing, means at least three different things.[15]

First, that the same person should not form part of more than one of the three branches of government. This, for example, implies that ministers should not sit in parliament, nor parliamentarians act as ministers. Second, that one branch of government should not usurp or encroach upon the powers or work of another. This means for example, that the judiciary should be independent of the executive and ministers should not be responsible to parliament. It also means that a person holding office in one branch of government should not owe his tenure to the will or preferences of persons in any of the other organs. Thus, the continuation in office or not, of ministers or members of parliament should depend on the will of the electorate at general elections. Third, that one branch of government should not exercise the functions of another. For example, ministers should not have legislative powers. Although the doctrine has rarely been held or practised in this extreme form, it does represent a sort of 'bench-mark' or an 'ideal-type' situation from which to appreciate its present application today.

Five main reasons have historically been given for requiring the legislative, executive, and judicial functions not to be exercised by the same people viz, the rule of law, accountability, common interest, balancing of interests, and efficiency.[16] These reasons basically summarize the different versions of the doctrine that have emerged over the centuries. The prevention of tyranny has remained the common thread that unites all the five different historical justifications for separating the legislative, executive, and judicial functions of government.

African constitutional engineers providing for a separation of powers in the new constitutional designs were guided by the constitutional traditions that were imposed during the colonial period. In order to better understand the African approaches, it is necessary to have a brief look at the Western models on which they are based.

## 3. Models of Separation of Powers that Influenced African Approaches

The models of separation of powers adopted by the two most active colonial powers in Africa, the British and the French, have been the dominant influence on the continent. Two points must be noted though. First, the British approach was very peculiar because it was operating in a country where there is no written constitution. In drafting the constitutions for its colonies, the British and later, African constitutional drafters borrowed from the US approach. The French approach was also peculiar but since it

[15] Anthony Wilfred Bradley and Keith D Ewing, *Constitutional and Administrative Law* (15th edn, Pearson Education Ltd 2011) 83.

[16] For a full discussion of this, see the two works of Gwyn (nn 7 and 8).

was in many respects similar to the approach adopted in many civilian jurisdictions in Europe, the model was adopted not merely by Francophone but also Hispanophone and Lusophone African countries. The second point to note is that WB Gwyn has abstracted from historical experience a threefold classification into which modern governments that have adopted the doctrine of separation of powers can be classified.[17] The first is the American system, the model and prototype of presidential government. This model is generally regarded as having gone farther than any other in embodying the fundamentals of the doctrine of separation of powers. The second type is the British parliamentary or Westminster model. This model appears to contradict the doctrine by fusing or concentrating powers. The third type, which is now more of historical interest than anything else, is the assembly or convention government that can be traced to England during the interregnum and France in the 1870s. There are however hybrids which combine elements of the first two models, the most prominent of which is the French Fifth Republic constitution of 1958 model. It combines elements of a strong and elected president with a parliamentary system. We will now briefly highlight some salient features of the American presidential system, the British parliamentary system, and the French hybrid system as a backdrop against which to understand the African approaches.

As noted earlier, the nature, role, and relevance of the doctrine of separation of powers remains a matter of considerable controversy especially amongst those scholars who consider it as irrelevant and obsolete. The purpose of this section is not to review these doctrinal debates within the different models but rather to capture the essence of how it operates within that system.

### 3.1 The American presidential system

The US model of the separation of powers comes closest to a 'pure system'. Unlike in most other countries, the doctrine of separation of powers is clearly expressed in the US constitution of 1787. Article I vests the legislative powers in Congress, consisting of the House of Representative and the Senate, and Article II vests the executive powers in the president, whilst Article III confers judicial powers in the Supreme Court and such other lower courts that may be established by Congress. The president is elected separately from Congress for a fixed term of four years and may therefore be from a different party than that which has a majority in either or both Houses of Congress. He cannot however, use the threat of dissolution to make Congress cooperate with him.

In spite of the apparently emphatic and in some instances, unqualified terms in which the doctrine of separation of powers is expressed in the US constitution, it is clear from even a cursory examination of the relevant provisions that the regime contemplated is far from being one of a rigid separation of powers. This is manifested in several ways with respect to each of the three branches of government.

With respect to the executive, the president as head of the executive, cannot sit or vote in Congress. He has no direct power to initiate bills but he may recommend

[17] Gwyn (n 8) 2.

legislation in his message to Congress but he cannot compel it to carry out his recommendations. He can also exercise some limited control over the legislative function through his right to veto legislation but this can be overridden by a two-thirds vote in both Houses. The vice-president is the only member of the executive who as president of the Senate is empowered to vote when they are equally divided and in this way exercise some limited legislative powers. The president also exercises some control over the judiciary in criminal cases by his power to grant reprieves and pardons for federal offences. The president is not directly responsible to Congress for his conduct of affairs and is normally irremovable. However, he could be removed from office by the process of impeachment by Senate for certain specified crimes which include treason, bribery, and other high crimes.

As regards legislative power, Congress controls the executive in its exercise of the legislative powers to amend or repeal statutes that had authorized particular executive action. Senate controls the executive in its right to approve treaties negotiated by the president as well as its right to approve appointments by the president of ambassadors, judges, and other senior officers. Each House has the right to punish its own members for contempt, thus exercising some form of judicial powers. The Senate is allocated additional judicial powers, with the sole power to try impeachments.

As concerns the judicial power, although the judiciary has not been allocated specific or general supervisory powers over the executive, it is able to use its general equitable jurisdiction to issue mandamus against executive officers to ensure that they perform their constitutional duties. Perhaps the most important judicial check on executive action is the judicial review of executive action to ensure compliance with due process of the law. The judiciary also controls legislative action through its power to declare laws unconstitutional.[18]

The US constitution therefore, instead of isolating each branch of government from the other two, provides an elaborate system of checks and balances. In the words of James Madison, in *The Federalist*:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying, 'There can be no liberty where the legislative and executive powers are united in the same person,' or 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this; that where the *whole* power of another department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free government are subverted.[19]

The US model of separation of powers is constructed around the 'open recognition that particular functions belong primarily to a given organ whilst at the same time superimposing a power of limited interference by another organ in order to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic

[18] See the famous judgment of Chief Justice Marshall in *Marbury v Madison* 1 Cranch 5 (US) 137 (1803).
[19] No 47, 323–8.

manner'.[20] Nevertheless, it is worthwhile noting the views of some, like Bruce Ackerman, an eminent American constitutionalist, who argues that the institutional dynamics of the last half-century have transformed the American presidency into a potential platform for political extremism and lawlessness. He cites events such as Watergate, Iran-Contra, and the War on Terror as symptoms of deeper pathologies that have resulted from presidential power-grabs and the centralization of power in the White House.[21] Although views differ widely as to whether the American model is ideal for adoption by other countries,[22] there are many features of it that have been adopted in mainly Anglophone Africa.

### 3.2 The British parliamentary system

Like the United States, the three branches of government exist in Britain. However, the extensive fusion and overlapping between the authorities in which the powers are vested has led many to question whether the doctrine of separation of powers is really a feature of the British constitutional system. In fact, due to the fusion or concentration of legislative and executive powers, there is no strict separation of powers in Britain on the scale provided for in the US constitution. The 2005 constitutional reforms did no more than reduce the mixture of powers, especially between the legislature and the judiciary. The extent of the separation of powers on the British constitutional system can be seen from three perspectives.

First, is the relationship between the legislature and the executive. The Queen, who is nominally the head of the executive, is an integral part of parliament. The prime minister (who is the head of government) and ministers who are all part of the executive must by convention be members of one or the other House of Parliament.[23] Parliament controls the executive in that it can oust a government by withdrawing support for it. Other forms of parliamentary control over the executive include question time, select committees, adjournment of debates, and opposition days. The executive sometimes exercises considerable legislative functions through the making of statutory instruments based on powers vested in it by Acts of Parliament. Such extensive fusion negates the distinction between the two. It has been strongly argued that 'Government and Parliament, however closely intertwined and harmonized, are still separate and independent entities, fulfilling the two distinct functions of leadership, direction and command on the one hand, and of critical discussion and examination on the other'.[24] Nevertheless, this system, especially where there is a

[20] See Jane Blessley, *Constitutional Law Textbook* (HLT Publications 1990) 18.

[21] See Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press 2010), but see also Eric Posner, 'Eric Posner Reviews Ackerman's "Decline and Fall of the American Republic"' (*The New Republic* 20 October 2010) <http://www.law.uchicago.edu/news/eric-posner-reviews-ackermans-decline-and-fall-american-republic> accessed 22 April 2015, who argues, quite plausibly that Ackerman's case against a system of executive primacy in the United States is exaggerated.

[22] See, for example, Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633–725.

[23] The House of Commons Disqualification Act 1975 limits the number of ministers who may sit in the House of Commons to ninety-five, which is about 15% of the total number of members of parliament.

[24] Cited in Bradley and Ewing (n 15) 84.

government with a strong parliamentary majority, considerably weakens executive accountability to parliament.

From the perspective of the relationship between the executive and the judiciary, the extent of separation between the two has improved since the coming into force of the Constitutional Reform Act 2005. The Lord Chancellor has lost his judicial role but as Secretary of State for Justice, remains a member of cabinet.[25] The executive exercises some control over the judiciary through the appointment of its members. However, the independence of judges of the superior courts is protected since the Act of Settlement of 1700 which provides that judges hold office during good behaviour and not at the pleasure of the executive. On the other hand, the courts exercise considerable control over the executive by protecting citizens against unlawful acts of government agencies and officials and if proper application is made by an aggrieved citizen, review executive acts for conformity with the law.[26]

Finally, the relationship between the judiciary and the legislature has changed considerably since the Constitutional Reforms Act 2005, which ended the right of Law Lords to receive life peerages and thus sit in the House of Lords. Although parliament may control the judiciary by way of legislation affecting the judiciary, the fact that judicial salaries are permanently authorized deprives parliament of an important opportunity of annually reviewing and possibly criticizing judges. Parliament may remove superior court judges after an address by the Crown to both Houses. Although the judiciary and the legislature do not generally exercise each other's functions, and the doctrine of legislative supremacy denies courts the power to review the validity of legislation, judges do exercise some law-making function in the process of interpreting and applying the law. But the effect of any court decision may be altered by parliament both prospectively, and if necessary, retrospectively. Furthermore, because of the common law doctrine of judicial precedent, the judicial function of declaring and applying the law has a quasi-legislative effect. As a result of British membership of the European Union, the courts may 'disapply' an Act of Parliament which clashes with rights in Community law. Under the Human Rights Act 1998, the courts may also declare an Act of Parliament to be inconsistent with the European Convention on Human Rights (ECHR) but have no powers to refuse to apply it.

In the final analysis, the absence of a written constitution setting this out means that there is no formal separation of powers in Britain. The close relationship between the legislative and the executive also means that there is no strict or effective separation of powers between the two. Nevertheless, there remains a clear distinction between the legislative and executive function. There is also an effective separation of the judiciary from the other two. Professor Wade has argued that the doctrine of separation of powers in Britain means nothing more than an independent judiciary.[27] The crux of

[25] In fact, prior to the 2005 constitutional reforms, the Lord Chancellor belonged to each of the three branches of government.

[26] See Bradley and Ewing (n 15) 84–8.

[27] See Blessley (n 20) 18. In fact, Reginald Parker, 'Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy' (1958) 12 *Rutgers Law Review* 450, has argued that effective separation of powers in England dates from the passage of a statute making judges removable from office only by impeachment by parliament for misconduct.

the British conception of the doctrine of separation of powers is that parliament, the executive, and the judiciary each have their distinct and largely exclusive domain and the circumstances where one exercises the functions of the other are the exception and are dictated by practical necessity.[28]

### 3.3 The French hybrid

French practice of the doctrine of separation of powers is in many respects a shadow of what was formulated by Montesquieu and embraced with such relish by French revolutionaries and captured in the famous article 16 of the 1789 Declaration of the Rights of Man and of the Citizen. In fact, the French approach enshrined in the present 1958 constitution of the Fifth French Republic is markedly different from both the US and British models. In spite of constitutional reforms in 2008 that tried to improve many aspects of the system, it remains essentially a parliamentary system that provides for close 'collaboration' between the executive and the legislature rather than a strict separation of powers. The elements of parliamentarism include a two-headed executive, the collective political responsibility of government to parliament, and the right of government to dissolve the lower chamber of parliament. However, the President of the Republic plays a role that is hardly typical of a parliamentary regime. We will limit this discussion to noting a few peculiarities of this system of separation of powers.

The most distinctive feature of the French system is the position of the judiciary. This has a long and strong historical foundation. The reputation of royal courts or *Parlements* before the French revolution was so bad that one of the first steps taken by the revolutionaries was to weaken the powers of these *Parlements*. This was done by the famous Law of 16–24 August 1790, partly inspired by Montesquieu's concepts of the separation of powers. This law precludes ordinary courts from interfering with the work of government, and means that an ordinary citizen aggrieved by some government action can only seek a remedy before the administrative courts, which to some extent exercise not only judicial but sometimes administrative and legislative functions. The most serious effect of the somewhat obsessive French distrust of judges was that until the 2008 constitutional reforms, the rather limited control of the constitutionality of laws was exercised, not by a judicial but rather by a quasi-administrative body, the Constitutional Council.[29]

The most distinctive aspect of the French doctrine is the dominance of the executive over the other two branches of government. An example of this is that instead of

[28] See Lord Mustill, in *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 567 put is thus: 'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by laws. The courts interpret the laws, and see that they are obeyed.'

[29] See generally Francois Luchaire, 'Le Conseil Constitutionnel est-il une Juridiction?' (1979) *Revue de Droit Public* (1979) 30; Michael Davis, 'The Law/Politics Distinction, the French Conseil Constitutionnel, and the US Supreme Court' (1986) 34 *American Journal of Comparative Law* 45–92; and for an African perspective, Charles Manga Fombad, 'The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?' (1998) 42 *Journal of African Law* 172.

defining the areas in which the executive is empowered to promulgate regulations on its own initiative, it defines the field of legislative competence of parliament. Outside the field of parliament's competence as defined in article 34 of the constitution, the executive enjoys, by virtue of article 37, the competence to legislate on all other matters. The effect of this is that residuary legislative power lies not with parliament, as is the case in the United States and Britain, but rather with the executive.

Another dimension of this executive dominance is underscored by article 64 of the constitution. It states that the 'President of the Republic shall be the guarantor of the independence of the judicial authority. He shall be *assisted* by the High Council of the Judiciary [Conseil Supérieur de la Magistrature or CSM]'. This clearly suggests that the courts are not on the same par as the executive, which the President of the Republic is part of, but rather below. This is reinforced by article 65, which makes the President of the Republic head of the CSM, and his Minister of Justice, deputy head of the body that is responsible for recommending judicial appointments as well as enforcing judicial discipline. The subordination of the judiciary is completed by stating that the CSM only 'assists' the president. This French deviation has been explained by the suggestion that the 1958 constitution did not envisage the French president as an executive officer but rather as a person outside the classic tripartite division of legislative, executive, and judiciary.[30] Although the 2008 revision of article 65 now excludes the president and his Minister of Justice from the High Council of the Judiciary, executive dominance of the judiciary, even if only indirectly, remains a prominent feature of the separation of powers under the French Gaullist constitution.

An important feature of the French system is that any executive position is incompatible with a seat in parliament and vice versa.[31] Nevertheless, with the judiciary largely subordinated to the executive, and with extensive law-making powers given to the executive, the doctrine of separation of powers in France means little more than the distinction between the legislative and executive branches of government. As a form of parliamentary democracy, this system basically provides for such close cooperation between the executive and legislative branches that renders any meaningful checks and balances between them ineffectual.

## 3.4 Some critical aspects of the doctrine of separation of powers and the impact of the diverse influences on Africa

Three important issues arise from the preceding discussion. The first is whether one can infer a general understanding of what separation of powers actually means. And the second is the way in which these Western influences have affected trends and developments in Africa.

On the first question, it bears repeating that there remains no generally accepted meaning of the doctrine of separation of powers. Nevertheless there are certain aspects

[30] See John Rohr, *Founding Republics in France and America: A Study in Constitutional Governance* (University Press of Kansas 1995) 89–93.

[31] It must however be pointed out that until fairly recently, this so-called *cumul des mandats* principle was allowed in France if it related to a local administrative or executive position.

of it that are widely accepted even if there is no unanimity in how to achieve this. First, the overriding goal of preventing tyrannical and arbitrary government appears to be generally accepted. All the models try to do this by preventing a concentration of powers. But the history of modern constitutionalism, particularly the experiences of France between the Fourth and Fifth Republics shows how difficult it is in constitutional design to achieve a balance which ensures that each of the three branches has no more powers than it needs to function properly and effectively.[32]

Second, it is clear that separation of powers does not mean a rigid compartmentalization of powers within the different branches of government. In fact, if this were to happen, it could very well paralyze government and lead to anarchy. The three models we have examined approach the matter in different ways. The American approach is premised on the recognition that certain core functions must be exercised primarily by a particular branch of government but with the other two branches allowed to interfere in a limited manner to prevent that branch exercising its acknowledged functions in an abusive and arbitrary manner. It has been largely shaped by the American colonial experience, the war of independence, and the desire by the founding fathers of the constitution to prevent some of what they perceived as the excesses of the British system. By contrast, the British system is premised on a mutual dependence rather than independence between the executive and the legislature backed by a strong and independent judiciary. The French model, which has elements of both the British and the US model, is marked by a strong and dominant executive branch that overshadows the other two branches. The French approach has also been largely shaped by its history; the Gallic fear of 'government by judges' and the bitter lessons of the Fourth Republic constitution that provided a recipe for governmental instability. The common denominator amongst the three approaches is the desire, not to prevent interference but rather such interference that would serve as a means of promoting accountability, transparency, and good governance. In other words, each branch should control and check the other in the exercise of their respective powers on the principle that *le pouvoir arrête le pouvoir*.

A third point to note is that the French easily transplanted their model to Africa and it was widely adopted with few changes. By contrast, the British had to adjust and adapt the model which they transplanted to Africa to the realities of a written constitution. As a result of this, many features of the American model were incorporated into the British model that was copied in Africa, and thus what operates in Anglophone Africa can more appropriately be referred to as an Anglo-American model. In spite of the extensive constitutional reforms carried out in the post-1990 period, the manner in which the doctrine of separation of powers was adopted has largely remained within the inherited colonial models. We could therefore talk of an Anglo-American model in Anglophone Africa and the French model in Francophone Africa with many civilian aspects of this model adopted in Hispanophone and Lusophone Africa. We shall not turn to see how these were adopted and in doing so, three critical issues which,

[32] For the travails of the French during this period, see Samuel E Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions* (Clarendon Press 1995) 8–9.

arguably reflect the three ways in which separation of powers is generally understood, will form the basis of the analysis, viz:

i) The extent to which there is a fusion or admixture of power;
ii) The extent to which one branch intervenes and controls the work of the other; and
iii) The extent to which one branch performs the functions of the other.[33]

## 4. The Anglo-American Influence in Anglophone Africa

This section will look at the incorporation of separation of powers in the present constitutions of Anglophone African states. This will be done from three perspectives viz, the relationship between the executive and the legislature, followed by the relationship between the executive and the judiciary, and ending with the relationship between the judiciary and the legislature. In each case, the three issues raised above will be examined, that is, whether there is a fusion of power, the nature and extent of control which each branch exercises over the other, and the extent to which each branch performs the functions of the other. Having noted that the goal of separating the branches is to enable limited interference by each in the other's functions in order to ensure accountability and transparency, the purpose of this section is to see to what extent this has been made possible.

To put this overview in its proper perspective, two preliminary points need to be made. The first point relates to the focus; one cannot pretend to cover all the countries, hence the focus will be on the constitutions of five Anglophone countries which have been carefully selected for several reasons. Botswana, with its 1966 independence constitution still in force, is selected because it shows a typical example of a post-independence Westminster-crafted constitution. Ghana's 1992 constitution is selected as an example of the first post-1990 new era constitutions, whilst South Africa's 1996 constitution is chosen because it is still in many respects one of the most modern and liberal constitutions on the continent. Kenya's 2010 and Zimbabwe's 2013 constitutions have also been selected as examples of the latest constitutional designs. These two constitutions, unlike most other post-1990 constitutions, and very much like the South African constitution, try to make a dramatic break with the past.[34] The second point to note is that the purpose of this overview is to indicate general trends. Inevitably, there are differences in details which are often dictated not only by the peculiarities of history and experience but also the political system and type of government (for instance whether it is a federal or centralized system, and whether it is a presidential, semi-presidential, or parliamentary system). There is no intention to minimize or underestimate the possible significance of these differences but as will be shown later, there are many overriding common features which justify them being considered as displaying peculiar features of a model of separation of powers.

[33] See Bradley and Ewing (n 15) 83.
[34] It is worth noting that some other Anglophone countries like Malawi and Zambia which adopted new constitutions in the 1990s are back at it again.

## 4.1 The executive and legislative branches

The executive is the most important and most powerful of the three branches of government and operates more or less as the engine of the state. In all systems of government, it is usually given primary responsibility for executing and carrying out state functions. Because of the enormous powers that it wields there is need to ensure that these powers are not abused. Constitutional governance in Africa had been systematically undermined since independence by the ability of executives, especially presidents, to abuse their powers with little regard to the weak constitutional constraints that were contained in the independence constitutions. Generally, the legislative and judicial branches on the continent were relatively too weak to check against regular executive lawlessness.[35]

In Anglophone Africa, the post-1990 constitutional reformers in designing constitutions that entrenched constitutionalism paid particular attention to the issue of separation of powers. To reduce the risks of the dictatorships of the past, provisions were introduced which tried to define and limit the powers of the executive and also ensure that they operate within the bounds of these limitations. This required a careful balance in the division of powers to enable the executive to have enough powers to discharge their mandate without too many inhibitive and paralyzing restrictions whilst avoiding their having too much powers which could be abused to the detriment of the citizens. This delicate balancing act meant mixing of executive and legislative functions as part of the process of providing checks and balances. Although this has resulted in the same persons sometimes forming part of the executive and legislative branches, this was counterbalanced by various possibilities provided for each of the two branches to control and thus check each other. The manner in which this has been done will now be examined.

One of the typical aspects of the British model which was copied by Anglophone Africa is the fusion of executive and legislative functions. For example, under section 86(1) of the South African constitution of 1996, it is stated that 'at its first sitting after election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or man from among its members to be the President'.[36] According to section 91(3), the president, in constituting his cabinet, must select the deputy president and any number of ministers from amongst members of the National Assembly but as in Britain, the provision provides that the president 'may select no more than two Ministers from outside the Assembly'. This approach has been followed by most Anglophone countries,[37] but recently Kenya in its 2010 constitution departed from this. In fact, article 152(3) expressly states that, 'a Cabinet Secretary [that is, Minister] shall not be a Member of Parliament'.[38]

[35] See further, Charles Manga Fombad and Enyinna Nwauche, 'Africa's Imperial Presidents: Immunity, Impunity and Accountability' (2012) 5 *African Journal of Legal Studies* 91.

[36] But once elected, according to s 87 of the constitution, the president ceases to be a member of the National Assembly.

[37] See, for example, ss 39, 42, and 43 of the Botswana constitution of 1966; arts 78(1) and 79(2) of the constitution of Ghana of 1992; and s 104(3) of the Zimbabwe constitution of 2013.

[38] Patrick Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press 2014) 457 explain the reasons for this change thus: 'The fact that Cabinet

The second issue is the extent to which each of these two branches control and check each other. There are a number of ways in which parliament may intervene to check any abuses of power by the executive in Anglophone Africa. In this regard, most constitutions give parliament the power to initiate the process for impeaching the president, the deputy president, and ministers,[39] for reviewing and approving the declaration of war,[40] for approving the appointment of ministers and other senior government officials,[41] and for holding ministers individually and collectively responsible in a process that could lead to their resignation or dismissal.[42] The ability of parliament to hold government accountable is one of the most important ways of preventing arbitrary government and dictatorships. The mechanisms provided in Anglophone constitutions are weak for two main reasons. First, as a practical reality which is reflected as well in advanced democracies, once a government has a majority in parliament, members of the ruling party will be very reluctant to openly criticize the government or vote against it.[43] This is particularly so when the ruling party is a dominant party. A recent study has shown that as many as twenty-nine (54 per cent) of the countries on the continent are ruled by dominant parties, an overwhelming majority of which correspond with the hegemonic party pattern.[44] Second, a problem peculiar to this mixed system is the potential for disruption which mixing legislative and executive positions can cause. For example, in Botswana, the 1966 constitution provides for forty-four[45] members of parliament.[46] With a total of twenty-two ministers and assistant ministers,[47] it therefore means that the executive effectively controls half the number of members of parliament and the principle of collective responsibility guarantees that every motion moved by the government, regardless of the views of either the opposition or the backbench, will be approved. There is no statutory limit to the number of ministers who should come from parliament, as there is in Britain. As a result of this, parliament has had to be adjourned on a number of occasions because

Secretaries ... are not appointed from among members of Parliament enhances separation of powers and gives the President the chance to appoint expert managers who may help him discharge the executive functions more efficiently. According to the CKRC this change is meant to ensure the Ministers ... are qualified for the portfolios assigned to them, and that they are not being burdened with constituency business or suffer conflict between national and constituency interests. Thus, they would be able to devote all their time and energies to their ministries.'

[39] See, for example, arts 95(5) and 144–50 of the 2010 constitution of Kenya; s 89 of the constitution of the Republic of South Africa, 1996; and s 97 of the 2013 constitution of Zimbabwe.

[40] See art 95(6) of the 2010 constitution of Kenya and s 111 of the 2013 constitution of Zimbabwe.

[41] See art 132(2) of the 2010 constitution of Kenya.

[42] See art 152 of the 2010 constitution of Kenya; ss 92(2) and 101–2 of the constitution of the Republic of South Africa, 1996; s 109 of the 2013 constitution of Zimbabwe.

[43] See Bradley and Ewing (n 15) 84.

[44] See further, Charles Manga Fombad, 'Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalisation of the Rights of Political Parties' (2015) 48 *Verfassung in Recht und Übersee* 3.

[45] Section 58 of the constitution was amended by the Constitution (Amendment) Act, 2002, which now provides for a total of sixty-one members of parliament, consisting of fifty-seven elected members and four specially appointed members.

[46] This excludes the Attorney-General who is an *ex officio* member of parliament, but has no vote. See s 58 of the constitution.

[47] There are sixteen ministers and six assistant ministers.

there was no quorum due to the absence of ministers who were away on official engagements.[48] The negative impact of ministerial absence on parliamentary work has also occurred in countries with large parliaments such as South Africa.[49] On the other hand, the executive is also able to exercise control over parliament in Anglophone Africa in at least two main ways. Under all constitutions, a bill adopted in parliament only becomes law after it has received presidential assent.[50] Although where the government holds a majority in parliament, presidential assent is almost automatic, it can however be refused. Under section 87 of the 1966 Botswana constitution, in the unlikely event that the president withholds his assent, the bill will be returned to Parliament who must resubmit it within six months. When returned to the president, he must assent within twenty-one days or dissolve parliament. A second form of control is by way of dissolution. Besides occurring when, as in the case of Botswana, the president refuses to assent to a bill or there is disagreement between the president and parliament over a bill, parliament may also in certain circumstances pass a resolution to dissolve.[51]

Finally, there is the question of the extent to which these two branches exercise each other's functions. This is where the powerful position of the executive vis-à-vis the other branches is manifest. Most Anglophone constitutions usually confer law-making powers on the legislature. It is often worded in language that gives it discretion to delegate these powers. For example, article 94(1) of the 2010 constitution of Kenya, after declaring that the legislative authority is vested in parliament, adds in paragraph 4 that 'no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under the authority conferred by this Constitution or by legislation'.[52] The most extensive manner in which the executive performs the functions of the legislature is in the making of secondary legislation when directly or indirectly authorized to do so by the legislature. In fact, the bulk of legislation in Anglophone jurisdictions is in the form of subsidiary legislation and far exceeds the laws enacted by parliament in the form of Acts of Parliament. Subsidiary legislation may take diverse forms such as, proclamations, regulations, rules, rules of court, orders, bye-laws, or any other instrument made directly or indirectly under any enactment and having legislative effect. For a number of reasons, delegated legislation has become an inevitable feature of modern governments. First, the complex and protracted nature of the law-making process and the pressure upon parliamentary time, risks causing the legislative machinery to break down if parliament attempted to enact absolutely every piece of legislation by itself. Second, legislation on certain technical topics necessitates prior consultations with experts and stakeholders; an

[48] See 'Live parliamentary proceedings on TV will be costly' *Daily News* (Durban, 5 November 2003) 2.

[49] See Linda Ensor, 'Divisive Bill Stymied by Lack of MP's Quorum' (*Business Day* 21 June 2013) <http://www.bdlive.co.za/national/labour/2013/06/21/divisive-bill-stymied-by-lack-of-mps-quorum> accessed 22 April 2015.

[50] See, for example, art 106 of the constitution of Ghana of 1992; and s 79 of the constitution of the Republic of South Africa, 1996.

[51] See, for example, s 50 of the constitution of the Republic of South Africa, 1889; and s 143 of the 2013 constitution of Zimbabwe.

[52] See also s 86 of the 1966 constitution of Botswana; art 93(2) of the 1992 constitution of Ghana; and s 43 of the constitution of the Republic of South Africa, 1996.

exercise which is best done by members of the executive. Third, parliament cannot foresee every administrative or other difficulty that may arise when it enacts legislation. It therefore makes sense to allow the executive to intervene and make changes when necessary. It will be far faster than the complicated processes of amending an Act to achieve the same purpose. The challenge however is to reconcile the whole concept of delegated legislation with the normal process of democratic consultations, scrutiny, and control to which a normal bill is subjected before it becomes law. Some parliamentary control is usually required. In many jurisdictions, it is required that all delegated legislation should be laid down before parliament. Such parliamentary supervision is hardly ever effective because either the legislation is not laid down before parliament or if it is done, the members are too busy with other matters to critically scrutinize this. One other important point to note is that although law-making remains the principal function of parliament, the reality is that the whole process and in fact, the most decisive stage of initiating bills is usually completely controlled and driven by the executive. It is clear from this that the executive not only exercises the functions of, but also effectively controls parliament. We shall now see how the executive relates to the judiciary.

## 4.2 The executive and judicial branches

Guided by the same three considerations, we shall look at the relationship between the executive and the judicial branches in Anglophone Africa. The first issue is whether the same persons form part of the two branches. The only possible instance of this, is the role played by the Director of Public Prosecutions (DPP) or the Attorney-General (AG), in those jurisdictions where the latter plays the role of the DPP or acts as the hierarchical superior of the AG.[53] Under most Anglophone constitutions the AG is a member of cabinet, which is an executive position but also either plays the role of DPP or directly supervises and controls the DPP, who as the person responsible for enforcing the criminal law plays a quasi-judicial role. The anomalous position of the AG and DPP as part of the executive and the judiciary has frequently raised questions in most jurisdictions of the independence of the prosecuting authorities from political interference and manipulation.

It is the possible control which both the executive and the judiciary exercise over each other that is perhaps one of the fundamental aspects of the doctrine of separation of powers. As regards the control which the executive exercises, the ability of the executive to intervene, especially in judicial appointments under the constitutions of most Anglophone African countries, has often been structured in a manner that will protect the independence of the judiciary. Judicial appointments of superior court judges are usually made by the president as head of the executive based on the recommendations made by the Judicial Service Commission (JSC).[54] Some of these

[53] See, for example, ss 51 and 51A of the Botswana constitution of 1966; art 88 of the 1992 constitution of Ghana; art 156 of the Kenyan constitution of 2010; s 179(5) of the constitution of the Republic of South Africa, 1996; and s 114 of the constitution of Zimbabwe of 2013.

[54] See, for example, ss 103–4 of the 1966 constitution of Botswana, arts 144–53 of the 1992 constitution of Ghana; art 166 of the 2010 constitution of Kenya; s 174 of the constitution of the Republic of South Africa, 1996; and s 180 of the 2013 constitution of Zimbabwe.

constitutions, especially the most recent ones, contain principles protecting the judiciary from political interference. The most elaborate example of this is contained in section 164 of the 2013 constitution of Zimbabwe which states:

(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.
(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—
 (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
 (b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.
(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.[55]

Other measures designed to enhance judicial independence include the payment of judicial salaries from the Consolidated Fund and elaborate and transparent procedures for the removal of judges. There is however still some scope for political interference due to a number of factors. First, under some constitutions, such as that of Botswana and South Africa, the president inexplicably has far wider discretion in the appointment of the heads of the highest courts than he has in appointing ordinary judges.[56] Second, the ability of the JSC to operate as an independent and impartial body that recommends or otherwise takes its decisions based on the merits and ability of particular persons to discharge their responsibility independently and competently often depends on the number of members of this body that are appointed directly or indirectly by the executive. Where the majority are appointed directly or indirectly by the executive, this provides considerable scope for executive interference with the process.[57] On the other hand, judicial control over the executive has become one of the most crucial features of any modern constitutional democracy. This judicial control over executive action is regularly exercised in order to protect citizens against any unlawful acts of government officials, government departments, or other public

[55] Also see art 127(2) of the 1992 constitution of Ghana and s 165 of the constitution of the Republic of South Africa, 1996.

[56] Thus, under ss 96(1) and 100(1) of the 1966 constitution of Botswana, the president alone appoints the Chief Justice of the High Court and the Judge President of the Court of Appeal without consulting or obtaining the advice of the JSC as he does in the case of ordinary judges. Similarly, s 174(3) of the constitution of the Republic of South Africa, 1996, empowers the president to appoint the Chief Justice and the Deputy Chief Justice of the Constitutional Court. All he needs to do before making these appointments is to consult the JSC and the leaders of the parties represented in the National Assembly. He is not bound by any views or advice that they may give.

[57] Some of these issues are discussed in Charles Manga Fombad, 'Appointment of Constitutional Adjudicators in Africa: Some Perspectives on How Different Systems Yield Similar Outcomes' (2014) *Journal of Legal Pluralism and Unofficial Law* 249.

authorities and ensures that these bodies perform their statutory duties in conformity with the law. This often brings the judiciary into conflict with the executive especially when the latter feel that the judiciary has intervened in a non-justiciable policy matter or so-called political issue which the courts are ill equipped to deal with or breached the doctrine of separation of powers.[58]

Finally, there are certain areas where the executive and the judiciary exercise each other's powers. In the case of executive exercise of judicial powers, this occurs in two main instances under Anglophone African constitutions. The first instance of this occurs during the exercise of presidential prerogative of mercy.[59] These powers enable the president to:

i) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions:
ii) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
iii) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and
iv) remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the government on account of any offence.[60]

Generally, in exercising these powers the president may sometimes consult his cabinet or at his discretion consult an Advisory Committee on the Prerogative of Mercy. The exercise of the prerogative of mercy amounts to a very serious interference with the judicial process and in principle should only be exercised in very exceptional and unusual circumstances where there is good cause, for example, where some new evidence may have emerged which cast doubts on the decision in a case.

[58] In South Africa, there have been many cases in which the executive has claimed that the courts have violated the principles of separation of powers. See, for example, in *Minister of Health v Treatment Action Group (TAC) (No 2)* 2002 (5) SA 721 (CC), where the Constitutional Court of South Africa was faced with a highly sensitive political case in which the applicants contested the state's policy of selecting test sites for the provision of anti-retroviral drugs to HIV-positive mothers and their newborn children and sought the right to these services for every child. The minister resisted the application, questioning the constitutional obligation of government to provide an 'effective, comprehensive and progressive programme' such as that argued for by TAC. The Court, whilst acknowledging that 'courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences', refused to be swayed by the state's argument that it should confine itself to a declaratory judgment. It decided that it was under a duty to grant effective remedies in all cases which included in this case an order for mandamus and the exercise of supervisory jurisdiction. Similar arguments that judicial intervention would breach the separation of powers was also dismissed by the South African Constitutional Court in *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); and *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC). Also see Enyinna Nwauche, 'Is the End Near for the Political Question Doctrine in Nigeria?' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (PULP 2010) 31–60.

[59] See, for example, ss 53–5 of the 1966 constitution of Botswana; art 72(1) of the 1992 constitution of Ghana; art 133(1) of the 2010 constitution of Kenya; s 84(j) of the constitution of the Republic of South Africa, 1996; and s 112 of the 2013 constitution of Zimbabwe.

[60] Section 53 of the constitution of Botswana.

The second area in which the executive has exercised some judicial functions is in the common practice of creating administrative tribunals and other disciplinary bodies and conferring on them the right to determine matters that traditionally come within the jurisdiction of courts of law. Many of the disputes that arise within the public service today are not decided by litigation in the ordinary courts but rather by administrative bodies that operate within the executive. The number and powers of these commissions have increased over the years as more efforts are made to render the executive more transparent and accountable. The most common example of these are the myriad of administrative tribunals which have the powers to undertake disciplinary proceedings and impose sanctions against public servants. Numerous commissions have been provided for under the 2010 constitution of Kenya and the 2013 constitution of Zimbabwe. A distinction however has to be made between those which have a purely administrative function,[61] others such as the Public Service Commissions which play a quasi-judicial role[62]and a third category of commissions, or more accurately, independent institutions, such as the Independent Electoral Commissions and Human Rights Commissions which we will discuss later.[63] In spite of this, it is a well-established common law principle that the courts of law have the powers to review the proceedings and decisions taken by these administrative bodies and tribunals to ensure that they do not exceed the powers that have been conferred and have acted in accordance with the ordinary rules of natural justice.[64] But in doing so, the courts would not exercise a discretion that has been exclusively reserved for these administrative bodies.[65]

Now turning to the judiciary exercising executive functions, this often occurs when judges and other members of the judiciary are appointed to discharge non-judicial functions that fall within the executive domain. This may take a permanent form or be of a temporary nature. A permanent form of this is the role usually conferred on judges, usually the Chief Justice, to act as a returning officer for purposes of the elections to the office of president. For example, under section 38(1) of the 1966 Botswana constitution, the Chief Justice is the returning officer for purposes of elections to the office of president.[66] He not only determines whether the constitution or any law relating to the election of the president under sections 32 and 35 has been complied with but also whether any person has been validly elected as president. Although it states that his

[61] Examples of these include the Police Service Commission, the Defense Forces Commission, and the Prisons and Correctional Service Commission provided for in ss 211–31 of the 2013 Zimbabwe constitution.

[62] See, for example, ss 110 and 111 of the 1966 Botswana constitution and ss 24–32 of the Public Service Act, 1998 of Botswana.

[63] See Section 6.

[64] For an excellent discussion of this see Peter Cane, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010) 426–48; and also Lawrence Baxter, *Administrative Law* (Juta & Co 1984) 250–2.

[65] See, for example, the Botswana cases of *Gogannekgosi v Commissioner for Workmen's Compensation and Others* [1993] BLR 360; *The Attorney-General and Another v Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234.

[66] Also see s 86(2) of the constitution of the Republic of South Africa, 1996 which confers similar functions on the Chief Justice.

'decision shall not be questioned in any court', this does not deprive the High Court of its inherent powers to review and quash any decision arrived at, if there were procedural irregularities or the Chief Justice acted *ultra vires.* Other examples are where the Chief Justice is made as permanent chair of the JSC.[67] The most common and frequent use of judges to exercise executive functions is when they are appointed to preside over ad hoc commissions of inquiry or over bodies or groups required to investigate and submit reports on policy issues that will enable the executive to take important decisions. For example, article 278(3) of the 1992 constitution of Ghana specifically stipulates that the person appointed as sole commissioner or chair of the commission of inquiry must be a justice of a superior court or a person who has held such an office. Although it also mentions the possibility of a person who possesses special qualifications or knowledge in respect of the matter being investigated, it is however clear that there is a preference for judicial officers. Article 279 further underscores the quasi-judicial nature of the process by stating that the commission of inquiry shall have the powers, rights, and privileges of the High Court in matters such as enforcing attendance by witnesses and compelling the production of documents. Although the Ghanaian constitution goes further to expressly state that the findings of the commission are without prejudice to any appeal against or judicial review of the finding, this is however an inherent right to any party to the proceedings.[68]

The frequent use of judges, especially senior judges such as the Chief Justice, to perform some of these executive functions reflects an instinctive desire to seek persons whose independence and impartiality in handling matters of public concern is widely recognized and accepted. There is nevertheless, a danger, especially where this relates to tasks of an investigatory or controversial policy nature that may put the reputation and prestige of the judiciary in jeopardy.[69] Judges risk becoming publicly identified with the policies of the group or body concerned in the investigation or they may be put in a position of being seen as either critics or supporters of the government. There is also a risk that some judges' performance of these duties may be influenced by the expectation of some reward in the form of elevation to a higher judicial office. It could result in some confusion between the judicial and executive functions. For example, it is one thing for the constitution to say that the Chief Justice shall be the returning officer for presidential elections, and quite another to say that he alone has the authority to determine the validity of the president's election. Will this determination be based on his judgment as a returning officer, an administrative position or his judgment as a Chief Justice, a judicial position? One cannot lightly ignore the fact that in the two jurisdictions where this happens, Botswana and South Africa, the Chief Justice is appointed largely at the discretion of the president. Generally, commission of inquiry reports often have a tendency to produce and provoke dissension or criticism, which may undermine the prestige and respect of the judges involved or even the judiciary as a whole. Perhaps the most serious problem is that there is also a risk that a judge who is

[67] See, for example, s 178(1)(b) of the constitution of the Republic of South Africa, 1996; and s 189(2) of the 2013 constitution of Zimbabwe.

[68] See art 94(4) of the constitution of Ghana of 1992.

[69] See generally Vanderbilt (n 6) 118–19.

appointed to chair or participate in a commission, may upon the resumption of his regular duties adopt a position that will justify or defend the position he took when acting in the commission, especially if the matter were to come before the courts on judicial review. We will now turn to issues that arise from the relationship between the judiciary and the legislature.

## 4.3 The judicial and legislative branches

No person is allowed under any of the constitutions examined here to belong to both the legislative and judicial branches. It is however, the ability of each of these two branches to control each other and to exercise the functions of the other that raises interesting issues.

Generally, the legislature controls the judiciary in the sense that it makes the laws that regulate the judiciary. Under some Anglophone constitutions, the legislature also plays a role in the management of the judiciary through its membership of the JSC[70] but in some other situations, such control is even more direct by the requirement that judicial appointments, especially those of the Chief Justice and his deputy must be approved by parliament.[71] It would seem that if members of the legislature have a substantial presence on the JSC and are thus able to influence its recommendations, then there is no need for further parliamentary approval. Whilst recognizing the importance of legislative control, the issue of judicial independence appears to be an important preoccupation with Anglophone constitutional engineers. Thus, unlike other public servants, the fact that the salaries of judges are charged to the Consolidated Fund denies parliament an annual opportunity to discuss and criticize the activities of judges.[72] Although some of these constitutions go further to state that the salaries, allowances, and other benefits of judges shall not be reduced,[73] this does not mean that judicial salaries cannot be reviewed. The purpose of this principle is not so much to guard against reductions in salaries but rather to provide a predictable framework for ensuring that the salaries of judges are only adjusted where necessary to keep pace with that of other public servants in a manner that is not discriminatory against judges. This principle that tries to protect them from parliamentary pressure has been reinforced by the convention that protects judges from disparaging criticism in parliament. This does not prevent members of parliament, like ordinary citizens, from criticizing judges but rather to ensure that such criticisms must be fair and reasonable, and are not be made in a malicious manner that could bring the courts into disrepute.[74]

[70] See, for example, art 171(2)(h) of the 2010 constitution of Kenya; and s 178(1)(h) of the constitution of the Republic of South Africa, 1996.

[71] See, for example, art 144(1) and (2) of the 1992 constitution of Ghana; art 166(1)(a) of the 2010 constitution of Kenya. Under s 174(3) of the 1996 South African constitution, the president need only consult the leaders of parties represented in the National Assembly when appointing the Chief Justice and his deputy.

[72] As Alexander Hamilton explained in *The Federalist,* No 79, 'In the general course of human nature, a power over a man's subsistence amounts to a power over his will'. Examples of such provisions are art 127(4) of the 1992 constitution of Ghana; and s 188(3) of the 2013 Zimbabwe constitution.

[73] See art 127(5) of the 1992 constitution of Ghana; and s 188(4) of the 2013 constitution of Zimbabwe.

[74] See Horwirtz Ag J in *Re Editors of Botswana Gazette and Another* [1990] BLR 655, 657.

Insofar as the control of the judiciary over the legislature is concerned, the practice in Anglophone Africa is closer to that of the United States rather than that of Britain. As a result of its unwritten constitution, Britain is still subject, in many areas of the law, to the doctrine of legislative supremacy which denies the courts the power to review the validity of legislation. Anglophone constitutions in most cases expressly[75] or sometimes, implicitly[76] declare the constitution to be the supreme law of the land which is binding on every person, natural or juristic. These provisions usually go further to state that any law, whatever the form, which is inconsistent with or violates the constitution, is null and void to the extent of the invalidity. As a result, it is an exercise of ordinary judicial functions as well as a means of controlling the legislature for the courts to declare any law or secondary piece of legislation which violates the constitution as being therefore invalid and of no effect.[77] This however does not give the courts the powers to tamper with and nullify any part of the constitution.

Now looking at the extent to which the two branches exercise each other's powers, there are two main ways in which the judiciary in Anglophone Africa sometimes exercises the powers conferred on the legislature. The first, and probably the main way, is through the doctrine of binding precedent, which was received in Anglophone Africa, as part of the general reception of English law during the colonial era.[78] The judicial function of interpreting and applying the law has a quasi-legislative effect in that it creates precedents that must be followed in subsequent cases with similar facts. This process of 'judicial legislation' in both the common law and statutory interpretation contributes to the progressive development of the law.[79] As a result of its inherent flexibility, the doctrine of binding precedent has enabled the courts, through the process of judicial legislation to intervene in areas where the government has been unwilling to ask parliament to legislate or has been too slow to propose new measures.[80] The second instance when the judiciary has performed legislative functions has

[75] See, for example, art 1(2) of the 1992 constitution of Ghana, art 2(1), (3), and (4) of the 2010 constitution of Kenya, s 2 of the constitution of the Republic of South Africa, 1996 and s 2 of the 2013 constitution of Zimbabwe.

[76] See generally the 1966 constitution of Botswana. In affirming its supremacy, Maisels JP said in the Botswana case of *Desai & Another v State* [1984] BLR 14: 'The National Assembly is supreme only in the exercise of its legislative powers and these powers cannot override the rights and freedom of its citizens or other persons . . . which are entrenched in the Constitution.'

[77] See, for example, the Botswana case of *Petrus & Another v State* [1984] BLR14, where the Court of Appeal declared s 301(3) of the Criminal Procedure and Evidence Act, which provided for corporal punishment to be administered in a traditional manner using traditional instruments, void on the grounds that it infringed s 7 of the constitution, which prohibited torture, and inhuman or degrading punishment.

[78] See generally JH Pain, 'The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland' (1978) 11 *CILSA* 137–67; Andrew Edward Wilson Park, *The Sources of Nigerian Law* (Sweet & Maxwell 1972); AJGM Sanders, 'The Characteristic Features of Southern African Law' (1981) 14 *CILSA* 328; James Richard Crawford, 'The History and Nature of the Judicial System of Botswana, Lesotho and Swaziland: Introduction and the Superior Courts' (1969) 86 *South African Law Journal* 476, 485 and (1970) 87 *South African Law Journal* 76.

[79] As Lord Wilberforce put it in *British Railways Board* v *Herrington* [1972] AC 877, 921, 'the Common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do'.

[80] See, for example, the decision of the South African Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC). This case dealt with the highly sensitive issue of the death penalty which the apartheid regime had used extensively in its attempts to destroy the resistance to its inhumane system. The sensitivity of the

arisen where the legislature has expressly authorized the judiciary to legislate on certain matters. The common instance of this is where the constitution authorizes the courts or the Chief Justice to make rules with respect to the practice and procedure of the different courts.[81] This judicial intervention into the legislative domain has some advantages. It enables judges who are better placed, as legal experts to know the specific procedural problems to be solved and the various ways of solving them. It also enables these rules to be expeditiously amended as and when the need arises without having to go through the complex and protracted legislative process of amending legislation. Perhaps the most significant advantage of judicial rule-making here is that it helps to reinforce the independence of the judiciary. Nevertheless, these rules of court, like all other forms of subsidiary legislation, even though made by judges, must be made within the powers conferred on them by the constitution and any other enabling legislation.[82]

On the other hand, the instances of legislative intervention in the judicial domain are quite limited. One must assume that this must be out of a desire by the legislature to respect and preserve the prestige and independence of the judiciary. However, there are many ways and circumstances when parliament can intervene and itself, directly or indirectly, perform judicial functions. The most obvious and frequent instance of this is where there is some legal uncertainly or controversy over an issue. Parliament may intervene through an enactment that may be declaratory or expository of the law. Such a declaratory statute is usually designed to end any doubts as to what the law is and declare what the law is or is supposed to be. These declaratory statutes are generally prospective in nature but may also have a retrospective effect. However, most constitutions prohibit parliament from enacting penal legislation which has a retrospective effect.[83] As a general principle, a curative Act of Parliament, for example, legislation that is designed to change the decision in a particular case or confirm judicial proceedings that are otherwise void for lack of jurisdiction, would be an unwarranted

matter was compounded by the fact that although the African National Congress (ANC) had long adopted an abolitionist stance on the matter, during the discussions leading to the new constitution in 1993, the delegates had been unable to agree on a common position. The Court, after reviewing the legislative history of the drafting of the constitution and relying primarily on the prohibition of cruel, inhuman, and degrading treatment and punishment as well as on the rights to human dignity and equality, concluded that the death penalty did not have a place in the legal system of a democratic South Africa. Hugh Corder, 'Judicial Activism of a Special Type: South Africa's Top Courts since 1994' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007) 332–3, after noting the public outcry against this judgment concludes that it 'represents a brave and principled staking of a claim for the authority of the judiciary in general and the Constitutional Court in particular to pronounce on matters of great social controversy, and even on occasion to go against the likely social consensus in giving expression to the words of the constitution.' Also see the British cases of *Conway v Rimmer* [1968] AC 910; and *R v Home Secretary, ex parte Brind* [1991] 1 AC 696.

[81] See, for example, s 95(6) of the 1966 constitution of Botswana; arts 22(3) and 163(8) of the 2010 constitution of Kenya; and ss 167(4), 169(3), and 171(2) of the 2013 constitution of Zimbabwe.

[82] For example, in the Botswana case of *Ngope v O'Brien Quinn* [1987] BLR 348, the Court of Appeal declared a rule made by the Chief Justice, acting under the powers conferred by the constitution and s 28 of the High Court Act, as *ultra vires* and therefore invalid.

[83] See, for example, s 87(6) of the 1966 constitution of Botswana; art 50(2)(n) of the 2010 constitution of Kenya; and s 70(1)(k) of the 2013 constitution of Zimbabwe.

encroachment on what is essentially the judicial domain and will be declared void by the courts.[84] For similar reasons, parliament cannot by statute declare what the intention of a former Act was or prescribe that a former Act should or should not be construed in a certain manner. The courts retain the full right to interpret the law. Parliament, in spite of its ability to exercise some judicial powers, cannot by a statutory enactment declare an Act to be either constitutional or void, though it may repeal or refuse to enact any law because it deems it unconstitutional, irrespective of whether or not the courts have declared it constitutional. On the whole, the almost unfettered right of parliament to do anything except change a man into a woman and vice versa, is tempered by a strong desire not to be seen to be usurping judicial functions in a manner that threatens to undermine the independence of the judiciary. An extreme example of the abuse of legislative power is the bill of attainder which is a legislative act declaring one or more persons guilty of a serious crime, particularly treason, without the benefit of a judicial trial.[85] To avoid some of these abuses, article 107 of the 1992 constitution of Ghana expressly declares that parliament shall have no power to pass any law to alter the decision or judgment of any court as between the parties or pass a law which operates retrospectively to impose limitations or adversely affect the personal rights and liberties of any person. It is a worthwhile precaution because before the 2013 constitution, many of the nineteen amendments that had been made to the 1980 constitution of Zimbabwe had deliberately been introduced to alter or nullify court decisions.[86] Thus, without entrenched constitutional limitations such as those contained in the Ghanaian constitution, it is easy for legislatures to misuse their law-making powers in a manner that will undermine any effective checks that the judiciary may exercise over them.

[85] In some countries, such as the United States, the bills of attainder are expressly prohibited both by the federal constitution (see art 1, s 9, para 3) and the state constitutions.

[86] Zimbabwe is perhaps one of the extreme cases of government resort to legislative overrides of court decisions. In *S v A Juvenile* 1989 (2) ZLR 61 (SC), the Supreme Court ruled that corporal punishment of juveniles in terms of the Criminal Procedure and Evidence Act was unconstitutional. The executive immediately reacted by passing through parliament Constitutional Amendment No 11 which legalized juvenile whipping in the case of boys. In *Catholic Commission for Justice and Peace and Others v Attorney-General of Zimbabwe and Others* 1993 (1) ZLR 242, the Supreme Court ruled that inordinate delay in carrying out the death sentence rendered its carrying out unconstitutional on the grounds of inconsistency with the prohibition against inhuman or degrading treatment in terms of s 15(1) of the constitution. The government disagreed and reacted by effecting Constitutional Amendment No 13 which provided expressly that the delay in carrying out the death sentence did not render its carrying out unconstitutional. The conflict between the judiciary and the legislature (in actual fact, the executive) reached its apogee in *CFU v Minister of Justice, Legal and Parliamentary Affairs and Another* SC 16/06 when the Supreme Court ruled that land grabs were unconstitutional. The government responded by amending the constitution through Constitutional Amendment No 17 which ousted the jurisdiction of the courts to deal with land reform disputes. Other cases where the constitution was amended to nullify the effect of court decisions include: *Rattigan and Others v Chief Immigration Officer of Zimbabwe* Unreported judgment S-64-1994; *Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1986 (1) SA 532 (ZS); *Catholic Commission for Justice and Peace v Attorney General and Others* 1993 (4) SA 239; and *Salem v Chief Immigration Officer, Zimbabwe and Another* 1995 (4) SA 280 (ZS). See further Derek Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the world* (University of Toronto Press 2006) 331–54.

## 5. The French Influence in Francophone and Other Civilian Jurisdictions in Africa

As in the preceding discussion, the analysis of the French approach in Francophone Africa (used in a broad sense to cover civilian-based systems whether French-speaking like Benin, Congo DR, Burundi, and Rwanda or Lusophone, like Angola and Mozambique or Hispanophone like Equatorial Guinea) will focus on a number of selected countries. Angola has been selected as a Lusophone country with a fairly recent constitution (2010), and Benin, Cameroon, Gabon, and Senegal as examples of Francophone countries. While Benin's 1990 constitution is one of the most modern and liberal of the French Gaullist model on the continent, the Cameroon constitution of 1996 (supposedly a revision of the 1972 constitution) is a typical example of this Gaullist model in its more or less original 1958 form. The 1991 constitution of Gabon and 2001 constitution of Senegal are selected as examples of the modified Gaullist model, the former having been adopted at the early stages of the post-1990 constitutional reforms fever and the latter being a more recent example.[87] The 2006 constitution of Congo DR will also be referred to as another civilian-based approach although not directly linked to the Gaullist model. Occasional references will be made to the constitutions of other countries such as the Burundi constitution of 2005 and Rwanda's 2003 constitution which have been influenced by the civilian approach.

In assessing the approach adopted in entrenching the separation of powers, the discussion will start by looking at the relations between the executive and the legislature, followed by that between the executive and the judiciary and ending with that between the judiciary and the legislature.

### 5.1 The executive and legislative branches

Using the same three conceptualizations of separation of powers that formed the basis of the analysis of the situation in Anglophone Africa, the starting point is to see whether the same person could form part of the executive and the legislative branch. All the constitutions examined expressly state that the holding of any position in the executive is incompatible with being a member of the legislature.[88] This doesn't preclude a member from either branch taking up a position in the other but what it clearly means is that such a person must resign from his previous position. The constitution of Congo DR of 2006 adopts a fairly different and rather contradictory approach. First, articles 96 and 97 expressly state that the exercise of the position of president and member of government is incompatible with membership of parliament.

[87] Other more recent examples like the 2010 constitution of Chad and the 2013 constitution of Central African Republic have been left out because both countries are in the throes of civil strife the outcome of which is unpredictable.

[88] See art 139(1) of the 2010 constitution of Angola; arts 54 and 92 of the 1990 constitution of Benin; arts 137, 152, and 155 of the 2005 constitution of Burundi; art 13 of the 1996 constitution of Cameroon; arts 14(b) and 32 of the 1990 constitution of Gabon; and arts 38 and 54 of the 2001 constitution of Senegal.

It then apparently contradicts this position. First, it says that the president appoints the prime minister from the party with a majority in parliament. One must assume that if such a prime minister is a member of parliament, then he must resign his parliamentary position. The second problem is that the same articles expressly state that the mandate of the president and that of a member of government is incompatible with 'responsibility within a political party'. It is difficult to understand why a president elected on a certain political platform, probably as leader, should abandon this platform. It is an anomaly which is inherent in the Gaullist system which is constructed around the fallacious assumption that the executive will always have the majority party in parliament. Apparently, some African constitutional drafters have not sufficiently learnt the lessons from the three periods in the 1980s and 1990s in France, when this assumption was exploded, leading to uncomfortable 'cohabitation' of a president from one party and a prime minister from a different party that won the majority seats in parliament.[89]

The Francophone constitutions allow for control and intervention of one branch into the domain of the other. With respect to executive control or intervention in the legislative domain, this occurs in at least two main ways. One is through the promulgation of bills adopted by parliament before they become law.[90] It is an important means of controlling parliament which puts pressure on parliament to compromise because no bill will ever become law until the president promulgates it. The powerful position of the president in this system contrasts with the position in Anglophone Africa which provides that should there be a stalemate between the president and parliament, then parliament must be dissolved and fresh elections held. In Anglophone Africa, it puts pressure on both branches to reach a compromise. In most of the Francophone constitutions, the president is given discretionary powers to dissolve parliament. Often, all he needs to do is to consult the presidents of the two chambers of parliament. The only restriction is that the right can be exercised at most twice during a mandate and not earlier than a year after the last parliamentary elections.[91] It is only under the 2006 constitution of Congo DR that some restrictions are imposed on the president's powers to dissolve parliament. He is only required to act when there is persistent crisis between the government and parliament but is however not allowed to do so during a state of emergency, siege, or war.[92] Legislative control over the executive, like under Anglophone African constitutions, operates in two main ways; through impeachment and parliamentary processes of control. Unlike under the Anglophone constitutions, the provisions regulating these are often very detailed. As regards impeachment, the crimes covered and the procedures to be followed differ depending

[89] The three periods started with the Socialist President Mitterand sharing power with Conservative Prime Minister Chirac (1986–88) and Balladur (1993–95). Conservative President Chirac shared power with Socialist Prime Minister Lionel Jospin (1997–2002). See further Jean Poulard, 'The French Double Executive and the Experience of Cohabitation' (1990) 105 *Political Science Quarterly* 243–67.

[90] See art 124 of the 2010 constitution of Angola; art 57 of the 1990 constitution of Benin; art 197 of the 2005 constitution of Burundi; art 31 of the 1996 constitution of Cameroon; art 17 of the 1990 constitution of Gabon; and art 72 of the 2001 constitution of Senegal.

[91] See, for example, art 8(12) of the 1996 Cameroon constitution; art 19 of the 1990 constitution of Gabon; and art 87 of the 2001 constitution of Senegal.

[92] In arts 148 and 197.

on whether it concerns the president or other members of the executive such as the prime minister and other members of cabinet. Presidents are usually charged with serious crimes such as treason and espionage. Generally, the crimes that could lead to impeachment also include grave abuse of office, corruption, violation of the constitution and of the law, and other so-called heinous and violent crimes. Although the proceedings often end up before either a special High Court of Justice or the Constitutional Court, the process is very political with parliament playing a leading role in initiating the process and sometimes appointing some of its members to sit in the High Court of Justice.[93] It is with respect to the control through parliamentary processes that the provisions are very detailed. This control is exercised through an impressive array of measures such as vote of no confidence (which is usually limited only to the prime minister and his cabinet but not the president), motions of censure, questions (both written and oral), commissions of inquiry, and other forms of parliamentary committees.[94] As conceived, these look like perfect mechanisms to hold governments accountable. Unfortunately, because of the prevalence of dominant parties, the chances of obtaining a two-thirds majority that is usually needed to impeach a president are slim. Similarly, the same dominant parties will often use their majorities to block any genuine attempts to hold the government accountable. The executive is therefore hardly ever under any serious pressure to account in these countries. Another thing that reinforces the view that all these measures enable parliaments in Francophone Africa to sometimes bark but hardly ever bite is the fact that the measures to control the executive and even sanction it only apply to the prime minister and his ministers. Yet, these latter all serve at the pleasure of the president and often do no more than implement the policies laid down by the president. Thus, the person who actually determines policies in these countries can hardly be made to account for any failures of these policies before the people's representative.[95]

Now turning to the extent to which these branches exercise each other's functions, the balance is again in favour of the executive. Unlike under Anglophone constitutions where executive law-making is the exception, at least in principle, under the civilian separation of powers model, executive-law making is expressly provided for under the constitutions. This is marked by two features. First, the constitutions of the countries examined in this section usually state that both the executive as well as parliament have

[93] See generally art 129 of the 2010 constitution of Angola; arts 135–6 of the 1990 constitution of Benin; arts 116–17 of the 2005 constitution of Burundi; art 53 of the 1996 constitution of Cameroon; arts 164–7 of the 2006 constitution of Congo DR; art 78 of the 1990 constitution of Gabon; and art 101 of the 2001 constitution of Senegal.

[94] See generally art 113 of the 1990 constitution of Benin; arts 187, 202–4 of the 2005 constitution of Burundi; arts 34–5 of the 1996 constitution of Cameroon; art 137 of the 2006 of the constitution of Congo DR; arts 61–4 of the 1990 constitution of Gabon; and arts 85–6 of the 2001 constitution of Senegal. It should be noted however that Angola, under art 162 of its 2010 constitution, provides very limited powers of legislative control over the executive.

[95] Art 11 of the Cameroon constitution of 1996 states: 'The Government shall implement the policy of the nation as defined by the President of the Republic.' Such is the position under art 54 of the 1990 constitution of Benin; and art 42 of the 2001 constitution of Senegal. The situation is more nuanced under art 131 of the 2005 constitution of Burundi and under art 91 of the 2006 constitution of Congo DR which state that the policy is determined by the president in consultation with the cabinet.

the right to initiate bills.[96] As in the Anglophone system, most of the bills are in fact initiated by the executive. Second, the law-making function is split into three distinct parts dealing with different areas. There are matters that are exclusively reserved for legislative enactments (the exclusive legislative domain); matters falling outside these areas are reserved for the executive (the exclusive regulatory domain) and then these constitutions provide that parliament may, either with respect to certain matters or in some cases, all matters falling within its exclusive legislative domain, authorize the executive to make laws usually in the form of decree-laws or ordinances for certain purposes and for specified periods subject to subsequent parliamentary ratification.[97] Two points are worth noting here. The first point is that although in practice, most modern laws in Anglophone Africa are initiated by the executive, which also has wide powers to make secondary legislation, the scope for executive law-making is far more extensive in Francophone Africa and in fact most governmental matters are regulated by presidential decrees, ordinances, and regulations as well as ministerial decrees and orders. The second point to note is that until the post-1990 extension in some of these countries of a form of judicial review, the executive laws were completely outside the scope of judicial review for conformity to the constitution, which was then essentially limited to abstract review of bills before their promulgation into law. Be that as it may, it is clear from this that the executive effectively dominates and controls the legislative domain. We shall now look at its position vis-à-vis the judiciary.

### 5.2 The executive and judicial branches

The relationship of the executive and judicial branches will also be analysed based on the same three questions. Starting with the question whether there are any persons who form part of both branches, the only person who seems to belong to both branches of government under most of the constitutions examined is, as in Anglophone Africa, the public prosecutor. From the elaborate description of the functions of the public prosecutor given in articles 185 to 187 of the 2010 constitution of Angola, it is clear that the incumbent exercises both judicial and executive functions. This can be inferred from the wording of the provisions dealing with this office in the typical Gaullist constitutions which cover public prosecutors under the section dealing with the judiciary but exclude certain provisions, especially those dealing with judicial independence, from applying to them.[98]

[96] See art 167(1) of the 2010 constitution of Angola; art 105 of the 1990 constitution of Benin; art 192 of the 2005 constitution of Burundi; art 25 of the 1996 constitution of Cameroon; art 130 of the 2006 constitution of Congo DR; art 53 of the 1990 constitution of Gabon; and art 80 of the 2001 constitution of Senegal.

[97] For all these three divisions of law-making in these constitutions, see arts 164–72 of the 2010 constitution of Angola; arts 98, 100, and 102 of the 1990 constitution of Benin; arts 158–60 and 195 of the 2005 constitution of Burundi; arts 26–8 of the 1996 constitution of Cameroon; arts 122–4 and 128–9 of the 2006 Constitution of Congo DR; arts 47–52 of the 1990 constitution of Gabon; and arts 67–8 and 76–8 of the 2001 constitution of Senegal.

[98] See, for example, art 126 of the 1990 constitution of Benin; and art 37(2) of the Cameroon constitution of 1996 which restricts the application of the principle that judicial officers in discharging their duties are bound only by the law and their conscience to judges. Art 90 of the constitution of Senegal of 2001, in addition to this, restricts the principle of irremovability only to judges.

With respect to the extent to which each of these branches control each other there is again clear evidence of executive dominance. Although it is expressly stated in these constitutions that judicial power is independent of legislative and executive powers, this is quickly contradicted by several other constitutional provisions. The exact extent of this varies slightly from one constitution to another but the effect is usually the same. For example, there is the typical and original Gaullist formulation that the president shall guarantee the independence of judicial power.[99] As noted earlier, if all three branches are on a par, there will be no need for one to guarantee the independence of the other. This is a matter that could more appropriately be taken care of by an effective system of checks and balances. Under most of these constitutions, the president plays a decisive role in the appointment of judges of the ordinary courts. Although he is supposed to be 'assisted' by or act on the 'opinion' of the CSM, this hardly makes sense. In most cases, the president is not only the chair of the CSM and his Minister of Justice, the deputy chair, but it is also he who convenes the meetings of the CSM and draws up its agenda.[100] He is therefore presiding over a body that is supposed to make recommendations to him. The net effect of this is that certain fundamental safeguards of judicial independence which the CSM deals with, such as issues of judicial discipline, transfers, and promotions are virtually controlled by the executive. On the other hand, the traditional form of judicial control over executive action is by way of judicial review of the conformity of such action to the law, especially the constitution. Before the 1990s, most Francophone countries had merely copied the largely ineffective Constitutional Council method for reviewing the constitutionality of laws that was established under the 1958 French constitution. Apart from Cameroon which in 1996 went back to this defective system,[101] most other countries, the best example being Benin, have now substantially departed from the Constitutional Council model. Although the system of review of the constitutionality of laws remains centralized, unlike in the past, it now allows not only for both abstract and concrete review of constitutionality but *locus standi* have been expanded for the first time to give individuals the right to directly or indirectly challenge unconstitutional laws and other forms of unlawful executive action.[102]

[99] See, for example, art 127 of the Benin constitution of 1990; art 131 of the Burkina Faso constitution of 1991; art 209 of the Burundi constitution of 2005; art 37(3) of the Cameroon constitution of 1996; and art 68 of the Gabon constitution of 1990.

[100] See, for example, art 219 of the Burundi constitution of 2005; and art 70 of the 1990 constitution of Gabon. Even under those constitutions where the functioning of the CSM is left to be determined by subsequent legislation, such legislation has often left control of the CSM in the hands of the president and his Minister of Justice, as the case in Cameroon. By contrast, arts 151 and 152 of the 2006 constitution of Congo DR goes to considerable extent to reduce the possible control the executive could have over the judiciary especially with respect to the composition of the CSM.

[101] See arts 46–52 of the 1996 constitution; and for a fuller discussion of this, see Charles Manga Fombad, 'The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression?' (1998) 42 *Journal of African Law* 172.

[102] See, for example, arts 226–32 of the 2010 constitution of Angola; arts 114–24 of the Benin constitution of 1990; arts 225–32 of the Burundi constitution of 2005; arts 157–69 of the Congo DR constitution of 2006; arts 83–93 of the constitution of Gabon of 1990; and arts 89–93 of the constitution of Senegal of 2001. For a discussion of the Benin Constitutional Court, see Horace Adjolohoun, *Droit de l'Homme et Justice Constitutionne en Afrique: Le Modèle Béninois. À la Lumière de l'Homme et des Peuples* (L'Harmattan 2011); Babacar Kante, 'Models of Constitutional Jurisdiction in Francophone West Africa'

Finally, as regards those situations in which these two branches exercise each other's functions, it is obviously undesirable and a serious threat to judicial independence if the other branches, especially the executive were allowed to exercise the functions of the judiciary. In fact, the 2006 Constitution of Congo DR expressly forbids this in article 151 which states:

> The executive power may neither give orders to a judge in the exercise of his jurisdiction, nor decide on disputes, nor obstruct the course of justice, nor oppose the execution of a decision of justice.
>
> The legislative power may not decide on jurisdictional disputes, or modify a decision of justice, nor oppose its execution.
>
> Any law of which the subject is manifestly to provide a solution to a juridical process in course is void and of no effect.

Nevertheless, these constitutions, like those in Anglophone Africa, allow the executive to intervene in the judicial domain only with respect to the exercise of the right of pardon through which the president may remit, commute, or reduce sentences passed by the courts.[103]

## 5.3 The judicial and legislative branches

Finally, the relationship between the judiciary and the legislature will now be considered. The first question relates to whether the same persons can exercise both judicial and legislative functions simultaneously. Some of these constitutions expressly prohibit this.[104] In most of these countries however, the prohibition of one person exercising both functions is usually done in secondary legislation but even if this was not done, it is difficult to see how as a practical fact, one person could do both at the same time.

With regards to the scope for controlling each other, the main method of control exercised by the judiciary over the legislature is by way of judicial review of legislative acts for conformity to the constitution. Whilst post-1990 Anglophone African constitutions are beginning to recognize the need for abstract review, this has always been the main form of control exercised by Francophone constitutional courts. With perhaps the exception of Cameroon, almost all modern Francophone constitutions now allow

(2008) 3 *JCL* 158, 168–73; Sory Balde, 'Juge Constitutionnel et Transition Démocratique : Etude de Cas en Afrique Subsaharieene Francophone' <http://www.juridicas.unam.mx/wccl/ponencias/16/279.pdf> accessed 22 April 2015; and Abdoulaye Diarra, 'La Protection Constitutionnelle des Droits et Libertés en Afrique Noire Francophone depuis 1990: Les Cas du Mali et Benin' <http://www.afrilex.u-bordeaux4.fr/sites/afrilex/IMG/pdf/2doc8diarra.pdf> accessed April 2015; and Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights?' (2004) 17 *Harvard Human Rights Journal* 280.

[103] See, for example, art 119(0) of the 2010 constitution of Angola; art 130 of the 1990 constitution of Benin; art 113 of the 2005 constitution of Burundi; art 8(7) of the 1996 constitution of Cameroon; art 87 of the 2006 constitution of Congo DR; art 23 of the 1990 constitution of Gabon; and art 47 of the 2001 constitution of Senegal.

[104] See, for example, art 145(1)(a) of the 2010 constitution of Angola; art 152 of the 2005 constitution of Burundi; and art 108 of the 2006 constitution of Congo DR.

their constitutional courts to go beyond the traditional abstract review and also undertake concrete review of legislation. This has considerably enhanced the ability of the judiciary to check against laws which violate the constitution. The effect of judicial review of legislative as well as executive actions may however be reversed by new legislation which usually has a prospective effect but may also have a retrospective effect. As we noted earlier, the 2006 constitution of Congo DR specifically bars the legislature from enacting legislation specifically aimed at neutralizing the effect of a court decision.[105]

As regards the judiciary and legislature exercising each other's functions, the scope for this is, unlike under Anglophone constitutions, fairly limited. Because the doctrine of binding precedent is not a feature of the civil law tradition, the scope for judicial law-making via judicial precedents is very limited. Inferior courts are not obliged to follow the rule of law laid down by superior courts in a similar case but may do so merely to forestall their decision being reversed on appeal and not out of any legal obligation to do so. On the other hand, and as we noted earlier, the legislature or some members of it exercise judicial functions when they initiate and participate in the trial of the president and other members of the executive for treason and other offences. Because of the wide-ranging powers of the executive and its control over the legislature, the possibility of the legislature initiating impeachment proceedings against the president or even any member of the executive is very slim. This is true not only under Francophone but also under Anglophone constitutions. As we will now see, it is no surprise that there have been serious efforts by constitutional designers to expand the scope of constitutional checks and balances beyond the well-established three branches of government.

## 6. The Emergence of Hybrid Institutions Beyond the Traditional Triad

When John Locke and Montesquieu developed their theories of separation of powers, many of the institutions that have now become commonplace in constitutional design such as political parties, the media, ombudsmen, human rights commissions, and anti-corruption agencies were not in existence. The number of these institutions and their powers have progressively expanded since the 1990s to such an extent that one can talk of a hybrid category of institutions that do not fit into the classic traditional triad but share with it, the goal of trying to check against abuses of powers.

Although some of these hybrid institutions, such as the ombudsman and the human rights commission had appeared in several constitutions in one form or another both prior to and after the 1990s, it can be argued that it is the South African 1996 constitution that firmly established a new pattern beyond the tripartite paradigm of separation of powers by creating what it refers to as 'state institutions supporting constitutional democracy' in chapter 9. The potential impact of these institutions is explored in Chapter 14 of this volume.

[105] See art 151 of this constitution.

## 7. Conclusion

What is clear from this overview is that the doctrine of separation of powers is still very much a feature of modern African constitutions and not just some abstract theoretical and philosophical construct developed centuries ago. Its main goal, the prevention of tyranny, is as potent today as it was many centuries ago when Lord Acton made his famous warning that 'power tends to corrupt, and absolute power corrupts absolutely'.[106] The doctrine, whether viewed from the American, British, or French perspective has never contemplated a rigid separation of the different branches of government into watertight compartments but rather such separation as will forestall the dangers that are inherent in the concentration of powers.

As a doctrine designed to promote constitutionalism, good governance, and respect for the rule of law, our analysis shows not only that it remains one of the core elements of modern constitutionalism but also that its continuous application cannot ignore dramatic changes in the structuring of modern societies and the need to craft new and better means to deal with the challenges that they pose. What has clearly emerged is that in spite of the separation of powers, the executive has become dominant and overbearing. It is a phenomenon that is much more acute in the countries that inherited and maintained the civilian legal tradition in Africa than those of the common law.[107] Nevertheless, it is a problem that has limited the practical effectiveness of the entrenchment of separation of powers in modern African constitutions. The emergence of hybrid institutions of accountability such as the ombudsman, anti-corruption agencies, and human rights commissions are an indication that the traditional checks and balances associated with the three branches of government are no longer sufficient. These hybrid institutions not only complement the traditional accountability measures but also reflect the political, social, and constitutional changes that are taking place. They underscore the ability of the doctrine to adjust to modern realities as well as reflect the peculiar needs and governance deficits and risks. It can be argued that the traditional triad have encouraged false complacency about the existence of adequate checks and balances within the different branches, which is clearly not true. The progressive constitutionalization of hybrid institutions of accountability is particularly important because of the capture and control of the three branches of government by powerful executives whose position is reinforced by dominant ruling parties thus increasing the risks of democratic reversal in Africa's fledgling democratic transitions. What makes these institutions distinctive and potentially critical to Africa's democratic project is their independence from the other branches, their ability to be both reactive and proactive, and their accessibility to the most vulnerable in society. In many respects they will act as the intermediary institutions between ordinary citizens

[106] In *Essays on Freedom and Power* cited in Vanderbilt (n 6) 37.

[107] For recent studies pointing to the failure of the constitutional reforms to reduce the 'imperial powers' of presidents under the Gaullist African constitutions, see Adama Kpodar, 'Bilan sur en Demi-Siècle de Constitutionannalisme en Afrique Noire Francophone' 8–10 < http://afrilex.u-bordeaux4.fr/sites/afrilex/IMG/pdf/BILAN_SUR_UN_DEMI-SIECLE_DE_CONSTITUTIONNALISME_EN_AFRIQUE_NOIRE_FRANCOPHONE.pdf > accessed 26 October 2015; André Cabanis and Michel Louis Martin, *Le Constitutionnalisme de la Troisième Vague en Afrique Francophone* (Bruylant-Academia SA 2010) 59–90.

and the three branches of government, and give the former an opportunity to directly seek solutions to their problems. The increasing popularity of these institutions is not testimony to the failure of the doctrine of separation of powers but rather strong evidence of its durability, viability, and adaptability. For, as Bruce Ackerman rightly points out, 'the separation of powers is a good idea', and 'there is no reason to suppose that the classical writers have exhausted its goodness'.[108]

In a modern age that lays stress on realism and political pragmatism rather than strict dogma, the doctrine of separation of powers now emphasizes unity, cohesion, and harmony within a system of checks and balances. It also allows space for other intermediary institutions to fill in the gaps. It is therefore contended that an effective system of separation of powers that limits the possibilities of an excessive concentration of powers and the abuse of powers that go with it, reinforced by well-designed hybrid institutions that can promote transparency and accountability, will certainly provide a solid platform for dealing with the numerous contemporary challenges to constitutionalism, rule of law, and good governance in Africa.

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[108] In Ackerman (n 21) 723.

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# PART II

# THE RELATIONSHIP BETWEEN THE LEGISLATURE AND THE EXECUTIVE

# 3

# Parliamentary Sovereignty or Presidential Imperialism?

## The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa

*Francois Venter*

## 1. Introduction

In the process of colonial emancipation of Anglophone Africa, the constitutional institutions that were established were mostly fashioned in the image of the metropolitan example: Westminster. This example seldom migrated well: parliamentary sovereignty could easily be made into executive authoritarianism;[1] in the absence of a symbolic and unifying monarchy, the separation of head of state and head of government could only confuse;[2] and the notion of a professional bureaucracy, unmoved by political change, was made very difficult, especially given the outgoing example of colonial administrators that could be bound only by colonial political interests.[3]

This chapter deals with examples of the constitutional relationships between the executive and the legislature in Anglophone Africa. The approach is comparative, but not encyclopaedic. The constitutional analysis is concentrated on four countries jointly having a population of at least 110 million people, viz Ghana, Kenya, Namibia, and South Africa. The choice of these examples is motivated by the consideration that the chosen constitutions may be said to represent recent autochthonous African intentions to incorporate and sustain the precepts of constitutionalism, qualified by often traumatic local history and circumstances.

Following a brief discussion of the reception of constitutionalist ideas in Anglophone Africa from sources on both sides of the North Atlantic, the constitutional arrangements in the four chosen constitutional orders regarding the presidents, the executives, parliaments, and the discernible patterns of interaction between executives and legislatures are set out sequentially. Based on this exposition some conclusions are drawn. It

[1] The constitutional law of South Africa between 1910 and 1994 is an example of such a result.

[2] Such was the case prior to the adoption of the current Kenyan 2010 constitution when a prime minister (Odinga) vied for power with the president (Kibaki).

[3] John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth—An Eastern and Southern African Perspective* (Cambridge University Press 2004) 14, for example, states: 'Colonial rule was philosophically and organisationally elitist, centralist, and absolute and left no room for either constitutions or representative institutions. The colonial administration not only implemented policy, it made it as well.'

is not possible to draw conclusions from this comparative overview of a widely shared view on the nature of the relationship between executives and legislatures in Anglophone Africa that will allow for the identification of a settled continental pattern. It is however possible to identify certain encouraging trends and common challenges that need to be overcome if the roots of lasting constitutionalism is to be established on African soil.

## 2. The Reception of Constitutionalist Thinking in Anglophone Africa

Some fifteen years ago Jonathan Hyslop wrote that contemporary African democratization had to be located in the realm of international and increasingly transnational politics:[4]

> By the time of the collapse of the East European and Soviet states in 1989–1991, there was . . . a striking delegitimisation of ideologies of benevolent authoritarianism throughout Africa. It was simply no longer plausible to claim that military or single-party regimes would bring great benefits. They had been tried and had failed. There was an ideological exhaustion . . . Thus, the turn to liberal democratic forms was in part a result of the discrediting of most of the available options. Multi-party democracy was the only ideological option that was not obviously in serious trouble.

Anglophone African constitutionalism had to be planted and germinated in colonial soil. Colonial conceptions of governance and legislation were however not particularly conducive to the establishment of notions associated with twenty-first-century constitutionalism. In fact, colonial possession implied the undemocratic imposition of (foreign) demands; selective allocation, if at all, of power or influence to indigenous entities; and imposition of constitutional structures and ideas conceived abroad, and allowing indigenous institutions to function only insofar as they were useful for control and administration of the population.

Post-colonial African constitutionalism also had to be imported, notably not by force, but under the unrelenting pressures of globalization. This brought about its own challenges, not unique to Africa, as can be clearly seen in regions such as Eastern Europe, China, and the Arab world. The power of the notion of constitutionalism, developed over centuries in 'the West', is nevertheless simply irresistibly attractive—even to those that do not believe in it but nevertheless succumb to its constitutional aesthetics. Where it did not originate (as in Africa), it needs to be nurtured anew, and more often than not under conditions much different from the original seedbeds of constitutionalism.[5]

[4] Jonathan Hyslop, *African Democracy in the Era of Globalisation* (Witwatersrand University Press 1999) 1–2.

[5] For more details on the reception of Western constitutionalism, see Chs 2 and 3; Hatchard, Ndulo, and Slinn (n 3) 12–27; Kofi Quashigah, 'Constitutionalism and Constitutional Reforms in Ghana' in Morris Kiwinda Mbondenyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (Pretoria University Law Press 2013) ch 5.

In significant ways, some of the current constitutions[6] contain indications that constitutionalism is taking root in Anglophone Africa. This is evidenced by various recently adopted and well written, democratically legitimized constitutions. Like most contemporary constitutions, these documents contain a number of notions associated with constitutionalism, including popular sovereignty, the rule of law, democracy, and justiciable rights. Nevertheless, as is true of every constitutional order, the question remains whether the notions of constitutionalism embraced in a constitutional text are hollow clichés, cornerstones on which constitutionalism is being built, or true reflections of political and institutional reality. Thus, one must ask whether, in a particular constitution 'we the people' means democratic popular sovereignty: are the elected bodies and persons representing their electorates or merely exercising power drawn *from* 'the people'? Closely related to this question, is the fate and role of parliamentary opposition in legislative and overview processes. Not all of these aspects can be dealt with in detail here, but a consideration of the constitutional arrangements regarding executives and legislatures does reveal much relevant information on the issues.

A further consideration is the potential uncertainty about the nature of constitutionalism. This question too, is not one that is relevant only in the African context, since clarity on the matter is difficult enough to find in the constitutional orders that inspired or influenced current constitutionalist African orders. Regarding Anglophone Africa the lack of clarity on constitutionalism can be traced to, inter alia, disparate influences from different sides of the Anglophone North Atlantic.

A cornerstone of text-based constitutionalism is the assumption that a supreme constitution represents the binding ethos of a state to which a democratic majority and all the organs of state and the population are subject until it is amended in accordance with the provisions of the constitution. The effects of this assumption are however seen differently in the United States and in Britain. Since both models have been influential in the process of African constitutionalization, the differences between them may be significant for the understanding of current responses in African countries to the demands of received constitutional notions.

In this connection, Bruce Ackerman distinguished between a monistic and a dualistic approach.[7] Dualism assumes that the supreme constitution is the supreme expression of 'the will of the people', which is to be distinguished from the will of the incumbent government. If an organ of state should therefore, regardless of its status as being legitimized by the latest election, act in contravention of the constitution, it acts against the popular will, except if 'the people' can be persuaded at the juncture of what Ackerman has termed 'a constitutional moment', to adapt their will in terms of a constitutional amendment or by adopting a new constitution.

In the English system, for obvious historical reasons the constitutional paragon of Anglophone colonial Africa, parliamentary practice traditionally did not raise constitutional concerns about government conduct, with the House of Commons routinely

[6] It would not serve much of a purpose to include constitutional rogue states such as Swaziland and Zimbabwe in a comparison of this nature for the obvious reason that they represent retrogressive constitutionalism.

[7] Bruce Ackerman, *We the People—Foundations* (Harvard University Press 1991) 6–10.

giving its majority support to government proposals. The underlying assumption is that, if the will of the popular electorate is not complied with, there will be a change of government after the next general election; until such time neither the judiciary, nor the House of Lords nor the Crown will interfere. This approach might be labelled 'monistic'.[8]

Commentators with a monistic perspective would tend to see the outcome of a democratic election to be paramount, even if the actions of the majority government challenge the constitution. This goes some way to explaining arguments around the 'counter-majoritarian difficulty': if the majority makes the laws and the policies, how dare an unelected bench of a few judges declare such conduct unconstitutional, presumably against the wishes of the current majority of 'the people'? The dualist explanation would simply be that the court is entrusted with the guardianship over the will of the people as it is enshrined in the 'higher law', the supreme constitution. Changing the expression of this will require an onerous and inclusive process. Until that happens, the judiciary is charged with the responsibility to preserve 'the will of the people' by judging in accordance with the constitution and not necessarily in accordance with the wishes of the current political majority.

For present purposes the relevance of the distinction between a monistic and a dualistic approach lies in the question what the thinking behind a particular African constitution might be. Due to their colonial past, most Anglophone African states inevitably built their constitutions on a British colonial foundation. Many leading African constitutional lawyers and political leaders have however been influenced by American thinking. As has been pointed out earlier, there may be profound differences between Anglophone notions of democracy drawn from the opposite sides of the North Atlantic. Undoubtedly the American example did influence African constitution-making despite its eighteenth-century thinking having become slightly quaint, while the example of Westminster is one lacking a written constitution, dependent on an understanding of numerous conventions.

Against this background, it is quite likely that a monistic confusion between the political preferences of the incumbent government and the imperatives of the constitution may occur. Such confusion can only be addressed by obtaining clarity on the foundations of the authority of the constitution.

Justification of the supremacy of the constitution may realistically be founded upon an historic sense of the inevitability of a negotiated compromise, such as in the case of South Africa. The primary authority of the constitution may alternatively be based on an understanding that its content and tenor are prerequisites for universal recognition—the background to the writing of the Namibian constitution might be considered to be a case in point. Another justification can be that the international community had been directly involved in the process of constitution-making. The role

[8] Whether Ackerman's description of British democracy in the 1990s is still accurate without qualification more than two decades later, can be doubted in view of the current human rights regime in the UK as a member of the EU and reforms relating to the 'watchdog' function of parliament (see, for example, Peter Leyland, *The Constitution of the United Kingdom—A Contextual Analysis* (Hart Publishing 2012) 141 *et seq*, but this does not detract from its explanatory value for present purposes).

of international law in constitution-making processes which are undertaken under international supervision and stricture can indeed be significant.[9] Whatever the source of the justification might be, the result of constitutions providing pre-eminent norms binding upon all authority-bearing organs—executive, legislative, and judicial—represents significant progress towards the establishment of constitutionalism in Africa.

Justifications of this nature for the superior authority of a constitutional text all relate to the founding history of the constitution concerned. This applies particularly to the American experience. Significantly, in the American constitutional psyche, the groundbreaking work of the 'founding fathers' achieved an elevated, quasi-religious status. Davis poignantly described this attitude in the following terms:[10]

> The Pledge of Allegiance is our creed, the Constitution is our scripture, and our founding fathers are our patriarchs. We are devoted to democracy, we pray for our progress, and we are committed capitalists. Our prisons are our civil religion's purgatory, where we hope the criminal perpetrators prove penitent. We celebrate our saintly soldiers on Memorial Day, and we praise our political prophets such as Martin Luther King, Jr.

This national American attitude lies at the root of the dualism between the sanctity of the founding document and the capricious outcome of politicized elections resulting in relatively frequent policy changes.

It is to be doubted that the founding history of any African constitution has achieved, or will ever achieve, a status in African thinking even approaching the hallowed eminence that the US constitution gathered in the minds of Americans over more than two centuries. It is in fact possible, if not probable, that the powers that be in any particular case, may consider the history of constitution-making to be flawed exactly because of, for example, the external pressures or the internal need for compromise under which the texts were adopted.

Therefore, should presidential imperialism prove to continue to be a prominent characteristic of twenty-first-century African constitutionalism, being defended on the basis of the British notion of monism as a reflection of the 'supreme will of the people' for the time being, constitutionalism itself may become the victim. The dichotomy of a presidency fashioned on the dualistic American model, managed in terms of monistic constitutional conceptions derived from Westminster, has the potential of creating a warped form of constitutionalism in Africa. The danger is that African constitutionalism may descend into perpetual concentration of power in an individual or party/movement/organization capable of manipulating the institutions provided for by the 'supreme' constitution, thereby diluting or even destroying their ability to defend the precepts of constitution as such.

[9] An historical example would be Germany, and more recent instances seem to increase in number: see, for example, Philipp Dann and Zaid Al-Ali, 'The Internationalized Pouvoir Constituant—Constitution-Making under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 424–63.

[10] AP Davis, 'International Civil Religion: Respecting Religious Diversity While Promoting International Cooperation' (2011) 34 *Hastings International and Comparative Law Review* 87, 97.

Another conceptual difficulty, which an analysis of African constitutionalism needs to take account of, is the increasing lack of realism of our constitutional terminology. Thus, for example, due mostly to the historical vagaries of the drawing of boundaries during the period of colonialism, African states, as others around the world, cannot realistically be said to be 'nation-states'.[11] Nevertheless, the vocabulary of nineteenth-century liberal democracy is still very strongly in evidence in current constitutions. Constitutional law and also international law still operate on the assumption that a state exists for the benefit and protection of its 'nation': thus the famous opening words of the US constitution of 1789 'We the People' and the French constitutional principle of 'government of the people, by the people, for the people',[12] are strongly in evidence in constitutions, even some of the most recent ones in Anglophone Africa.[13] It should therefore be kept in mind that notions such as 'nation-building', 'national interest', and 'nationality' have in the twenty-first century lost much of their meaning beyond political rhetoric.

## 3. Presidents

Presidentialism is ubiquitous in Africa—but, one may ask, on what foundations do Anglophone African constitutions base their presidencies? Should we think in terms of a unique African form of presidentialism, or are we dealing with a conceptual confusion of the role of the head of state and the head of government, alien to the example of Westminster but also not founded in the eighteenth-century dualist thinking in which the American constitution is rooted? This may even affect one's thinking regarding constitutional differences between directly elected presidents and those elected by their parliament.

### 3.1 Powerful presidencies

A survey of the four chosen examples makes it clear that Anglophone African constitutionalism is built around powerful presidencies.

The president of Ghana is head of state, head of government, and Commander-in-Chief of the armed forces.[14] Article 57(2) of the constitution of Ghana provides:

> The President shall take precedence over all other persons in Ghana; and in descending order, the Vice-President, the Speaker of Parliament and the Chief Justice, shall take precedence over all other persons in Ghana.

[11] African constitutions routinely contain provisions concerning the recognition of traditional institutions, linguistic and cultural pluralism, and regional or tribal interests, all obviously indicative of social diversity rather than nationhood.

[12] Art 2 of the current constitution of the Vth Republic of 1958.

[13] Amongst others, the preamble of the Namibian constitution employs the phrase twice, the preambles of the South African and Kenyan constitutions open with it, as does the Zambian first draft constitution of 2012.

[14] Art 57(1) of the constitution of the Republic of Ghana of 1992 (hereafter constitution of Ghana).

Article 57(4)–(6) then goes on to privilege the president while in office and for three years after leaving office not to be liable to proceedings in any court for the performance of his functions, nor to be personally liable to any civil or criminal proceedings.

In Ghana the president is entrusted with the executive authority, which extends to the 'execution and maintenance' of the constitution and all laws. Although the president may exercise the executive power through 'officers subordinate to him', 'all executive acts of Government shall be expressed to be taken in the name of the President'.[15]

The president of Kenya is head of state and head of government, the Commander-in-Chief of the Kenya defence forces, chairperson of the National Security Council, and 'symbol of national unity'.[16] As such, the president is required to respect, uphold, and safeguard the constitution, safeguard the sovereignty of Kenya, promote national unity, and ensure the protection of human rights and the rule of law.[17]

During the term of office of a president, no criminal or civil proceedings may be instituted against the incumbent, but the immunity does not extend 'to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.[18] The effect of this provision was demonstrated by the summonsing of President Uhuru Kenyatta before the International Criminal Court in terms of the Rome Statute.[19]

The president of Namibia is the head of state, the head of government, and the Commander-in-Chief of the defence force.[20] A core responsibility of the president is set out in article 32(1) of the constitution:

> As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.

In terms of article 31 of the constitution, the Namibian president enjoys immunity from civil proceedings during and after his term of office for acts done in his official capacity. Regarding immunity from criminal prosecution, article 31(2) provides:

> No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.

Long before the adoption of the current constitution, in post-colonial South Africa the British colonial governmental model of a prime minister in the image of Westminster

[15] Art 58 of the constitution of Ghana. [16] Art 131(1) of the constitution of Kenya 2010.
[17] Art 131(2) of the constitution of Kenya 2010. [18] Art 143 of the constitution of Kenya 2010.
[19] See, for example, ICC-01/09-02/11 *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/pretrial%20chamber%20ii/Pages/382.aspx> accessed 31 March 2015.
[20] Art 27(1) of the constitution of Namibia.

being head of government, symbolically subordinate to the monarchical head of state, prevailed. When this model was revised in 1983,[21] the functions of the symbolic head of state were merged with those of the prime minister, thus creating a state presidency at the pinnacle of both the executive and legislative branches. The state president's position of power was thereby rendered constitutionally unassailable, except from within, that is, through internal party political processes. After the relatively brief existence of the Government of National Unity provided for in 1993, the 1996 constitution re-established this arrangement. Currently the South African president is both head of state and head of the national executive.[22] There is however no constitutional provision that grants the incumbent president with immunity from prosecution or civil action.

## 3.2 Democratic legitimation of presidential power

For the election of the president of Ghana, an absolute majority (more than 50 per cent of the number of valid votes cast in the election) is required in a direct popular presidential election.[23] The term of office is four years and the office may not be held by the same person for more than two terms.[24]

The election of the president of Kenya occurs on the same day as the general election of the members of parliament.[25] All registered voters may vote in the presidential election. To be elected a candidate requires more than half of all the votes cast in the election, as well as 'at least twenty-five per cent of the votes cast in each of more than half of the counties',[26] a 'county' being one of forty-seven regions of Kenya.[27] The term of office is the same as that of parliament and a person may not hold office as president for more than two terms.[28]

The president of Namibia is elected by absolute majority vote by 'direct, universal and equal suffrage' for a term of five years and may serve not more than two terms.[29]

The South African president is not elected popularly, but indirectly at the first sitting of the National Assembly after a general election.[30] The legitimacy of this election is however founded upon the assumption that the person whose name appears first on the list of candidates of the political party that obtains the majority of the seats in the proportional election of members of the National Assembly, will be elected president.

## 3.3 Presidents as supreme executives

Although Anglophone African constitutions do not explicitly entrust arbitrary powers to their presidents, the British example of dividing head of state and head of government responsibilities between different functionaries, has disappeared. Generally,

[21] As reflected in the Republic of South Africa Constitution Act 110 of 1983.
[22] Section 83(a) of the constitution of the Republic of South Africa, 1996.
[23] Art 63 of the constitution of Ghana. [24] Art 66 of the constitution of Ghana.
[25] Art 136 of the constitution of Kenya 2010. [26] Art 138 of the constitution of Kenya 2010.
[27] Art 6 and the First Schedule of the constitution of Kenya 2010.
[28] Art 142 of the constitution of Kenya 2010. [29] Arts 28 and 29 of the constitution of Namibia.
[30] Section 86(1) of the constitution of the Republic of South Africa, 1996.

presidents lead the executive, but retain head of state functions to be exercised with a greater degree of independence. Their powers of appointment are extensive.

Certain key appointments are made at the discretion of the president of Ghana, including the Commissioner for Human Rights and Administrative Justice, the Auditor-General, the members of the Public Service Commission, the Lands Commission, and the Electoral Commission.[31] For these appointments the president must consult the Council of State, but does not seem to be bound by its advice.[32] The Council of State is composed of a former Chief Justice, a former Chief of the Defence Staff, a former Inspector-General of Police, the President of the National House of Chiefs, elected representatives of each of the regions, and eleven members appointed by the president.[33] The president also determines the emoluments payable to the Speaker and members of parliament, the judges, the Auditor-General, and the holders of similar positions.[34]

Key appointments made by the president of Kenya include the Attorney-General,[35] the 'principal secretaries' (that is, the administrative heads of state departments) with the approval of the National Assembly,[36] and diplomats. The presidential authority to appoint includes the authority to dismiss.[37]

The Namibian president has the power to appoint at his discretion diplomats, the prime minister, ministers and deputy-ministers, the Attorney-General, the Director-General of Planning,[38] on the recommendation of the Judicial Service Commission the Chief Justice and other judges, the Ombudsman and Prosecutor-General, on the recommendation of the Public Service Commission the Auditor-General and the Governor of the Central Bank, and on the recommendation of the Security Commission the Chief of the defence force, the Inspector-General of Police and the Commissioner of Prisons.[39] The president is in the position to determine the majority membership of the recommending commissions.[40]

As head of government, the South African president not only appoints the deputy president and the cabinet ministers, but may also dismiss any of them at any time.[41] This places the leader of the political party that obtains the majority vote in a general election in a position where every member of the executive is completely dependent for his or her political, executive, administrative, and legislative activities on the goodwill and approval of the president. An inordinate amount of power of patronage is thus concentrated on the incumbent of the presidential office.

As head of the executive the president of South Africa also appoints the commander of the defence force, the national commissioner of police, and the heads of the intelligence services.[42] The president has a decisive role in senior judicial

[31] Art 70 of the constitution of Ghana.

[32] Art 70(1) provides that the president acts 'in consultation with the Council of State', which is to be distinguished from acting on the (binding) advice of a body.

[33] Art 89 of the constitution of Ghana.

[34] Art 71 of the constitution of Ghana.

[35] Art 156 of the constitution of Kenya 2010.

[36] Art 155 of the constitution of Kenya 2010.

[37] Art 132(2) of the constitution of Kenya 2010.

[38] Art 32(3)(l) of the constitution of Namibia.

[39] Art 32(4) of the constitution of Namibia.

[40] Arts 85, 112, and 114 of the constitution of Namibia.

[41] Section 91(2) of the constitution of the Republic of South Africa, 1996.

[42] Sections 200(1), 207(1), and 209(2) of the constitution of the Republic of South Africa, 1996.

appointments,[43] and appoints the National Director of Public Prosecutions[44] and diplomatic representatives.[45]

The power of an elected head of state and head of government to make political appointments goes organically with such an office. Appointing powers regarding functionaries and institutions that are intended to serve as guardians over political conduct, such as the Commissioner for Human Rights and Administrative Justice in Ghana, the Attorney-General in Kenya, the Ombudsman in Namibia and the National Director of Public Prosecutions in South Africa, however do potentially put an inordinate measure of political influence over constitutional checks and balances in presidential hands.

### 3.4 Is African presidentialism unique?

Presidentialism is without doubt the prime characteristic of African constitutionalism. Does that however make it uniquely African? One might argue that most of the extensive powers in the hands of the presidents of Anglophone Africa are also found in the hands of heads of state and heads of government in the rest of the English-speaking world. Peter Leyland for instance writes:[46]

> Enormous power is focused on the office of Prime Minister. The most important political decisions are generally taken not by the full Cabinet, but through Cabinet committees, many of which are chaired by the Prime Minister . . . Indeed, 'elective dictatorship' is useful shorthand for the executive dominance which is a central characteristic of the UK constitution. It refers to the ease with which the government is able to secure a majority in Parliament for nearly all legislative proposals.

With reference to Article II of the US constitution, Barron and Dienes wrote:[47]

> The need for prompt, informed and effective action in domestic and foreign affairs has meant that power has tended to flow to the Executive. While many of the vague, open-ended executive powers provided in the Constitution are shared with Congress, presidential initiatives have generally produced only congressional acquiescence and the courts have tended to avoid judicial review of executive actions, especially in the area of foreign affairs and national security. Indeed, it has been suggested that separation of powers questions involving the allocation of powers between Congress and the Executive should generally be treated as political questions inappropriate for judicial resolution.

A curious remnant of the historical transition from monarchy to democracy in many constitutional orders around the world is the prerogative, a discretionary power originally retained by kings even after their sovereignty migrated to democratic

[43] Section 174 of the constitution of the Republic of South Africa, 1996.
[44] Section 179(1)(a) of the constitution of the Republic of South Africa, 1996.
[45] Section 84(2)(i) of the constitution of the Republic of South Africa, 1996.
[46] Leyland (n 8) 188.
[47] Jerome A Barron and C Thomas Dienes, *Constitutional Law in a Nutshell* (5th edn, Thomson West 2003) 137.

institutions.[48] In some of the African constitutions under discussion, British royal prerogatives, such as the granting of mercy to convicted offenders, were placed in the hands of presidents,[49] and in other cases they ceased to be understood as prerogatives, but nevertheless remained in place.[50]

It seems that the only real difference between Anglophone African presidentialism and that of the Western constitutional paragons may lie in the level of public awareness and preparedness of electorates to react to routine government action, and government sensitivity to public reaction between elections. Due to various factors such as the social penetration of media coverage of public affairs, the level of awareness and engagement of civil society, political culture, levels of education and wealth, etc., scrutiny of government conduct by electorates can be expected to be more effective in older democracies. There are, however, encouraging signs of positive developments in Africa in this regard.[51]

## 4. Executives

The executive authority of Anglophone African states is almost exclusively situated in the hands of their presidents, although the other members of the cabinets are entrusted with the execution of most of the routine executive functions.

### 4.1 Appointment of cabinet members

The vice-president of Ghana is a person designated by the successful presidential candidate before the presidential elections and takes office on the election of the president.[52] The ministers of state are appointed by the president in terms of section 78(1) of the constitution 'with the prior approval of Parliament from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament'. The Namibian cabinet is composed of the president, the prime minister, 'and such other Ministers as the President may appoint from the members of the National Assembly ... for the purposes of administering and executing the functions of the Government'.[53] Similar to Ghana, the deputy president of Kenya is elected with the president, since the successful presidential candidate would have nominated the deputy before the elections as required by article 148 of the constitution. The rest of the cabinet consists of 'Cabinet Secretaries' (that is, ministers) nominated and appointed by the president with the approval of the National Assembly. The president assigns the

[48] See Francois Venter, 'Confusing Grace With Amnesia: Reviewing Acts of the Head of State' (2012) 4 *Constitutional Court Review* (Pretoria University Law Press 2012) 167–88.

[49] Art 72 of the constitution of Ghana and art 32(3)(d) of the Namibian constitution.

[50] Section 84(2)(j) of the constitution of the Republic of South Africa, 1996 and art 133 of the constitution of Kenya 2010.

[51] See, for example, Charles Fombad and Nathaniel A Inegbedion, 'Presidential Term Limits and Their Impact on Constitutionalism in Africa' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Press 2010) 22–3.

[52] Art 60 of the constitution of Ghana.

[53] Art 35(1) of the constitution of Namibia.

portfolios and may dismiss cabinet secretaries.[54] The executive authority of South Africa is vested in the president[55] who is the 'head of the Cabinet' which consists of the president, the deputy president and ministers appointed by the president.[56] The deputy president assists the president 'in the execution of the functions of government'.[57] True to the model of elected heads of government, the presidents of all four countries are constitutionally empowered to surround themselves with trusted deputies and ministers. The only qualification on this power may be political circumstances where some form of coalition is required (such as in Kenya since 2008), forcing the president to negotiate with coalition partners before making appointments.

## 4.2 Executive responsibilities

In Ghana the executive authority of the president is not shared by the cabinet, but the cabinet, consisting of the president (who calls all cabinet meetings and presides over them), the vice-president, and between ten and nineteen ministers of state 'assist the President in the determination of general policy of the Government'.[58]

In terms of article 130(1) of the Kenyan constitution, 'the national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet'. The inclusion of the deputy president and the cabinet seems not to indicate that they are entrusted with independent executive authority, since article 131(1)(b) provides that the president 'exercises the executive authority . . . with the assistance of the Deputy President and Cabinet Secretaries'. From this provision it may be deduced that the president's executive authority is not curbed by an obligation to consult the rest of 'the national executive', nor to be bound by its advice. The cabinet secretaries of Kenya are expressly accountable individually and collectively to the president 'for the exercise of their powers and the performance of their functions'.[59]

The president of Namibia presides over cabinet meetings.[60] Article 27(3) provides:

> Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet.

According to Mbahuurua the executive power of Namibia vests in both the president and the cabinet and that 'in consultation with' requires not only that the president must consult the cabinet, but also that 'the President together with Cabinet would have to decide as to when, and how the President must exercise his or her powers'.[61] This seems to be an unlikely interpretation, given the fact that it should be assumed that the power to appoint ministers includes the power to dismiss them. After all, article 41 of

[54] Art 152 of the constitution of Kenya.
[55] Section 85(1)(a) of the constitution of the Republic of South Africa, 1996.
[56] Section 91(1) of the constitution of the Republic of South Africa, 1996.
[57] Section 91(5) of the constitution of the Republic of South Africa, 1996.
[58] Arts 76 and 77 of the constitution of Ghana.
[59] Art 153(2) of the constitution of Kenya.
[60] Arts 32(3) and 35(3) of the constitution of Namibia.
[61] VH Mbahuurua, 'The Executive Power in the Namibian Constitution: Precept and Practice' in Manfred O Hinz, Sam K Amoo, and Dawid Van Wyk (eds), *The Constitution at Work—10 Years of Namibian Nationhood* (University of South Africa 2002) 49.

the constitution renders ministers accountable 'both to the President and to Parliament'. Parliament may force the dismissal of a minister by adopting a vote of no confidence in the member concerned, but that cannot be the only route available to the president to replace a minister. These considerations justify the conclusion that article 27(3) requires no more of the president than to consult his cabinet, whose advice he may or may not accept, since if he should not agree with the ministers, he can in his discretion replace them with others.

The prime minister of Namibia does not bear the responsibilities of head of government, but is 'the leader of Government business in Parliament', coordinates the work of the cabinet and advises and assists the president in the execution of the functions of government.[62] In the event of the office of president becoming vacant, the prime minister is first in line to act in the office.[63] Given the fact that the Namibian president is not only head of state, but also head of government, the position of the prime minister is quite different from that of the Westminster model: the position might just as well have been named 'deputy-president' or something similar.

Section 85(2) of the South African constitution provides:

> (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (b) developing and implementing national policy;
> (c) co-ordinating the functions of state departments and administrations;
> (d) preparing and initiating legislation; and
> (e) performing any other executive function provided for in the Constitution or in national legislation.

There can be no doubt that the presidents of the four states concerned are in full control of the executive power. Despite the nominal responsibility of the executives to their parliaments, the presidential powers of appointment, including dismissal, divert the actual ministerial responsibility in practical terms on their political leaders, the presidents.

## 4.3 Confirmation of executive action

In terms of article 58(5) of the constitution of Ghana, executive (and other) official actions taken by the president must be authenticated by the signature of a minister. It does not seem likely that this requirement places the ministers in a position to veto presidential acts, since the president may revoke the appointment of a minister at any time.[64]

Decisions of the president of Kenya must be in writing, bearing the seal and signature of the president,[65] but no other signatures, for instance of a cabinet secretary, are required.

[62] Art 36 of the constitution of Namibia.
[63] Art 34(1) of the constitution of Namibia.
[64] Art 81(a) of the constitution of Ghana.
[65] Art 135 of the constitution of Kenya.

The constitution of Namibia does not require ministerial signatures for the confirmation of executive actions, but article 32(8) requires appointments made and actions taken by the president to be announced by him by proclamation in the Government Gazette.

Section 101(2) of the South African constitution provides that '[a] written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member'. The requirement of ministerial counter-signatures does not seem to indicate effective control over presidential discretion.

### 4.4 Government involvement in and censure by parliament

The president of Ghana is required to report at least once annually to parliament on the steps taken towards the realization of the constitutional policy objectives provided for in Chapter Six of the constitution.[66] The parliament of Ghana may consider and pass by a majority of two-thirds, a vote of censure against a minister, in which case the president 'may, unless the Minister resigns his office, revoke his appointment as a Minister'.[67] The president may be removed from office by a two-thirds vote of all the members of parliament.[68]

Although parliament may cause the dismissal of a Kenyan cabinet secretary in cases of gross misconduct, and cabinet secretaries are obliged to appear before parliamentary committees and answer questions relating to their responsibilities and must provide parliament with regular reports,[69] they are not otherwise accountable to parliament. The president can be impeached by a two-thirds majority vote in each of the two Houses of Parliament.[70]

The prime minister of Namibia leads 'government business' in parliament.[71] Article 39 of the Namibian constitution obliges the president to terminate the appointment of any member of the cabinet if the National Assembly by a majority of all its members resolves that it has no confidence in that member. The president can be impeached by a two-thirds majority vote in each of the two Houses of Parliament.[72]

A member of the South African cabinet is appointed by the president to be 'the leader of government business in the National Assembly'.[73] A motion of no confidence may be passed by an ordinary majority of the National Assembly in the cabinet, excluding the president, in which case the president must reconstitute the cabinet. If the motion includes the president, he, and all the ministers and deputy ministers, must resign.[74]

[66] Art 34(2) of the constitution of Ghana.
[67] Art 82 of the constitution of Ghana.
[68] Art 69(11) of the constitution of Ghana.
[69] Art 152(3) and (4) of the constitution of Kenya.
[70] Art 145 of the constitution of Kenya.
[71] Art 36 of the constitution of Namibia.
[72] Art 29(2) of the constitution of Namibia.
[73] Section 91(4) of the constitution of the Republic of South Africa, 1996.
[74] Section 102 of the constitution of the Republic of South Africa, 1996.

## 5. Parliaments

The stock liberal–democratic response to the question as to what is the foundation of the claim that the constitution is supreme, is that the constitution is the product of a social contract between 'the people', composed of sovereign individuals who have willingly surrendered a measure of their freedom to the state in exchange for the protection of their interests and their inalienable human rights. Thus for instance in Ghana it was stated as an ideal for the development of a new constitution in 1969 that 'the individuals who form the body politic of Ghana should be elevated above the state'.[75] Contemporary Anglophone African constitutional law developed against the background of the British notion of parliamentary sovereignty, which was the result of the drawn out historical competition for supremacy between the Crown and parliament (notionally representative of 'the people'). A similar contest did not take place in African history before the reception of constitutionalism presented the polities with elected legislatures exercising their legislative competencies in close interaction (as in Westminster) with the executives.

Despite the familiarity and assumed triteness of the constructions of liberal democracy, it is remarkable that they are largely unrealistic, purely theoretical, and in fact wholly romantic. No state in Africa or anywhere else in the world can be said to owe its sovereignty to a popular contract, nor can any government claim that its political actions and goals are altruistically designed and executed purely in the interests of the whole of the citizenry. Nevertheless, African constitutions, like most others around the world, continue, in the absence of more realistic alternatives, to maintain the vocabulary of the fictitious social contract. Popular democracy, regardless of the quality of democratic structures and electoral procedures, but no doubt to be preferred above autocracy and arbitrary dictatorship, unabatedly animates the language of constitutionalism.

The interplay between the elected legislatures and the presidential executives in the countries under discussion reveals the actual, as opposed to the rhetorical, nature of the power relations between them.

### 5.1 Democratic composition

In terms of article 93(2) of the Ghanaian constitution, the legislative power is vested in parliament, a unicameral body composed of no less than 140 elected members.[76] The members of the parliament of Ghana are elected from single-member constituencies demarcated by the Electoral Commission.[77] Multi-party democracy is guaranteed by section 55 of the constitution.

Article 94(1) of the constitution of Kenya provides that '[t]he legislative authority of the Republic is derived from the people and, at the national level, is vested in and

[75] Quashigah (n 5) 122.
[76] Art 93(1) of the constitution of Ghana. Currently there are 230 seats in parliament: cf. <http://www.parliament.gh/content/376/45> accessed 7 July 2014.
[77] Art 47 of the constitution of Ghana.

exercised by Parliament' and clause 5 guarantees that only parliament can make or authorize the making of law. Parliament is composed of the National Assembly and the Senate.[78] The National Assembly is composed of 290 members elected from single-member constituencies, one woman elected by each of the forty-seven counties, twelve members nominated proportionally by the successful political parties, and the Speaker of the National Assembly, who is an *ex officio* member.[79] The Senate has forty-seven elected members each from one of the counties, sixteen women nominated proportionally by the political parties represented in the Senate, one man and one woman representing young people, one man and one woman representing persons with disabilities, and the Speaker of the Senate being an *ex officio* member.[80]

In terms of article 44 of the constitution of Namibia, the legislative power is vested in the National Assembly, and article 45 provides:

> The members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience.

Seventy-two members of the National Assembly are popularly elected 'by general, direct and secret ballot', and at most six members may be appointed by the president 'by virtue of their special expertise, status, skill or experience', although such members do not have a vote in the Assembly.[81] Chapter 8 of the constitution provides for the establishment of the National Council, which is representative of the regions and is in principle capable of reviewing legislation passed by the National Assembly. Although 'parliament' is defined as consisting of both the National Assembly and the National Council,[82] the actual constitutional status of the National Council seems to be limited.[83]

The South African parliament consists of the National Assembly and the National Council of Provinces.[84] In terms of section 42(3) of the constitution, the National Assembly:

> is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

The 400-member National Assembly is elected in a simple proportional election based on universal adult franchise.[85] The National Council of Provinces is required 'to ensure that provincial interests are taken into account in the national sphere of government'.[86]

[78] Art 93(1) of the constitution of Kenya.
[79] Art 97(1) of the constitution of Kenya.
[80] Art 98(1) of the constitution of Kenya.
[81] Art 46(1) of the constitution of Namibia.
[82] Art 146(2)(a) of the constitution of Namibia.
[83] Cf. Mbahuurua (n 61) 54.
[84] Section 42(1) of the constitution of the Republic of South Africa, 1996.
[85] Sections 1(a) and 46(1) of the constitution of the Republic of South Africa, 1996.
[86] Section 42(4) of the constitution of the Republic of South Africa, 1996.

### 5.2 Speakers

In Ghana, the office of Speaker plays an important role in parliamentary and related matters. In terms of article 95 of the constitution, the Speaker is elected by parliament from amongst its members, or from amongst persons 'who are qualified to be elected as members of Parliament'. In parliamentary proceedings the Speaker has no vote, neither an original, nor a casting vote.[87] In terms of article 112 of the constitution, the Speaker summons parliament, determining the dates of its meetings, but a meeting must be summoned should at least 15 per cent of the members request it.

The Speakers of the Kenyan parliamentary Houses are elected by the House concerned from outside its membership, but Deputy Speakers are elected by each House from amongst its members.[88]

The Namibian Speaker is elected by the National Assembly from amongst its members[89] as are the Speakers of both Houses of Parliament of South Africa.[90]

### 5.3 Presidential assent to laws

Presidential assent to bills passed by the parliament is required by all four constitutions under consideration. The presidents may refer bills back to parliament for reconsideration but, in the unlikely event that a parliament should wish to overrule the presidential objections, re-adoption by a two-thirds majority is possible.[91]

## 6. Patterns of Executive/Parliamentary Interaction

The general pattern regarding executive involvement in parliamentary proceedings in Anglophone Africa appears to be a combination of the presidential and parliamentary examples: the parliaments generally emulate Westminster, except that the head of government (the president) does not normally take part directly in routine parliamentary proceedings, and has the additional status of head of state.

At the beginning of each session of the parliament of Ghana and before its dissolution, article 67 of the constitution requires the president to deliver 'a message on the state of the nation'. The appointment by the president of ministers of state, the majority of who must be members of parliament, is subject to the prior approval of parliament.[92] should the president resign before the end of the term, it is done in writing, addressed to the Speaker of parliament.[93]

In Kenya, the pattern leans stronger to the presidential system. The president is required to address the opening of a newly elected parliament and report annually to parliament 'on all the measures taken and the progress achieved in the realisation of the

[87] Art 104(2) of the constitution of Ghana.

[88] Art 106(1) of the constitution of Kenya.

[89] Art 51 of the constitution of Namibia.

[90] Sections 51 and 111 of the constitution of the Republic of South Africa, 1996.

[91] Art 90 of the constitution of Ghana; arts 109(1), 115, and 166(1) and (2) of the constitution of Kenya; arts 56 and 64 of the constitution of Namibia; ss 79 and 81 of the constitution of the Republic of South Africa, 1996.

[92] Art 78(1) of the constitution of Ghana.

[93] Art 66(4) of the constitution of Ghana.

national values'.[94] Cabinet secretaries (ministers) are not members of parliament,[95] nor is the president or the deputy president. The constitution provides for procedures for the removal of the president by majority vote of the National Assembly on the grounds of physical or mental incapacity,[96] and for the impeachment of the president by a two-thirds majority vote in both Houses.[97] Although the presidential appointment of the principal secretaries requires the approval of the National Assembly, the president may re-assign any of them and if they resign, they do so by giving notice to the president.[98]

Article 32(2) of the Namibian constitution explicates executive/legislative interaction as follows:

> In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.

The cabinet ministers of Namibia are members of the National Assembly, where they are required to initiate bills,[99] 'to formulate, explain and assess for the National Assembly the budget of the State and its economic development plans and to report to the National Assembly thereon',[100] 'to attend meetings of the National Assembly and to be available for the purposes of any queries and debates pertaining to the legitimacy, wisdom, effectiveness and direction of Government policies',[101] and to perform various other explanatory and guiding functions.[102] It is nevertheless within the power of the president to dissolve the National Assembly before the expiry of its term on the advice of the cabinet 'if the Government is unable to govern effectively', thereby bringing about a fresh general election within ninety days of the dissolution.[103]

The South African president is elected by the National Assembly at its first sitting from amongst its members, but vacates his seat on being elected.[104] The president is therefore not a member of parliament, but the rest of the cabinet (excepting no more than two ministers) are appointed from amongst the members of the National Assembly,[105] where they perform a leading role by introducing bills.[106] In terms of section 92(2) of the constitution, '[m]embers of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'. It speaks for itself, however, that the cabinet can command the support of the majority in the National Assembly. Notwithstanding not being a member of parliament, the president may attend and speak in the National Assembly.[107] Although

[94] Art 132(1) of the constitution of Kenya.
[95] Art 152(3) of the constitution of Kenya.
[96] Art 144 of the constitution of Kenya.
[97] Art 145 of the constitution of Kenya.
[98] Art 155 of the constitution of Kenya.
[99] Art 40(b) of the constitution of Namibia.
[100] Art 40(c) of the constitution of Namibia.
[101] Art 40(e) of the constitution of Namibia.
[102] Art 40(g) and (h) of the constitution of Namibia.
[103] Arts 57, 50, and 32(3)(a) of the constitution of Namibia.
[104] Sections 86 and 87 of the constitution of the Republic of South Africa, 1996.
[105] Section 91(3) of the constitution of the Republic of South Africa, 1996.
[106] Section 73 of the constitution of the Republic of South Africa, 1996.
[107] Section 54 of the constitution of the Republic of South Africa, 1996.

it is not required by the constitution, the president addresses a joint sitting at the annual opening of parliament which is generally deemed to be an important opportunity for the executive to announce its policies and plans. The time of parliamentary sittings is determined by parliament itself,[108] but the president may summon parliament 'to an extraordinary sitting at any time to conduct special business'.[109] On a resolution of the National Assembly to that effect (not taken before three years have elapsed since its election), the president dissolves parliament.[110]

Despite the variation regarding direct and indirect election of the presidents of the four constitutional orders, no apparent indications are evident that the election processes increase or diminish the position of any of the presidents at the pinnacle of governmental power. In all four cases the presidents and their cabinets are nominally responsible to their parliaments, but are fully capable of dominating the legislative process and its outcome. Seen against the background of the conflation of the British (-colonial) and American examples of constitutional design, Anglophone African constitutions appear to sing the words of monism on the melody of dualism.

## 7. Conclusions

Taking into consideration that the separation of powers is a key element of the notion of constitutionalism and that it is focused on the avoidance of a concentration of power, the consideration of the interaction between Anglophone African parliaments and presidents reveals uncertainties regarding the foundational source and appropriately balanced allocation of constitutional powers. The constitutional configuration of the presidencies project a monistic superiority of executive authority while the parliaments are conceived along dualistic lines reminiscent of parliamentary sovereignty. The difficulty lies therein that both American dualism and British monism presuppose regular shifts in electoral outcomes based on political performance, whereas the African pattern tends towards long-term incumbency of dominant political groupings. This begs the question whether the power in the Anglophone African state originates in 'the people', the 'supreme' constitution, or in the ability of patriarchal politicians to retain power by means beyond constitutional reach.

The mystical social contract can no longer be considered, if it ever could, to be the foundation of state sovereignty,[111] neither in the Western world, and even less so in Africa. Sovereignty is rooted in effective norms contained in constitutional and international law emerging from historical events. The authority of a constitutional state and of its constitution depends on the understanding and acceptance, especially by the organs of the state entrusted with authority, of the precepts of constitutionalism, including an effective separation of powers.

[108] Sections 51(1) and 63(1) of the constitution of the Republic of South Africa, 1996.

[109] Sections 42(5), 51(2), and 63(2) of the constitution of the Republic of South Africa, 1996.

[110] Section 50(1) of the constitution of the Republic of South Africa, 1996.

[111] H Patrick Glenn, *The Cosmopolitan State* (Oxford University Press 2013) 133–4 for instance dispatches the social contract to the domain of the 'implausible'.

Anglophone African constitutions of the late twentieth and early twenty-first centuries were written and legitimized with more inclusive popular involvement and comparative finesse than those produced in the foregoing colonial and post-colonial phases. Nevertheless, none of them can be said to have the same iconical status as the original ground-breaking founding actions of the American constitution builders of the late eighteenth century, making it unlikely that Founding as an interpretative and authenticating notion will shoot deep roots into African constitutional soil. A fictional reconstruction of the supposed hallowed intentions of 'founding fathers' and mothers, as in monist American views, is therefore not an option in Africa. Nor can constitutional dualism in the Westminster mould explain Anglophone African understanding of the source of constitutional power, given the evident differences existing between African and British electoral cultures and the constitutional construction of the relationships between presidents and parliaments.

The upshot is that, in the constitutional orders discussed here, neither the prime example of the presidential system of the United States, nor the parliamentary system characteristic of colonial Britain[112] can be said to prevail. The merging of head of state and head of government functions in African presidencies, combined with the phenomenon that executives usually control the legislative processes and majority policy opinions in the parliaments, appear to have the effect of promoting presidential imperialism despite constitutionalist rhetoric to the contrary. The general pattern in Anglophone Africa is that the legislative checks on the executive are nominal or symbolic, the balance of power being in the hands of the executives under the predominating leadership of the presidents. Constitutional variation of this pattern between the states discussed appears to be mostly cosmetic and dependent on political reality: loss by a president of personal political clout would conceivably be a more effective check on his powers than parliamentary censure of his conduct during his term of office.

Nevertheless, emerging from colonialism, authoritarian arbitrariness, and popular suffering under political extremism, Anglophone Africa shows encouraging signs of sprouting constitutionalism in the form of constitutional balances between popularly elected legislatures tasked with executive overview and governments led by presidents who are at least notionally responsible to their parliaments. Westminster parliamentary sovereignty, from the outset a non-starter beyond the shadows of Westminster, has been replaced by superior constitutions. Presidentialism is constitutionally curbed by executive responsibility to elected parliaments, at the very least in form, if not consistently in substance.

The line between an effective separation of powers and the concentration of effective power in an individual head of state is thin. Constitutional guarantees against abuse of power and the manipulation of resources can easily become empty rhetoric in the hands of cynical and opportunistic politicians able to mobilize electoral majorities through patriarchy. This is true for any constitutional order, but especially in situations

[112] See, for example, Ronald J Krotoszynski, 'The Separation of Legislative and Executive Powers' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 237–47.

such as in contemporary Anglophone Africa where the operation of constitutionalist precepts has but a short history of governmental accord and a long history of popular subjection to concentrated power.

Formal constitutional foundations for the growth of constitutionalism in Anglophone Africa have been laid in some of the leading states on the continent, albeit on incongruous foundations derived from both sides of the Atlantic. Although monistic separation of powers between the executive and legislative branches is not a cornerstone of the constitutional structures built upon those foundations, such a separation has been proven in monistic British constitutionalism not to be a *sine qua non* for constitutional merit. The prospects for future constitutional stability logically depend on developmental and economic progress, but it is highly desirable that sound and apposite theoretical justifications for the constitutional award of state authority be developed in the African context. The competing notions of constitutionalism that migrated from different contexts and were incongruously written into fine constitutions do not hold sufficient promise for the emergence of a sound construction of African constitutionalism.

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# 4

# Kenya's Budding Bicameralism and Legislative–Executive Relations

*Conrad M. Bosire*

## 1. Introduction

Kenya's fairly recent constitution (adopted in August 2010) makes fundamental changes to the structure, powers, and functions of the national executive and legislature. Following the American model, the constitution establishes a presidential system of government with separation of powers between the legislature, executive, and judiciary. Prior to the current legislative and executive structures, the president was also an elected member of the legislature and cabinet ministers were appointed from serving members of the legislature, akin to the Westminster parliamentary system of government.

At the core of these fundamental changes was the desire by Kenyans to address a perennial African problem: the concentration of political and economic power in the president (or head of the executive). The culture of imperial presidency is rooted in colonial practice where the 'Native Commissioner or the Governor General had control over other branches of government and was only answerable to London'. A brief attempt was made, at independence, to discard this colonial era arrangement by establishing Kenya as a dominion republic with the Queen of England as the head of state and a Westminster model where the prime minister was the head of government and a member of the legislature. After years of centralized colonial rule, the British attempted to bequeath a semi-federal system of government (locally known as *majimbo*).[1] The regional system of government consisted of eight regions and a bicameral legislature at the national level consisting of a Senate whose primary role was to safeguard the interests of the regional governments.

These arrangements were, however, rejected by the emerging African elite. Like their counterparts in other newly independent African states, they dismissed the new arrangements as 'extensions of colonial rule'. In the case of Kenya, changes were made to the independence constitution which had two effects: the recentralization of political and economic power, and the creation of a powerful executive (in the person of the president) upon whom control of state power and resources was placed. Comparisons have been drawn between presidential powers in post-colonial Kenya and the powers of the Governor General or Native Commissioner during the

[1] Yash Pal Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press 1970) 178 explain that '"Majimbo" is a Swahili word which means an "administrative unit" or "region", and is generally used to refer to those provisions of the Constitution which established the [independence] regional structure'.

protectorate and colony days (1895–1963).[2] Abuse of state power and resources by successive presidents led to growing resentment of centralization and the personalization of public authority. This led to popular pressure for constitutional reform that ultimately led to adoption of the current constitution in 2010.

The constitution of Kenya sought to deal with centralization of power in the executive in three main ways. First, presidential powers were substantially reduced in many areas: the president no longer has direct and extensive control over the branches of government as he did in the past and many of the remaining presidential powers are subject to checks by other branches of government.[3] Second, the constitution establishes a presidential system of government. During the constitutional review process, the choice of the presidential system was justified on the basis that a higher degree of separation of powers between the legislature and executive will reduce the latter's dominance and control over the former. Lastly, the constitution establishes two levels of government: national government and forty-seven county governments across the country. At the national level, a Senate has been carved from parliament to represent and safeguard county autonomy.[4]

The constitutional changes made in 2010 have resulted in a higher degree of separation of powers between the legislature and executive with an elaborate system of checks and balances. This chapter analyses the structure, context, and emerging practice of legislative–executive relations under the 2010 constitution. The decision to opt for a presidential system of government (as opposed to a parliamentary or mixed one) and the re-introduction of the Senate are, as mentioned above, the defining features of the legislative and executive organs. However, the new system is superimposed on a longstanding institutional and political culture that was based on the presence of executive dominance in legislative affairs in a unicameral setting. The new system of government will, therefore, operate in a broader social, political, and historical context that will have a greater impact on their overall effectiveness.

The chapter begins by examining the broad political, social, and economic context within which legislative and executive business is to be carried out. Second, we then examine the constitutional review process and specifically highlight the factors that informed the choice of a presidential system of government. We then examine the constitutional framework for legislative–executive relations and the emerging practice under this framework.

## 2. The Kenyan and Comparative Context of Executive–Legislative Relations

Following the general trend of former British colonies, as mentioned in Chapter 1, Kenya has established an American-style structure of the legislature and the executive. However, there are some important differences. First, America's vice-president sits in the Senate while both the Kenyan president and vice-president are totally delinked from the legislature. Second, the Kenyan Senate's power is fairly limited compared to

[2] ibid 220. [3] See generally constitution of Kenya, arts 129–58.
[4] Constitution of Kenya, arts 174–200 and 109–16.

the American Senate: Kenya's Senate can only consider laws affecting counties unlike the former whose legislative role is general. While the American Senate has clear treaty ratification powers, the position regarding the Kenyan Senate is unclear in the constitution. The Kenyan Senate does not play any role in the appointment of members of the cabinet and this role is exclusively reserved for the National Assembly. Lastly, the Kenyan Senate's supervisory powers over the affairs of government are much more limited than those of the American Senate.[5]

The Kenyan context further distinguishes the potential political and institutional practice from that of the United States where the current Kenyan system is borrowed from. First, parliamentary culture in Kenya has been built around veneration of the executive and subordination of legislative agenda to the executive. Past presidents and ministers were a substantive part of the legislature where they dominated the parliamentary agenda. The fact that they are no longer part of the legislature does not necessarily eliminate this culture that has been developed over time. Second, even with a deliberate will by parliament to assert its independence and control its activities, the technical capacity required and institutional re-orientation to fit a presidential system of government may itself emerge as a challenge in Kenya.

Given that the centralization of power is the defining feature of Kenya's political and institutional culture, the nature and mandate of the Senate (safeguarding county power and autonomy) is potentially inimical to this past institutional and political culture. Indeed, a system of centralized powers and resources tends to operate more easily in a unicameral legislative setting where control over legislative affairs can be exerted more effectively. The concern now is that the nature of the mandate and role of the Senate may end up, just like its independence-era predecessor, as an additional hurdle which the national executive may want to side-step.

Even as the constitution of Kenya moves to assert the structural and functional independence of the legislature, there is an institutional and political culture built around a powerful imperial presidency that may impede the effective separation of powers that is required under a presidential system. In the absence of a deliberate decision to transition to the current constitutional dispensation, the legislative and executive structures may end up being beholden to the past practice where parliament was subordinated to the executive. This challenge may manifest in the lack of institutional capacity and experience to undertake legislative functions in a presidential system and continued executive influence despite the constitutional measures.

Lastly, it is also necessary to note that Kenya's political structures are weak, ethnic-based, and without central ideology or party discipline. Political parties are based on personalities and do not have strong institutional and ideological foundations. The ethno-political nature of Kenya's politics prompted the constitutional drafters to add a requirement that a president must win at least more than half of the votes cast in at least half of the forty-seven counties. This condition has led to the building of ethnic coalitions to enable the president and the running mates to ascend to office. The nature of Kenyan politics means that the president, as head of the executive, will always rely on

[5] Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute 2011) 94–5.

the political coalitions to ensure support of the executive in parliament. Relations between the executive and legislature in Kenya must be seen and understood from this prism. To better appreciate this, it is necessary to briefly see how this issue was dealt with during the constitutional review process.

## 3. The Executive and Legislature During Kenya's Constitutional Review Process

Kenya's constitutional review process can be divided into two major phases: the first was under the Constitution of Kenya Review Commission (CKRC) which commenced work in 1998 and ended with an unsuccessful referendum in November 2005. The second phase commenced in 2008 under the Committee of Experts (CoE) that ended with the successful referendum of August 2010. During the entire process, spanning slightly less than two decades, several constitutional drafts emerged which had varying provisions on the national and legislative structures. The structure of the national executive and the legislature proved to be the most contentious of all the constitutional review issues, and almost derailed the entire review process.

While Kenya ended up with a presidential system of government, most of the previous constitutional drafts had provided for a mixed system with strong features of a parliamentary system of government. The experience of the imperial presidency led to widespread public resentment against a powerful executive. Successive presidents used their power and control over public institutions to pilfer state resources, favour their home regions, and crack down on political dissent. This made Kenyans roundly reject a powerful presidency similar to the pre-2010 constitutional order. The dominance of the executive in the legislature and control of legislative affairs that was witnessed in the past led to specific calls to remove the executive from parliament. This may well have informed the call for a presidential system of government.[6]

The CKRC extensively documented the public's views regarding the national legislature and executive, as well as other aspects of the constitutional review process.[7] With regard to the system or form of government, public views were divided over two different systems. A part of the public recommended a system of government with a president who exercised presidential power and is subject to democratic checks and balances by the other arms of government. A majority of the people who expressed their views, however, proposed a parliamentary system of government with the prime minister (leader of the majority party in parliament) exercising executive power and a ceremonial president.[8]

While the public called for a ceremonial head of state or president, they were generally agreed that the president should nevertheless be directly elected by voters. This was justified on the basis that a directly elected president will be accountable to the voters. The public also wanted the president to choose a running mate who was to be his or her vice-president after the election. Furthermore, the public was unanimous

[6] Constitution of Kenya Review Commission (CKRC), 'The Final Report of the Constitution of Kenya Review Commission' (2005) 192–5.

[7] CKRC (n 6) in general. [8] ibid 192–5.

that the president should not be a member of the legislature and that there should be a strict separation of powers between the legislature and executive with appropriate checks and balances.[9]

The fear of an overly powerful executive, and specifically the presidency, influenced public views regarding the structure of the national executive and legislature. It was felt that the presence of the president in parliament, as was the case in the previous dispensation, could compromise the independence of the legislature and separation of powers. On the other hand, the need to check presidential power may have led to a suggestion, by the majority of the public who presented their views, for a position of prime minister who would share executive power with the president. However, there was no clarity on how the executive power was to be shared and exercised between the president and the prime minister.

After collecting and collating public views, the CKRC produced its first draft. It attempted to strike a balance between the opposing public views. The draft provided for an executive structure composed of the president and prime minister with the latter being the leader of the majority party in parliament. The president and the prime minister were to share executive power although the prime minister was to be head of government. The CKRC draft was submitted to a National Constitutional Conference for discussion and adoption.[10]

During the National Constitutional Conference, sharp political differences emerged between two political sides. One group, allied to the then President Mwai Kibaki, favoured a president with executive power who is not part of the legislature but is still subject to strong parliamentary checks. The other group, led by the then main political opposition, called for a parliamentary system with a prime minister based in parliament with some executive power. The opposition group seemed to hold sway at the Conference as they received majority support during the Conference. This led to a walk-out from the Conference by politicians allied to the then president. The draft that was adopted from the Conference had strong features of a parliamentary system. The position of the prime minister was retained in the draft that emerged from the Conference and his powers were enhanced.

The draft from the National Constitutional Conference was referred to parliament for debate and approval. This effectively led to the political wrangles being transferred to parliament. After unsuccessful attempts to change the Conference draft, parliament referred the draft to the Attorney-General for redrafting and publication of a constitution bill in readiness for a referendum vote. However, while carrying out the redrafting, the Attorney-General made material changes to the draft adopted by the National Constitutional Conference which almost fundamentally changed what the delegates had proposed to the national legislative and executive structures. The amendments by the Attorney-General, a presidential appointee, retained but substantially weakened the powers of the prime minister. For instance, while the Conference draft provided that the prime minister was to be the leader of the majority party in

[9] ibid.

[10] Report of the Constitution of Kenya Review Commission, 'The Draft Bill to Amend the Constitution' (2002) vol 2, ch 8, cls 148–83.

parliament and established the prime minister as head of government, the constitution bill developed by the Attorney-General provided that the president could appoint any member of the legislature as prime minister and expressly stated that the prime minister was under the control and direction of the president.[11]

A clear majority of the people were in favour of a bicameral legislature composed of two chambers. Accordingly, both the drafts developed by the CKRC and the National Constitutional Conference provided for a bicameral parliament. However, the constitution bill that was prepared for the referendum reversed this and provided for a unicameral legislature.[12] While the constitution bill provided for the position of a prime minister, it weakened the parliamentary system provided for in the earlier drafts. The constitution bill was, however, defeated in a referendum that was held in November 2005.

The law that was guiding the review process lapsed soon after the constitutional referendum of 2005. This led to a lull between the first and second phases of the constitutional review process. The second phase of the review process was started as part of the long-term measures to address the political violence which ensued after disputed presidential elections of December 2007. Constitutional review was seen as one of the long-term measures to consolidate political stability and national unity.[13] A new law which established a Committee of Experts (CoE) to guide the review process was passed in early 2008. The mandate of the CoE was narrower than that of the CKRC. While the CKRC carried out extensive public consultation and developed reports and full constitutional drafts, the experts were only required to review past constitutional drafts and isolate contentious issues for consensus-building and limited stakeholder and public consultation. Furthermore, unlike the CKRC which had time to operate that ran into years, the CKRC had only about a year to complete its work.

The structures of the executive and legislature were singled out as the most contentious issue by the CoE. The CoE developed three main drafts during its period of operation. In its first draft, the harmonized draft constitution, the CoE provided for a structure of the executive composed of the president and prime minister. This was as a result of the review of past constitutional drafts and public views which were documented during the constitutional review process. The CoE came to the conclusion that Kenyans wanted a mixed system of government where executive power was shared between the president and prime minister. The first draft provided for arrangements

[11] For instance, art 172 of the draft from the National Constitutional Conference had provided that: 'There shall be a Prime Minister of the Republic who shall be head of government; The Prime Minister shall co-ordinate the work of the ministries and the preparation of legislation and is responsible to parliament; The Prime Minister shall preside at meetings of the cabinet;'. However, art 163 of the draft produced by the Attorney-General provided thus on the prime minister: 'There shall be a Prime Minister of the Republic, who shall be appointed by the president in accordance with provisions of this part; The Prime Minister shall be accountable to the president and shall, under the general direction of the president: be the leader of Government business in parliament; perform or cause to be performed such other duties as the president may direct; and perform such other as are conferred by this constitution and any other functions as the president may assign.'

[12] Proposed new constitution of Kenya, 2005, cls 114–15.

[13] Kenya National Dialogue and Reconciliation (KNDR), 'Longer Term Issues and Solutions-Constitutional Review' (4 March 2008).

similar to those in the draft that was produced by the National Constitutional Conference during the first phase of the review process.

The CoE received views on its first draft which resulted in the second draft named 'Revised Harmonised Draft'. The second draft retained the position of prime minister and only made minimal adjustments to the structure of the national legislature and the national executive. The first and second drafts provided for the prime minister as head of government and generally retained shared executive powers between the president and the prime minister.[14] The two constitutional drafts, therefore, largely reflected the public consensus on the structures of the national executive and legislature that were presented to the CKRC as discussed earlier.

The review law required the second draft to be forwarded to the parliamentary select committee that was established to assist in building political consensus. It is at this stage that a political agreement between politicians from the ruling and opposition was reached to have a presidential system of government. The political sides agreed to a presidential system with the president as head of the executive and subject to parliamentary checks. It was agreed that the position of prime minister be removed from the constitutional drafts. The experts had little choice than to follow the political agreement that was reached by the politicians and revised the third draft to provide for the presidential system of government that is provided for in the current constitution.

Hence, although a majority of public views, and indeed previous constitutional drafts, provided for strong features of a parliamentary system, this was discarded towards the end of the constitutional review process. The political settlement on a presidential system came as a surprise to the public, as well as the CoE since neither political side had seriously canvassed for such a system throughout the entire constitutional process.[15] With regard to the structure of the legislature, the CoE retained the bicameral structure which was provided for in most of the previous constitutional drafts, in accordance with the majority of public views on the legislature.

## 4. The Constitutional Framework for the National Executive And Legislature

The system of government provided for in the current constitution, as discussed earlier, is a presidential one. None of the members of the executive are part of parliament. There is a separation of powers between the two branches of government with many of the traditional checks and balances (see Chapter 2). The primary driving force behind this system of government and structure was, as was earlier pointed out, the need to limit and check presidential power as a result of past abuse of this office. The clamour to reduce the influence of the executive on the legislature may have been interpreted by constitutional experts and the politicians as preference for a presidential system of government.

[14] Committee of Experts on Constitutional Review, *Harmonised Draft Constitution* (17 November 2009), cls 155–92.

[15] Committee of Experts, *Final Report of the Committee of Experts on Constitutional Review* (2010) 88–9.

Apart from the national executive and legislative structures, the devolved system of government also affects the legislative–executive relations in two main ways. First, governmental power is not only divided horizontally between the three traditional branches of government (executive, legislature, and judiciary), but governmental power is vertically split between the national and county levels of government. In turn, devolved power is split into executive and legislative power at the county level. Accordingly, unlike the previous constitution where all governmental power was centralized, executive and legislative power is two-tiered (at national and county levels) in the constitution. The vesting of power in a different level of government contributes to the overall objective of reducing the concentration of power and resources at the centre, the effect of which is all too familiar to Kenyans.

Second, the national legislature is split into two chambers primarily because of the devolved system of government. The Senate, which is the second chamber of the legislature, is established primarily to safeguard the autonomy and interests of the forty-seven counties at the national level. The legislative and other powers of the Senate and even its structures are designed to promote the interests of county governments. This core role of the Senate (protection of counties) has significantly impacted on how executive–legislative functions are carried out under the current constitutional dispensation. The place of bicameralism in executive–legislative relations is discussed later.

## 4.1 The national executive

The president is both head of state and head of government. A candidate is elected as president if he or she receives more than half of the votes cast and at least 25 per cent of votes in more than half of the forty-seven counties. If this threshold is not achieved on the first round, the two candidates with the highest number of votes will go into a run-off and the one with the most votes (on the second vote) will be declared the president. A person elected as president can only be re-elected once. Each presidential candidate is required to choose a running mate who will become deputy president for the winning candidate. The president, and deputy, can be removed from office through an impeachment process that is instituted through the National Assembly and determined by the Senate.[16]

The president heads the executive which is composed of the deputy president and not more than twenty-two cabinet secretaries. Unlike the previous dispensation, the cabinet secretaries are chosen from outside the national legislature. Any member of the national legislature who is nominated and approved as a member of the cabinet has to resign from the legislature in order to adhere to the principle of separation of powers. The president is also the Commander-in-Chief of the Kenya Defence Forces and chairperson of the National Security Council. Ghai and Cottrell observe that this power implies that the president has a major say on defence matters as the highest executive authority and chair of the National Security Council.[17]

[16] Constitution of Kenya, arts 131–45.

[17] Ghai and Ghai (n 5) 94–95.

While the constitution bestows upon the president powers and responsibilities of the head of state and government, a major difference with the past dispensation is that these powers have been limited and further subjected to checks by the other organs of government. The president has the power to nominate members of the cabinet but all nominees have to be vetted and approved by the National Assembly. The National Assembly also has to approve all other major appointments including: permanent secretaries, members of the electoral commission and the Judicial Service Commission, the Attorney-General, and ambassadors, amongst other senior appointments. Furthermore, the president can only make decisions such as declaration of a state of emergency, and declaration of war with the concurrence of parliament. The president can no longer dissolve parliament, establish and abolish public offices, or nominate members of the National Assembly, as he used to do under the old Kenyan constitution.

The president runs, with the assistance of the cabinet secretaries, the affairs of the national executive and coordinates governmental functions. As the head of government, the president is empowered to chair cabinet meetings, direct and coordinate the functions of ministries and government departments, and assign the responsibility of implementation of legislation.[18] The president's state functions include receiving foreign and diplomatic and consular representatives, conferring honours, making a declaration of a state of emergency, or a declaration of a state of war. As head of state, the president is required to promote nation-building and national unity. The constitution requires the president to be the symbol of national unity, to safeguard the constitution, safeguard Kenya's sovereignty, promote and enhance national unity, and promote respect for diversity.[19] The president is also required to promote the respect for human rights and rule of law. Other head of state functions include receiving foreign and diplomatic and consular representatives and the conferring of honours.

In view of the fundamentally changed structures of the executive, the president and the entire executive have to develop systems and ways of relating to the national legislature which conform to the broad constitutional framework. Specifically, the executive agenda will only be favourably considered if the executive has support in both chambers. This will, in turn, depend on the number of candidates from the president and deputy president's party or coalition (and other supporters) that are elected to the Senate and the National Assembly. In the process, the general challenges related to the presidential system of government (such as deadlock between the executive and legislature) cannot be eliminated.

## 4.2 The national legislature

The bicameral structure of Kenya's legislature has resulted in the splitting of parliament into two chambers: the National Assembly and Senate. The Senate's legislative mandate is limited to matters affecting counties which it shares with the National Assembly while the latter has an exclusive legislative mandate on legislative matters that do not concern counties. The two chambers also carry out the traditional checks and balances

[18] Constitution of Kenya, art 132. [19] ibid art 132.

against the executive. Similarly, the Senate's review and oversight powers are relevant to the Senate's core mandate of protecting county governments. However, there are general oversight and review powers that are also equally shared between the chambers.

The National Assembly is composed of 290 national legislators who are elected from single-member constituencies, forty-seven women representatives elected from each of the forty-seven counties, and twelve members nominated by parties represented in parliament in proportion to party performance in the constituencies. The twelve nominees are meant to represent special interests which include: young people, persons with disabilities, and workers.[20] The National Assembly is also composed of the Speaker who is an *ex officio* member of the chamber. The Senate, on the other hand, has forty-seven senators who are directly elected by voters from the forty-seven counties, sixteen women representatives, and four nominated representatives representing young people and persons with disabilities in the Senate (two male and two female each). The Senate Speaker too is *ex officio.*

Legislative power is shared between the two chambers and there is a system of checks and balances on the executive. These include: the power to review and approve appointments by the executive, impeachment powers on the president and the deputy president, and power to oversee executive action, amongst other powers that are discussed in detail later. Similarly, there is a division of review and oversight role between the two chambers. The Senate has certain special oversight and review powers relevant to its core mandate (protecting counties) while there are general oversight and review powers shared by the two chambers.

## 5. Assessment of Executive–Legislative Relations in Kenya

The national executive requires its laws, budget, policies, and appointments to be approved by the legislature. As a result, the president and the cabinet require the support of the majority of members of both Houses. Previously, ministers who were also members of parliament championed the executive agenda in parliament. The position of the Leader of Government Business was reserved for the vice-president, also a serving member of the legislature. However, under the current dispensation, the president has to work with friendly legislators to ensure that the executive agenda is considered in the legislature.

Unlike the American system where there are mid-term elections for the legislature, Kenya's elections are held on the same day. Concurrent presidential and parliamentary elections provide presidential candidates with an opportunity to form political coalitions that will facilitate smooth executive–legislative relations.[21] The run-up to the March 2013 general election saw the formation of ethnic-based political coalitions in a bid to capture the presidency. As a result, the coalition that won the March 2013 general election had slight majorities in both the National Assembly and the Senate. Hence, persons elected as speakers of both Houses were preferred candidates of the

[20] ibid art 97. [21] Ghai and Ghai (n 5) 103.

ruling coalition. This has provided the president with support to push the executive agenda through parliament.

However, even with the support of the executive in both chambers, emerging practice shows that the executive is ready to side-step the Senate and deal exclusively with the National Assembly. In some cases discussed later, the desire to avoid the Senate has resulted in the Senate's unconstitutional exclusion from legislative business (engineered by the executive and the National Assembly).[22] This is primarily because the ruling coalition (Jubilee Alliance) that won the March 2013 election has majorities in both Houses, and support for its agenda is guaranteed more in the National Assembly than the Senate for a number of reasons.

The ratio of members from the ruling coalition to that of the opposition coalition is far greater in the National Assembly than Senate. In the March general election, parties affiliated to the ruling coalition secured 162 seats of the 349 seats while parties from the second largest political coalition (Coalition for Reform and Democracy (CORD)) secured 138 seats. Amani Coalition, the third coalition, secured fourteen seats while the rest of the seats (nine) were shared between individual parties and an independent candidate.[23] In the Senate, the ruling coalition narrowly clinched the majority with twenty-one elected senators against CORD's twenty elected senators. The other six seats were taken by the smaller coalitions and parties.

Representation in the National Assembly is mostly based on population criteria and this ensured high numbers of members for the ruling coalition whose support base was mainly in highly populated regions of the country. Elected seats of the Senate, on the other hand, are based on the forty-seven counties. The executive is therefore more likely to side with the National Assembly where it is stronger in numbers than the Senate.

Bicameralism complicates legislative business as the executive has to work out strategies of ensuring its agenda goes through the two chambers. The additional task of passing through the Senate after the National Assembly is an inconvenience that the Executive may wish to avoid. Furthermore, the nature of mandate of the Senate (safeguarding county autonomy) requires measures such as pushing for the transfer of more powers and resources to counties from the centre and the executive may not be entirely comfortable with such an agenda.

In order to consolidate control of the National Assembly, the ruling coalition in parliament used its numbers to ensure that its members chaired the most crucial committees of the National Assembly. The committees include: the House Business Committee, which has the role of planning the parliamentary calendar; and the Budget Committee, which is in charge of considering budget proposals by the National Treasury and tabling the proposals. Other committees chaired by the ruling coalition include: the Departmental Committee on Administration and National Security, the Defence and

[22] Commission for the Implementation of the Constitution (CIC), 'CIC Press statement on the violation of the Constitution by Parliament' (2 October 2014).

[23] Yash Pal Ghai and Jill Cottrell Ghai, 'Ethnicity, Pluralism and 2013 Elections' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism and Katiba Institute 2013) 120.

Foreign Relations Committee, and the Justice and Legal Affairs Committee. The speaker chairs the House Business Committee, House Rules Committee, and the Appointments Committees.[24] Amongst the important committees left to the opposition coalition are the Public Accounts Committee and the Public Investments Committee which the opposition 'wrestled' from the ruling coalition. These committees play a crucial role in ordering legislative activities, considering laws, and exercising oversight.

## 5.1 The law-making process

Legislative power of the two chambers is exercised through bills. Bills concerning counties have to be considered in both chambers while those not concerning the counties are exclusively dealt with in the National Assembly. The Constitution defines a bill concerning county governments as one which affects the powers of county governments which are listed under the Fourth Schedule to the constitution. This is not a very helpful definition. A bill concerning counties also includes one that relates to the election of the county executive or legislature, or a bill that affects the finances of county governments.[25] With the exception of money bills, any of the bills affecting counties can be introduced in either House; money bills can only originate or be introduced in the National Assembly.[26] A money bill is defined as a bill that deals with taxes (excluding county taxes), imposition of a charge on a public fund, borrowing or guaranteeing a loan, and related matters.[27] A money bill touching on counties can only be referred to the Senate after being debated and passed in the National Assembly.

There is no clear constitutional distinction between a bill which affects counties and one that does not. The constitution requires the two speakers to resolve the question of whether a bill affects counties or not before it is introduced to either chamber. Many bills actually affect counties and it will depend on the willingness and enthusiasm of the Senate to review legislation and ensure that county interests are promoted. This lack of clarity has in some cases led to attempts to exclude the Senate and subsequent conflict between the two chambers.

Bills concerning counties are divided into two further categories: ordinary and special bills concerning counties. Special bills require a special majority vote (two-thirds) of the National Assembly to veto the decision of the Senate to pass the bill into law. Ordinary bills, on the other hand, only require a simple majority to be overturned by either House. Special bills concerning counties include: bills relating to the election of members of a county assembly or the county executive, or the annual County Allocation of Revenue Bill (CARB) which divides national revenue allocated to counties amongst the forty-seven counties. In these two bills, the National Assembly can only veto the Senate decision after garnering two-thirds of the vote.

Where there is a deadlock between the two chambers, the constitution provides for the formation of a mediation committee to come up with a consensus bill. If the

[24] Parliament of Kenya, 'National Assembly Committees' (15 June 2015) <http://www.parliament.go.ke/index.php/the-national-assembly/committees/committees?start=20> accessed 15 June 2015.

[25] Constitution of Kenya, arts 111–12. [26] ibid art 114. [27] ibid art 114(3).

consensus bill is not passed by both chambers, the proposed legislation is defeated. If any bill on a matter concerning counties is passed by both chambers or by the National Assembly (if the bill does not affect counties), the bill is referred to the president for assent before it becomes law. The president can either assent to the bill or send it back to parliament. The two Houses or the National Assembly (as the case may be) can either amend the bill to incorporate the president's concern or overturn the president's veto by raising a two-thirds majority vote. If parliament manages to raise the required numbers (two-thirds) to overturn the president's veto, the president is required to promptly assent to the bill as passed by parliament.

The majority of laws considered by parliament are usually developed and sponsored by the executive and almost all of these laws have been introduced in the National Assembly. Almost all bills initiated through the Senate are usually by private member bills prepared by senators. The only bill, perhaps, that comes from the executive (National Treasury) to the Senate is the CARB that the Senate has a special power to consider and pass. The majority leader in the National Assembly is, in practice, given the task of presenting laws prepared by the executive to the National Assembly.

One of the first major disputes between the two chambers related to the manner in which the Annual Division of Revenue Bill (DORB) for the financial year 2013–14 was passed. The DORB apportions revenue between the national and county levels of government. While the constitution mentions that the Senate has a special power over the CARB which divides the county share amongst counties, it is silent on the role of the Senate over the DORB that divides revenue between the national and county levels. In this case, the speaker of the National Assembly, after passing the DORB of 2013–14, handed it over to the Speaker of the Senate. The Senate, however, sought to alter the DORB passed by the National Assembly by increasing the county share.

The Speaker of the National Assembly ignored the Senate amendments and passed on the bill (as initially passed by the National Assembly) to the president for assent. The constitution provides that when there is a legislative deadlock between the two Houses, a mediation team composed of equal numbers from each chamber is supposed to be constituted in order to develop a consensus bill. Against the advice of the Commission for the Implementation of the Constitution, the president assented to the bill on the grounds that any further delay with the bill would affect budget implementation.

The Senate took the matter to the Supreme Court (through an advisory opinion) and the Court ruled (with one judge dissenting) that the DORB is a bill affecting counties and the Senate has a role to debate and vote on the bill.[28] The Court followed its previous ruling on matters affecting counties in the case of *Re the Matter of the Interim Independent Electoral Commission*[29] where the Court noted that '. . . any national level activity that has a significant impact on county government would come within the purview of a matter concerning the county governments'.

The Court therefore concluded that the DORB is a bill that affects county governments and should have been considered by the Senate. The Court advised that in the

[28] *Senate v National Assembly* Supreme Court of Kenya, Advisory Reference Opinion No 2 of 2013.
[29] Supreme Court Constitutional Application No 2 of 2011 [40].

instant case, the proper procedure was for the two chambers to form a mediation committee of equal numbers from the same House to develop a consensus bill, in an attempt to resolve the stalemate, as provided for in the constitution.[30]

In late 2014, the National Assembly debated and passed an amendment bill that was meant to amend twenty laws on security issues. The government argued that these amendments were necessary to ensure that the security agencies were able to deal with the emerging insecurity in the country related to terrorism. The bill was rushed through the National Assembly with special motions introduced to reduce parliamentary time for debate. The Speaker ignored near-violent protests by the opposition on the floor of the National Assembly and presided over the passing of the bill with the support of the majority members of the House from the ruling coalition. The president assented to the bill the following day.

Again, the Senate was not involved in the passing of the laws. However, the Speakers of the two chambers consulted and reached an agreement that amendments that touch on county matters be deleted so that the bill does not have to be taken to the Senate.[31] The agreement between the Senate and the National Assembly Speakers to have provisions requiring the Senate's involvement deleted, instead of being considered by the House, points to the Senate Speaker's willingness to abdicate the proper role of the Senate. As stated earlier, Speakers of both chambers are preferred candidates of the ruling coalition and a different Speaker may have sought to assert the Senate's role in the amendments rather than avoiding it.

While the constitution requires Speakers to make a joint decision on whether a bill affects counties or not, this decision is in practice made by the majority leader who usually labels the tables in the National Assembly as not affecting counties. No clear parliamentary procedures have been adopted to ensure a clear process of 'tagging' proposed laws as affecting counties or not. In November 2014, Senators observed that forty-six laws which were passed by the National Assembly ought to have been referred to the Senate and were not referred as required by the constitution.[32] Amongst the bills/laws which ought to have been presented to the Senate but have been 'tagged' as not affecting counties are the Water Bill (2014) which was tabled in the National Assembly in mid-2014, the Mining Bill (2014) which was passed by the Senate and handed to the president for assent and many other bills which are lined up for tabling in the National Assembly.

The majority leader in the National Assembly, a position further borrowed from the American system, assists the executive to have its laws tabled and pushed through the national legislature. The majority leader has essentially become the representative of the national executive in parliament.[33] A bulk of the proposed legislation that is tabled

[30] *Senate v National Assembly* (n 28).

[31] *Coalition for Reform and Democracy (CORD) and 2 others v Republic of Kenya and 1 other* High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition No 268 of 2014 consolidated with petition No 630 of 2014 and petition No 12 of 2015.

[32] Nation Reporter, 'Senators Seek Uhuru's Hand in Feud with National Assembly' (*Daily Nation* 15 November 2014) <http://www.nation.co.ke/news/politics/President-Kenyatta-caught-in-supremacy-war/-/1064/2524068/-/view/printVersion/-/2c0799/-/index.html> accessed 22 November 2015.

[33] Ghai and Ghai (n 5) 102.

in the National Assembly is usually executive-sponsored. This is a trend which has been carried from the former dispensation where legislative development was driven by the executive and legislation pushed through in parliament by ministers who were part of the legislature. The only difference now is that the executive has to rely on the majority leader and members of the ruling coalition to push legislation.

## 5.2 Oversight of the executive

Past abuse of presidential and state power led to constitutional provisions for a stronger oversight role over the executive in the constitution. The power to check and oversee the executive is, in turn, split between the National Assembly and the Senate. The oversight powers of the legislature can be divided into three: exclusive oversight powers of the National Assembly, oversight powers shared by the two chambers, and special oversight powers of the Senate on specific matters touching on counties.

A bulk of the horizontal checks and balances are bestowed on the National Assembly. The constitution specifically provides that the National Assembly exercises oversight of state organs.[34] Most senior appointments by the president are, as explained earlier, subject to the ratification of the National Assembly. The National Assembly is, in turn, required to ensure that the president satisfies the constitution in making appointments such as the requirements of standards of integrity, respect for diversity and regional balance, among other constitutional requirements.[35] The president is also required to address the opening of a newly elected National Assembly and the Senate and also address a special sitting of the two chambers once each year to report on the progress in achieving the national values stated in the constitution. Additionally, the president is required to submit a report of the progress for tabling before the two chambers.

The numbers in the National Assembly have ensured that the president's nominees for various positions get a nod from the chamber even where fairly serious questions have been raised. While vetting the president's nominees for the position of cabinet secretaries, members from the opposition coalition opposed the approval of two nominees. According to the members, one of the candidates lacked the standard of integrity required to serve in the ministry while the other nominee failed to give satisfactory answers on how she was to handle the docket that she was proposed to head. The Vetting Committee and the National Assembly, however, confirmed the nominees despite questions raised by legislators from the opposition coalition.[36]

In June 2015, the National Assembly rejected one of the president's nominees for the position of secretary to the cabinet. The nominee was at the time serving as the Principal Secretary in the Ministry of the Interior and Coordination of National Government and the president sought to elevate her to the position of Secretary to the Cabinet, a position that requires the National Assembly's approval. The Vetting

[34] Constitution of Kenya, art 95(5)(b). [35] ibid art 131(2).

[36] Edwin Mutai, 'Vetting committee deadlocked over Kandie, Chirchir' (*Business Daily Africa,* 13 May 2013) <http://www.businessdailyafrica.com/Vetting-committee-deadlocked-over-Kandie-and-Chirchir/-/539546/1851330/-/fg5va3z/-/index.html> accessed 22 June 2015.

Committee and most members of the National Assembly opposed her nomination on grounds that the nominee, while in her position of Principal Secretary, wrote a 'rude letter' to parliament. The letter was addressed to clerks of the Senate and National Assembly raising concerns about frequent visits and requests to her office by members of both chambers asking for irregular transfers or dismissal of public officers serving under her docket in various stations across the country.[37]

The report of the Vetting Committee stated that the letter was written in bad faith and the nominee 'displayed arrogance and insensitivity to the needs and concerns of the public and elected leaders'.[38] The majority of the members of the National Assembly who rose to speak supported the motion. Attempts by the majority leader to seek a postponement to allow more time for debate were unsuccessful. After rejection of the nominee, the presidency issued a statement that defended the nominee's professionalism and strong work ethic that led to her nomination. The president expressed 'profound disappointment' with the decision of the National Assembly to reject the nominee.[39] This single incident demonstrates that while the president has the support of the National Assembly, the latter can withdraw support where its interests are affected. The Commission for the Implementation of the Constitution (CIC) indicated that it will challenge the National Assembly's decision in court noting that the National Assembly had been engaged in a vendetta, as opposed to acting objectively, when it made the decision to reject the nominee.[40]

While most of the major presidential appointments are the preserve of the National Assembly, a few of the appointments are subject to 'approval of Parliament' and therefore require the approval of both chambers. For instance, the appointment of the Inspector General of Police is subject to the approval of both the National Assembly and the Senate.[41] Furthermore, impeachment proceedings against the president or the deputy president are commenced in the National Assembly but it is only in the Senate that the actual impeachment process is held and a final decision is taken. Both chambers approve deployment of national forces in and outside of Kenya[42] and both chambers also jointly approve the extension of the term of parliament when the country is at war.

The Senate has special and exclusive powers relevant to its mandate of the protection of county governments. The Senate has the power to set, by a special resolution, the basis of division of revenue between the forty-seven counties every five years. Once the Senate has passed this special resolution, the National Assembly can only change this basis through a two-thirds majority vote. The constitution also gives the Senate power to overturn decisions of the executive on certain matters concerning counties. First, while the constitution recognizes that the national executive can intervene in county

[37] National Assembly, 'Parliamentary Debates' (Official Report, 11 June 2015) 8–10.

[38] ibid 8.

[39] The Presidency, 'Statement on Parliament's vetting of Amb Dr Monica Juma' (11 June 2015) <http://www.president.go.ke/2015/06/11/statement-on-parliaments-vetting-of-amb-dr-monica-juma/> accessed 23 June 2015.

[40] CIC, 'Press Statement on the Unconstitutional Exercise of Power by the National Assembly' (12 June 2015) <http://www.cickenya.org/index.php/newsroom/item/486-press-statement-on-the-unconstitutional-exercise-of-power-by-the-national-assembly#.VYr0yPmqqko> accessed 23 June 2015.

[41] Constitution of Kenya, art 245(2)(a).

[42] ibid art 240(8)(a) and (b).

affairs where the county fails to perform its functions or adhere to national financial regulations, the Senate has the power to terminate such an intervention at any time.[43] Furthermore, while the constitution provides for grounds and procedures through which the president can suspend a county government, it also provides that the Senate can terminate the suspension at any time.[44]

Both the National Assembly and the Senate have the power to summon members of the executive and require specific answers on issues. The constitution specifically provides that a cabinet secretary must appear before a committee of the National Assembly or the Senate when required to do so and answer any questions concerning a matter for which the cabinet secretary is responsible. Generally, the legislative scrutiny of executive action is done through committees as opposed to the previous constitutional dispensation when ministers, who were parliamentarians, answered questions from other members during 'question time' in parliament.

The National Assembly has, in the past, sought to bring back the previous parliamentary system of 'question time' through the back door. This was achieved by amending House Rules to provide for sessions where cabinet secretaries would attend sessions every Tuesday to answer questions on the executive before the 'Committee of the Whole House'. Initially, the president had raised concerns regarding the regular summoning of cabinet secretaries to appear before committees of the National Assembly. He noted that the summons wasted valuable time that the cabinet secretaries could have used for running executive business.[45]

The CIC advised that the move to establish a Committee of the Whole House would be unconstitutional as it offends the principle of separation of powers as articulated in the constitution. The CIC based its advice on the fact that the current constitutional framework seeks to separate the executive from the legislature to the fullest extent possible. The CIC concluded that the proposal was akin to reintroducing the 'question time' which allowed the executive to participate in the business of the legislature indirectly.[46] This plan was, however, abandoned by the National Assembly, possibly as a result of the protestations from the executive and institutions such as the CIC.

## 5.3 The budget-making process

The constitution of Kenya 2010 greatly enhanced the role of the legislature in budget-making and supervision of public expenditure. Previously, only the executive, through the National Treasury, had the power to prepare the national budget. The budget proposals were not subject to parliamentary scrutiny or input. The legislature's role was limited to approval of expenditure and the usual oversight of the use of public resources. The current legislature has budget-making powers which include making substantial adjustments to the budget proposals made by the National Treasury.

[43] ibid art 190(5)(d). [44] ibid art 192(4).

[45] Anthony Omuya, 'Uhuru Hits Out At House Teams Over Cabinet Summons' (*Business Daily Africa,* 7 November 2013) <http:// www.businessdailyafrica.com/-/539546/2064600/-/view/printVersion/-/1iu74f/-/index.html> accessed 23 June 2015.

[46] Commission for the Implementation of the Constitution (CIC), 'CIC Press statement on the Violation of the Constitution by Parliament' (2 October 2014).

Additionally, the legislature has the usual power of approving all public expenditure by the national government.

The budget process is an important one for the ruling coalition since its priorities can only be pursued through budgetary allocation. The Chairman of the Budget and Appropriations Committee (BAC) is headed by a member from the ruling coalition. The cabinet secretary usually presents budgetary proposals to the BAC who then make a report to the whole House. The whole House considers the submissions of the cabinet secretary (to the committee) and recommendations of the committee and adopts the budgetary proposals. In the process, the BAC and the whole House can make amendments proposed by the National Treasury.

## 6. Conclusion

The presidential system of government (which requires separation of power between the legislature and executive) as well as the bicameral system are indeed the defining features of the relations between the legislature and the executive in Kenya. These features were intended to curb the national executive's past dominance over the legislative branch. Parliament now controls its own agenda and calendar without any direct controls by the national executive as was the case in the past.

The executive, with its slight majorities in both Houses, is able to have most of its agenda sail through parliament. However, the National Assembly has also demonstrated that it can stand up to the executive when its collective interests are threatened. Furthermore, there is no guarantee that every coalition that comes to power will have majorities in either or both of the chambers. In such an instance, the executive will have to negotiate and deliberate with the legislature and reach compromises on issues that are acceptable to both branches of government.

While the Senate has an integral role to play in executive and legislative relations, constitutional ambiguity on its legislative role has provided an opportunity to the National Assembly and the executive to side-step it. Most of the legislators in the National Assembly served in the previous unicameral legislature prior to March 2013 general election. The president and his deputy were also members of the last legislature under the previous constitution. Against this background, it is possible that both institutions (the National Assembly and the executive) see the Senate as an 'irritant'. Courts have, however, demonstrated that they are prepared to support the Senate in its assertion of its role.

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# 5

# Legislative–Executive Relations in Presidential Democracies

## The Case of Nigeria

*Sylvester Shikyil*

## 1. Introduction

One of the salient premises on which the presidential system of the constitution of the Federal Republic of Nigeria, 1999 rests is the doctrine of separation of powers and the principle of checks and balances amongst the three branches of government. The constitution clearly spells out how governmental powers of the Federal Republic of Nigeria are separated. The legislative powers of the federation are vested in the National Assembly, which comprises the Senate and the House of Representatives; and in the State House of Assembly at the state level.[1] The executive powers of the federation are vested in the president while the executive powers of the states are vested in the respective governors of the states of the federation.[2] Judicial powers are vested in courts established for the federation and the states.[3] The essence of the separation of powers is that each branch of government, as a general rule, is prohibited from exercising the powers of the other branches of government and enables each branch to keep the powers of the other branches in balance with its own powers.[4] The constitution grants the legislature the power to make laws while the executive has the power to execute and the judiciary the power to interpret the laws. The president as the head of the executive is granted a wide range of powers in the constitution but he cannot go beyond these powers as he would be checked by the legislative arm by way of impeachment.[5] Although the constitution explicitly provides for separation of powers as if each branch of government remains inviolate with separate and distinct roles, the complexity of governance demands a growing interrelationship amongst the branches of government in practice. Accordingly, through checks and balances, the three arms of government can work harmoniously to ensure that no branch of government gains control over the other.

This chapter examines how the legislature and the executive interact and check each other in a manner that prevents abuses of powers. The discussion is divided into six

[1] Constitution of the Federal Republic of Nigeria 1999, s 4. [2] ibid s 5. [3] ibid s 6.

[4] Solomon Akinboye and Remi Anifowose, 'Nigerian Government and Politics' in Remi Anifowose and Francis Enemuo (eds), *Elements of Politics* (Malthouse 1999).

[5] The president or vice-president may be removed from office by the National Assembly for gross misconduct in line with provisions of the constitution of the Federal Republic of Nigeria 1999, s 143(1)(2)(b).

sections. Section 1 is a general introduction and tries to provide the context for understanding the legislative–executive relations in Nigeria's presidential system. This is followed by section 2 which brings into focus the constitutional role of the legislature and the executive. Section 3 examines the features of Nigeria's presidential system. Section 4 explores the areas of interaction between the legislature and the executive in the discharge of their constitutional roles. The fifth section examines the causes of legislative–executive conflicts and their impact on good governance and the discussion ends with a conclusion in section 6.

## 2. Constitutional Roles of the Legislature and Executive

Separation of powers is the basis of legislative–executive relations in Nigeria, and has remained vital in the organization of the affairs of the state. The division of powers amongst the three arms of government is, however, not absolute, as the constitution recognizes a system of checks and balances. The activities of the branches overlap in some cases and each of them connects with the others at various points. A basic structure of a democratic constitution is that state power is divided and distributed amongst the three arms of government: the executive, the legislature, and the judiciary. This is essential to any democratic constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. It follows therefore that wherever the constitution establishes independent institutions with legislative, executive, or judicial powers, such institutions are meant to function in aid of and subordinate to the legislature, executive, and judiciary.[6] In the context of Nigeria's presidential system, the concept of separation of powers contains four basic elements:

(i) Separation of the arms of government;[7]
(ii) Constitutional supremacy;[8]
(iii) Partial independence; and
(iv) Judicial review.[9]

### 2.1 The legislature

Any discussion on the role of the legislature in a liberal democratic state needs to be placed in a proper political context. Broadly, the legislature in contemporary Nigeria operates within a presidential system. The defining political element of the presidential system in Nigeria is a system of separated arms of government sharing powers. This

[6] See for instance, constitution of the Federal Republic of Nigeria 1999, s 153. The section provides that there shall be established for the Federation the following bodies, namely: Code of Conduct Bureau; Council of State; Federal Character Commission; Federal Civil Service Commission; Federal Judicial Service Commission; Independent National Electoral Commission; National Defence Council; National Economic Council; National Judicial Council; National Population Commission; National Security Council; Nigeria Police Council; Police Service Commission; and Revenue Mobilization Allocation and Fiscal Commission.

[7] Rahila Ashirumun Ahmadu and Niyi Ajiboye (eds), *A Hand Book on Legislative Practice and Procedure of the National Assembly* (National Secretariat of Nigerian Legislatures 2004) 30.

[8] Constitution of the Federal Republic of Nigeria 1999, s 1(1)(3).

[9] ibid s 4(8) provides that the exercise of legislative powers shall be subject to judicial review by courts of law and of judicial tribunals established by law.

means that each of the various arms of government stands distinct and separate from the other but in terms of personnel and dominant functions none of the arms of government exercises its power to the exclusion of the other organs. Section 4 of the constitution provides the framework for the exercise of legislative powers. As a federal state, the legislative powers of the federation are vested in the National Assembly[10] which consists of the Senate and House of Representatives[11] while the legislative powers of the states are vested in the State Houses of Assembly.[12] Both the National Assembly and the State Houses of Assembly are expected to make laws for peace, order, and good government in their respective spheres of legislative competence.[13]

There are two legislative lists in the 1999 constitution, the exclusive legislative list and the concurrent legislative list.[14] As a federal state, both the federal and state legislatures are empowered to legislate on any subject matter in the concurrent legislative list. The National Assembly is responsible for making laws for the peace, order, and good government of the federation or any part of Nigeria with respect to any matter in the exclusive legislative list contained in Part 1 of the Second Schedule to the constitution.[15] Under this provision, the National Assembly is empowered to make laws that will regulate the sixty-six items in the Second Schedule to the constitution. In addition to these, there are two areas of implied jurisdiction provided for under paragraphs 67 and 68 of the Second Schedule.[16] Furthermore, the National Assembly in conjunction with the State Houses of Assembly can make laws on any matter specified in Part II of the Second Schedule to the constitution.[17]

Symbolizing the equality of the constituent states, the Senate is composed of three senators from each of the thirty-six states in the federation and one from the Federal Capital Territory,[18] with membership strength of 109. However, representation in the House of Representatives is based on population.[19] The National Assembly has more legislative powers under the 1999 constitution than the State Houses of Assembly. That notwithstanding, two conditions must be fulfilled before a State House of Assembly can validly make any law in pursuance of its constitutional powers. First, it must ensure that the subject matter of the legislation is not included in the exclusive legislative list

[10] Constitution of the Federal Republic of Nigeria 1999, s 4(1) states that 'the legislative powers of the federal Republic of Nigeria shall be vested in a National Assembly for the federation which shall consist of a Senate and a house of representatives'.

[11] ibid s 43.

[12] ibid s 4(6) provides that 'the legislative powers of a State of the Federation shall be vested in a House of Assembly of the State'.

[13] ibid s 4(2) and (7).

[14] Specifically, ibid s 4(1) states that legislative powers of the federal Republic of Nigeria shall be vested in a National Assembly for the federation which shall consist of a Senate and a house of representatives. Section 4(2) states that 'the National Assembly shall have power to make laws for peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the second Schedule to this Constitution.'

[15] There are sixty-eight items in the exclusive list as contained in Part I of the Second Schedule to the constitution.

[16] *Abia State v Attorney-General of the Federation* (2006) 16 NWLR (PT 1005) 265 (SC) 352.

[17] Constitution of the Federal Republic of Nigeria 1999, s 4(6) and (7).

[18] ibid s 48.

[19] This is in line with s 49 of the constitution. The House of Representatives has membership strength of 360.

provided in section 4(7)(a) of the constitution, which is exclusively reserved for the National Assembly.[20] Second, it must ensure that the subject matter of the legislation, though included in the concurrent legislative list, does not conflict with any federal legislation on the same subject matter as otherwise it would be rendered void as a result of its inconsistency with the federal law.[21] In the case of *Attorney-General of Ogun State v Attorney-General of the Federation*,[22] the Supreme Court of Nigeria ruled that:

> Where identical legislations (sic) on the same subject matter are passed by virtue of the constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that subject matter.

The implication of the above *ratio* of the decision of the Supreme Court is that the doctrine of 'covering the field' applies in Nigeria. Therefore, if the provisions of a federal law on a subject intend to cover the entire field on the subject and thus provide what the law on the subject should be for the entire federation, the state law on the same subject which is inconsistent with the federal law shall, to the extent of its inconsistency, be invalid.[23]

The framers of the 1999 constitution, like those of the previous ones, expect the legislators to be the custodians of the people's sovereignty. Hence, section 14(2)(a) states that sovereignty belongs to the people of Nigeria from whom government derives its power and authority. To give effect to this provision, the constitution places a very high premium on the question of accountability of the legislative assemblies to the people by providing for periodic elections and the recall of elected members of the legislature. However, the challenge is how to assess the effectiveness of the legislature in its provision of good governance. There is also the fundamental problem of what constitutes a good index of governance. For instance, given that the foremost role of the legislature is law-making, should the focus be on the number of bills passed or on the quality of such bills, and their relevance to the provision of good governance? Alternatively, should the focus be on the effectiveness of legislative oversight recognizing that it is within the framework of legislative oversight that the doctrine of separation of powers as well as checks and balances which are central to the principle of democracy and good governance take on greater meaning? Without question, the legislature has a critical role to play in the promotion of good governance. Consequently, the legislature is the first line of defence and safeguard against executive excesses and any descent into authoritarianism. This is very useful in the Nigerian context where executive dominance over the years has become part of the country's chequered history of democratic experience. The diversity of the interests and constituencies represented in the legislature makes it an important structure in linking the people to the state and in the exercise of the sovereignty of the people through their elected representatives. In summary therefore, the importance of the legislature arises from the fact that its

[20] *Abia State* (n 16).
[21] Constitution of the Federal Republic of Nigeria 1999, s 4(5).
[22] (1982) 3 NCLR 166 (SC).
[23] *INEC v Musa* (2003) 3 NWLR (Pt 806) 114 (SC) 116.

functions are the expressions of the will of the people. It is in the light of this that the legislature is seen globally as the symbol of power and legitimacy.[24]

## 2.2 The executive

The executive occupies a very crucial position in the governance of a state. Accordingly, the executive under the Nigerian constitution makes policies, ensures that public services strictly adhere to policies of government, as well as coordinating the activities of ministries, departments, and agencies of the state. The executive is also responsible for providing good and responsible governance for the state.[25] The executive power of the federation is vested in the president while the executive power of the state is vested in the governor of a state. The presidential system practised in Nigeria has a single executive. The system precludes the concurrent vesting of executive powers in two or more persons of equal authority. The legislature cannot take away from the president or confer on others, functions of a strictly executive nature.[26] Section 5(1)(b) of the constitution enumerates executive powers of the federation to include maintenance of the constitution, laws made by the National Assembly, and all matters with respect to which the National Assembly has power to make laws.[27] Executive power in the context of this constitution also implies the power of control over all executive departments, bureaus, and offices, supervisory powers over local government areas, power to execute laws, powers of appointment, powers as the commander-in-chief of the armed forces of Nigeria, power to grant reprieves, commutations, and pardons, power to grant amnesty with the approval of the legislature, and power to enter into treaties or international conventions. Furthermore, section 5 states:

> 5(1) Subject to the provisions of this Constitution, the executive powers of the Federation—
>
> (a) Shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation; and

[24] Ralph A Rossum and G Alan Tarr, *American Constitutional Law: The Structure of Government* (6th edn, Wadsworth/Thomson learning 2002) 315.

[25] TA Puka, *Substance of Government* (JHL Printing and Publications 2007) 58.

[26] *AG Federation & Ors v Abubakar & Ors* (2007) 10 NWLR (PT 1041) 53 (SC) 54.

[27] The Supreme Court of India, while interpreting art 53 of the Indian constitution which is similar to s 5(1)(a) of the 1999 constitution, defined executive power in the case of *Samsher Singh v State of Punjab* as what remains after the legislative and judicial powers are separated and removed. The Supreme Court of India in the case adopted the 'residuary test' in defining executive power. However, one of the best interpretations of executive power was provided by Justice PB Mukharji. According to him '[E]xecutive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of state in political philosophy and political science . . . Executive power is nothing short of 'the whole state in action' in its manifold activities. In one sense, the legislative power and judicial power, in order to graduate from phrases to facts, have finally to culminate in executive power to become effective.'

(b) Shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being, power to make laws.[28]

The executive arm is the most dynamic organ of government as it is expected to translate into concrete actions, activities, and social services on a daily basis, all the laws made by the legislature. For the executive to discharge its responsibilities effectively, it relies on the legislature to appropriate funds through budgetary provisions, approve the appointment of key political functionaries, and pass appropriate laws for the removal of any obstacle that may obstruct the smooth functioning of the executive. In this respect, the legislature and the executive are independent of each other in role specification, but cooperate and collaborate with each other in the discharge of their functions.

## 3. Features of Nigeria's Presidential System

There are some basic features that characterize or define the presidential system under the 1999 constitution, which have implications for legislature–executive relations. Nigeria's presidential system is characterized by separation of powers between the legislature, executive and the judiciary.[29] The president as the chief executive is elected in a general election directly by the electorates. Similarly, members of the legislature are elected in a general election directly.[30] The president holds office for a constitutionally fixed term of four years[31] and until that prescribed term ends; he or she can only be removed under the circumstances stated in section 143 of the constitution. The terms of both the legislature and the executive are fixed and are not contingent on mutual confidence.[32] The chief executive has control over the cabinet as a result of his power to select his ministers who are responsible to him and not to the legislature.[33] In practice, the ministers are mere advisers and subordinate to the president.[34] Most important decisions can be made by him or her even against the advice of the cabinet; hence he or she has power over the cabinet.[35] These basic characteristics are the salient premises upon which the presidential system in Nigeria rests. In addition, the separate origin

[28] The constitution of the Federal Republic of Nigeria 1999, s 5(2) on the other hand provides that '[s]ubject to the provisions of this Constitution, the executive powers of a State shall be vested in the Governor of that State and may, subject as aforesaid and to the provisions of any law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of the State or officers in the public service of the State; and shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws'.

[29] Constitution of the Federal Republic of Nigeria 1999, ss 4, 5, and 6 provide the framework. See also Ben Nwabueze, *Constitutional Democracy in Africa* vol 4 (Spectrum Books Limited 2004) 76.

[30] Constitution of the Federal Republic of Nigeria 1999, s 132(1).

[31] ibid s 135(2).

[32] ibid ss 64(1) and 135(2), which state the tenures of the legislature and the president respectively.

[33] SA Idahosa and Wesley Ekpekurede, 'Ideas And Forms of Organization of Government' in Augustine Ovuoronye Ikelegbe (ed), *Politics and Government: An Introductory and Comparative Perspective* (Uri Publishing Ltd 1995) 317.

[34] Jose Antonio Cheibub, *Presidentialism, Parliamentarianism and Democracy* (Cambridge University Press 2007) 92.

[35] Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999) 58.

and survival of the executive and the legislature means that the executive does not depend on the continued support of the legislature to stay in power.

By virtue of section 147(4) of the constitution, the same persons or bodies cannot form part of the executive and the legislature at the same time.[36] The crux of this provision is that when a member of the National Assembly is appointed as a minister, he or she shall be deemed to have resigned his membership of the National Assembly and a bye election will be conducted to fill the vacancy.[37] The reason is that the doubling by ministers as members of the legislature can breed conflicts of interest as experienced in the Second Republic under the parliamentary system. It can also severely undermine the ability of the legislature, especially for an emerging democracy like Nigeria after a prolonged period of military rule, to effectively perform its functions.[38]

There are provisions in the constitution for checks and balances to guard against misuse of power by the legislature and the executive. For instance, the president must assent to bills passed by the National Assembly for them to become Acts of the National Assembly. The National Assembly on the other hand exercises power of scrutiny over policies and decisions made by the executive. However, the control has not been effective because of certain factors which include corruption, religion, ethnicity, adverse legislative environment, inexperienced legislators coupled with the dearth of skilled legislative staff and aides, overbearing executive, and party loyalty.

## 4. Legislative–Executive Interaction

The organization of modern day governments makes the overlap of roles and functions of the legislature and executive inevitable in several ways and sometimes results in a stalemate. Though there is separation of powers between the legislature and the executive, in a practical sense, the two branches watch over each other to ensure the smooth operation of government. The areas in which these arms of government provide oversight over each other in exercising their constitutional powers include: (i) the process of making laws; (ii) the powers of appointment of key political and legal functionaries; (iii) the power to declare war or an emergency situation; (iv) the power of removal of political functionaries; (v) the power to appropriate and authorize public expenditure; and (vi) the power to enforce transparency and accountability. These areas of interactions have become necessary to enable the two branches to check each other in a manner that prevents the abuse of powers. However, in practice, this is where legislative–executive conflicts originate as one branch either expands the scope of its existing powers or exercises powers that legitimately and constitutionally belong to the other branch.

[36] Constitution of the Federal Republic of Nigeria 1999, s 68(1)(d) and (e).

[37] ibid s 147(4) states that where a member of the National Assembly or of a House of Assembly is appointed as a minister of the government of the Federation, he shall be deemed to have resigned his membership of the National Assembly or of the House of Assembly on his taking the oath of office as minister.

[38] ibid s 147(4) is similar in context and intendment to art 1 s 6(2) of the US constitution which prevents members of the Congress from serving as officers of the government in the executive branch.

## 4.1 Power to make laws

The legislature and the executive jointly make laws in the sense that bills that eventually metamorphose into Acts of the National Assembly could be initiated by the executive[39] and be acted upon by the legislature. Apart from initiating bills that are enacted into Acts by the legislature, the chief executive plays an active role in the final culmination of bills into Acts. This is done by exercising a power of veto. Section 58(1)–(5) of the constitution sets out in detail how the legislature and the executive collaborate to make a bill become an Act of the National Assembly. It provides as follows:

> 58 (1) The powers of the National Assembly to make laws shall be exercised by bills passed by both the Senate and House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.
>
> (2) A bill may originate in either the Senate or House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.
>
> (3) Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two houses on any amendment made.
>
> (4) Where a bill is presented to the President for assent, he shall within 30 days thereof signify that he assents or that he withholds assent.
>
> (5) Where the President withholds his assents and the bill is again passed by each House, by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

In this power relation, the chief executive is given the power to heavily influence the content of law made by the legislature. The chief executive may decide to reject a bill in its entirety through the invocation of his veto power. However, if the veto power of the chief executive is exercised unrestrained, the power of the legislature could easily be eroded. In such a situation, the chief executive would control both the law-making and law execution, which is a recipe for dictatorship. To avert the possibility of dictatorship, the constitution mitigates the adverse effect of the veto power of the executive. The president or governor must indicate whether he or she assents or withholds assent within thirty days.[40] Where the president or governor withholds assent and the bill is again passed by each House of the National Assembly with a two-thirds majority vote,

[39] In the context of the Nigerian legislative process, a bill can emanate from the president, the judiciary, or a member of the Senate or House of Representatives. For instance, the Standing Orders of the House of Representatives, Order XII Rule 2(1)(a) and (b) state that all bills emanating from the president shall be forwarded to the Speaker under covering letter personally signed by the president of the Federal Republic of Nigeria while all bills emanating from the judiciary shall be forwarded to the Speaker under covering letter personally signed by the Chief Justice of the Federal Republic of Nigeria. Bills from the Senate and members of the House of Representatives shall also be forwarded to the Speaker. See also Ra'uf Ayo Dunmoye et al (eds), *The National Assembly: Pillar of Democracy* (National Secretariat of Nigerian Legislatures 2007) 209.

[40] Constitution of Federal Republic of Nigeria 1999, s 58(4).

the bill shall become an Act of the National Assembly and the assent of the president is not required.[41] Thus the power of the legislature is checked by that of the president, but the president's checking power is counter-checked by that of the legislature. An example of where these provisions were applied was with respect to the Niger Delta Development Commission Bill (NDDC) of March 2000. The president withheld his assent to the bill that was sent to him by the National Assembly on 3 March 2000. His objection concerned the inclusion in the bill of a provision that the appointment of the Chairman of the Commission must be confirmed by the two Houses of the National Assembly. After the expiration of the thirty days, members of the National Assembly obtained the two-thirds majority vote to override the president's veto power and passed the Niger Delta Development Commission Act without recourse to the executive arm.

## 4.2 Appointment of key political and judicial functionaries

The executive branch has been empowered by the constitution to execute all laws made by the legislature. This entails the appointment of key functionaries in the ministries, departments, and agencies of government. Political appointees such as ministers, directors-general, executive secretaries of specialized agencies, and ambassadors can be made by the president. However, the appointments have to be referred to the Senate for screening and confirmation.[42] The president may appoint a person to the office of Minister of the Federation subject to confirmation by the Senate.[43] The appointment of key political functionaries in the executive branch of government is also a joint responsibility of the National Assembly and the executive. The same is true of the appointment of judicial officers.[44] An example of this is section 231(1) and (2) of the constitution which states:

> (1) The appointment of a person to the office of the Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council, subject to the confirmation of the appointment by the Senate.
>
> (2) The appointment of a person to the office of the Justice of the Supreme Court shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate.

[41] ibid s 58(5).

[42] See ibid s 154(1) in respect of the appointment of chairman and members of certain federal executive bodies.

[43] ibid s 147(2).

[44] ibid s 318 defines a judicial officer in the context of the Nigerian legal system to mean the office of the Chief Justice of Nigeria, or Justice of the Supreme Court, the President or Justice of the Court of Appeal, the office of the Chief Judge or Judge of the Federal High Court, the office of the Chief Judge or Judge of the High Court of the Federal Capital Territory Abuja, the office of the Chief Judge of the High Court of a State and Judge of a High Court of a State, a Grand Khadi or Khadi of the Sharia Court of Appeal of the Federal Capital territory Abuja, a Grand Khadi or Khadi of the Sharia Court of Appeal of a State, a President or Judge of the Customary Court of Appeal of the Federal Capital Territory, Abuja, a President or Judge of the Customary Court of Appeal of a State, and a reference to a judicial officer is a reference to the holder of such office.

As part of their oversight role, section 67(2) of the constitution gives the National Assembly the powers to summon ministers, directors-general, and other chief executives of extra-ministerial agencies to appear and explain the activities of their respective agencies. On the whole the appointment of ministers and other senior state officials is made by the president in collaboration with the legislature.

## 4.3 Power to declare war or state of emergency

The president is the chief executive and the commander-in-chief of the Nigerian armed forces.[45] He is, by virtue of these powers, authorized to deploy the armed forces to defend the country against external aggression. In exercising this power, the president is limited by the constitutional provision that requires the concurrence of the Senate and House of Representatives sitting in a joint session. For example, section 5(4)(a) of the constitution states that the president shall not declare a state of war between the federation and another country except with the sanction of a resolution of both Houses of the National Assembly sitting in a joint session. Similarly, the president cannot deploy members of the armed forces on combat duty outside Nigeria without prior approval of the Senate.[46] However, in exceptional cases and in emergency, the president may deploy the armed forces and seek concurrence retroactively. In this regard, section 5(5) of the constitution states:

> Notwithstanding the provisions of subsection (4) of this section, the President in Consultation with the National Defence Council, may deploy members of the Armed forces of the Federation on a limited combat duty outside Nigeria, if he is satisfied that the national security is under imminent threat or danger; provided that the President within seven days of actual combat engagement, seek the consent of the Senate and the Senate shall thereafter give or refuse the said consent within fourteen days.

Further, section 305 of the constitution allows for a proclamation of a state of emergency by the president in the following circumstances: (i) if the Federation is at war; or (ii) in imminent danger of invasion; or (iii) there is actual break-down of law and order and public safety in the Federation or any part of the country to such an extent as to require extraordinary measures to restore peace and security; or (iv) there is a clear and present danger of an actual break-down of public order and public safety in the Federation or any part of the country; or (v) there is an occurrence or imminent danger or the occurrence of any disaster or calamity in any part of the Federation; and (vi) when the president receives a request to do so in accordance with the provisions of section 305(4) of the constitution. Such a proclamation must be endorsed by the National Assembly within two days if the National Assembly is in session or within ten days if it is on recess.[47] The provisions of sections 5(5) and 305 of the constitution clearly show that the powers to deploy the Nigerian armed forces for the purpose of

[45] Constitution of the Federal Republic of Nigeria 1999, s 218(1).
[46] This is in line with the provisions of the constitution of the Federal Republic of Nigeria 1999, s 5(4)(b).
[47] Constitution of the Federal Republic of Nigeria 1999, s 305(6)(b).

prosecuting war or to declare a state of emergency are exercised concurrently between the legislature and the executive.

## 4.4 Powers to appropriate and authorize public expenditure

The relationship between the legislature and the executive in public finance remains a controversial topic. First, public choice theorists tend to portray the legislature as selfish politicians, who are likely to help themselves to public resources either to pursue their individual, constituency, or party interests.[48] On the other hand, the parliamentarians argue that the executive, largely made up of non-elected members, cannot claim to understand the needs of the people better. This is predicated on the assumption that parliament is largely made up of elected representatives who understand the needs of the people. The constitution laid down the legal framework for democratic governance based on a presidential system by establishing a bicameral legislature at the federal level while at the state level, it established a unicameral legislature. Since the re-emergence of democracy on 29 May 1999, the country has witnessed several conflicts between the legislature and executive over the budgetary processes at all levels of government.

Law, order, and good governance can only be effectively provided to the citizens when there are adequate financial resources. The power of appropriation and authorization of public funds is conferred on the legislature but with the active participation of the executive arm of government. It is therefore no surprise that one of the areas where the legislature and the executive interact most actively is in respect of the budget process. In this respect, sections 80(2), (3), and (4), 81(1), and 83(1) of the constitution state:

> . . .
>
> 80(2) No money shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act, or and Act passed in pursuance of section 81 of this Constitution.
>
> (3) No money shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by the National Assembly.
>
> (4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.
>
> 81(1) The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimate of the revenues and expenditure of the Federation for the next following financial year.
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> . . .

[48] SC Rapu, *Legislative–Executive Relations and the Budgetary Process in Nigeria: An Evaluation of the 1999 Constitution* (Central Bank of Nigeria 2003) 3.

> 83(1) The National Assembly may by law make provisions for the establishment of a Contingency Fund for the Federation and for authorising the President, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from the Fund to meet the need.

At the federal level, the National Assembly authorizes expenditure through the passage of the Appropriation Bill and this is assented to by the president.[49] Moreover, the content of the Appropriation Bill is by and large defined by the executive, since it normally emanates as an executive bill submitted to the National Assembly for deliberations and approval.[50] In its deliberations, the National Assembly maintains close contact with the executive during the budget defence sessions and may request such clarification or information as may be necessary to guide it in the discharge of its functions. Generally the powers conferred on the National Assembly under section 88(1)(a) and (b) of the constitution enable it to make laws or to expose corruption, inefficiency, or waste in the execution or administration of laws; or in the disbursement or administration of funds appropriated by the National Assembly.[51] In essence, the legislature and the executive play active and complementary roles in the budget process.[52]

## 4.5 Enforcement of transparency and accountability

Corruption has become an endemic problem in Nigeria with grave consequences on the polity. In the illuminating words of renowned jurist and former chairman of the Independent Corrupt Practices Commission, the Honourable Justice Mustapha Akanbi, the effect of corruption on the foundation of the Nigerian society has been most harrowing and disconcerting. He described the situation as follows:

> Corruption is indeed the bane of our society. It has been the harbinger of the messy situation in which we find ourselves today. Our economy has been ruined. Our hopes for a greater tomorrow have been dashed. Our value system is destroyed. Nigeria which was once the pride of the black race sank into the nadir of degradation. The devastating effect of the colossal corruption into which the country was plunged destroyed our economy and created an unstable political environment which unfortunately made us cut a sorry picture in the eyes of the international community. As we went down sliding, there was hardly any probity, accountability and transparency… Respect for the rule of law and order was relegated to the background. Inefficiency, incompetence, mediocrity, dishonesty, commonalty and all sorts of vices, which are all by-product of corruption ruled the waves.

[49] Constitution of the Federal Republic of Nigeria 1999, s 80(2).
[50] ibid s 81(1).
[51] ibid s 88(2).
[52] In practice, the sources of acrimony between the legislature and the executive have been the late submission of the draft budget which always leads to late approval of the budget; the unilateral amendment of the outcomes of the draft budget by the legislature; the budget of the legislature; the use of parliamentary oversight; lack of proper information flow from the Accountant-General during the budget implementation stage; delay in the auditing and submission of the report to the legislature; poor implementation of the budgetary provisions; and the perception of the executive over audit queries as an unnecessary attack on the government and the constitution which fails to specify a time frame within which the Accountant-General must report the financial statements to the Auditor-General and the general public.

The legislature and the executive are constitutionally mandated to try as much as possible to eliminate all corrupt practices and abuse of power.[53] It is in furtherance of this duty that the legislature enacted the Corrupt Practices (And Other Related Offences) Act, 2000, the Economic and Financial Crimes Commission (Establishment) Act, 2004, the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007. The executive has the responsibility of executing projects and ensuring the day-to-day delivery of social services. The executive is therefore accountable for the performance of the government in this regard. The legislature through its oversight monitors, evaluates, and imposes sanctions on the executive where necessary. Through the committees of the two Houses of the National Assembly, the legislature can keep close check on the activities of ministries, departments, and agencies.

In general, the National Assembly and the State Houses of Assembly have not been very effective in carrying out their many responsibilities of oversight over the executive. This is generally believed to be the result of the long period of military rule which deprived the nation of the services of a legislature and the experience that goes with this. As Hamalai notes, the broad political challenges in legislative–executive relations involve the subordination of the legislature to the executive in Africa's imperial presidential systems and some formal constitutional constraints on legislative oversight powers.[54] In the Nigerian presidential system, the State Houses of Assembly have become mere appendages and instruments of the political executives.

## 5. Causes of Legislative–Executive Conflicts

Given the emergence of many mixed-regime types, the debate over which specific institutional arrangement best promotes political stability could be cast in terms of the dispersion of power and authority amongst all national institutions.[55] In the tradition of Madison, it can be argued that diffusing power across institutions contributes to the stability and survivability of democratic systems by making it difficult for any one branch of government, and therefore any one political group, to centralize power.[56] Thus, legislative–executive conflict in Nigeria often originates in disagreements between the two branches over policy issues or as a result of personal conflicts between prominent politicians in each branch. In many cases, personal conflicts reinforce policy conflicts.

Constructive relationships between the legislature and the executive are essential for good governance, effective maintenance of the constitution, and the rule of law.[57]

[53] Constitution of the Federal Republic of Nigeria 1999, s 15(5).

[54] Ladi Hamalai, 'Legislative Oversight of the Executive' in Ladi Hamalai and Rotimi Suberu (eds), *The National Assembly and Democratic Governance in Nigeria* (National Institute for Legislative Studies 2014) 253.

[55] Kent Eaton, 'Parliamentarianism versus Presidentialism in the Policy Arena' (2000) 32 *Comparative Politics* 355.

[56] Charles R Wise and Trevor L Brown, 'The Separation of powers in Ukraine' (1999) 32 *Communist and Post-Communist Studies* 23.

[57] House of Lords Select Committee on the Constitution, 'Relations between the executive, the Judiciary and Parliament' (6th Report of Session, House of Lords, London, 26 July 2007, The Stationery Office Limited) 57.

However, the relationship according to Lijphart is inherently a power relationship and a power struggle.[58] Bernick and Bernick, while considering the model of a balance of power relation between the legislature and the executive in a presidential system, summarized the relationship into three power configurations: the governor is dominant, the legislature is dominant, and the two are competitively structured.[59]

## 5.1 Unhealthy rivalry following from legislative oversight

One of the reasons that the presidential system was adopted in Nigeria was to avoid the clashes of interests, conflict of authority, complexities, and uncertainties in governmental relations and the weakening of leadership by collective power and responsibility which were inherent in the parliamentary system adopted at independence.[60] In exercising oversight, mutual suspicion between the legislature and the executive has remained one of the most important challenges since the return to constitutional governance in 1999. It is a challenge that is rooted in the culture of executive dominance and the relative weakness of the legislature in Nigeria's post-independence political history. Under Nigeria's presidential system, the legislature as an institution is engaged in overseeing, supervising, or controlling ministries, departments, and agencies.[61] Oversight supervision and control denote distinct degrees of legislative influence on the executive. For instance, when the legislature by contact, observation, or investigation places itself in the position of a watchdog over executive activities, the legislative–executive relationship is defined in terms of oversight. When the influence of the legislature constitutes substantial involvement in the formulation or implementation of executive policy, producing change in policy emphasis or priority, the legislative–executive relationship is defined in terms of supervision. When the legislature directs executive establishment and policy or requires legislative clearance for executive decisions, the relationship is defined in terms of control. These varied relationships between the legislature and the executive provide mechanisms by which the legislature can test and secure executive compliance with legislative policy as well as hold the executive accountable. Also, legislative investigations, review, and even involvement in executive policy-making provide the legislature with the mechanisms for evaluation and assessment of executive policy, exposing gaps between expected and actual performance and providing legislators with clues as to what changes to the law are needed. Above all, legislative oversight, supervision, and control provide relationships that should ordinarily facilitate reciprocal and sustained support for public policy between the legislature and the executive.

[58] Lijphart (n 35) 64.

[59] Ethan M Bernick and Lee E Bernick, 'Executive–Legislative Relations: Where You Sit Really Does Matter' (2008) 89 *Social Science Quarterly* 142.

[60] Ben Nwabueze, *A Constitutional History of Nigeria* (Longman 1982) 256.

[61] Constitution of the Federal Republic of Nigeria 1999, s 88(1). The right to check abuse of power, mismanagement of funds, waste of national resources, non-application of appropriated funds to the right purpose, or application of non-appropriated funds is a very important function of the legislature under the constitution.

However, sixteen years of democratic governance have yet to eliminate the mutual suspicion and distrust, acrimony, intimidation, political rivalry, unnecessary bickering, blackmail, and muscle-flexing[62] between the legislature and executive, who have the responsibility to ensure delivery of democracy dividends to Nigerians. At the centre of the friction is the exercise of oversight, which is a constitutional mechanism for checks and balances, coupled with the annual budget-making exercise and its implementation. The law-makers have continued to bicker over the poor implementation of Appropriation Acts. Further, the tendency by both of the arms of government to usurp each other's power or meddle in the affairs of the other continues unabated. The operatives of the executive arm in the ministries, departments, and agencies still conduct their affairs as if Nigeria remains under military rule where the input of the legislature is inconsequential. The executive arm perceives the essence of legislative oversight as the pursuit of parochial interests and self-aggrandisement by the members of the legislature, while the members of the legislature on the other side feel that those who do not want them to exercise their power of oversight are corrupt.

## 5.2 Non-adherence to due process in the conduct of government business

The rule of law is the pillar on which civilized societies are founded. The legislature and the executive must exercise their authority by way of law and be subject to legal restraints. Most of the conflicts between the legislature and the executive have their roots in the non-adherence to the rule of law and due process in the exercise of constitutional powers.[63]

The Supreme Court of Nigeria has deprecated the behaviour of the legislature and the executive caused by the lack of respect for the rule of law in the conduct of government business in *Attorney-General, Lagos State v Attorney-General of the Federation,*[64] when the Court said:

> In a society where the rule of law prevails, self-help is not available to the executive or any arm of government. In view of the fact that such a conduct could breed anarchy and totalitarianism, and since anarchy and totalitarianism are antithesis to democracy, courts operating the rule of law, the life-blood of democracy, are under constitutional duty to stand against such action. The courts are available to accommodate all sorts of grievances that are justifiable in law and section 6 of the Constitution gives the courts power to adjudicate on matters between two or more competing parties. In our

[62] Emmanual Remi Aiyede, 'Executive–Legislative Relations in Nigeria's Emerging Presidential Democracy' (2005) 2 *Unilag Journal of Politics* 65.

[63] Late President Musa Yar'Adua once decried the situation when he said that 'as a nation, one of our greatest challenges has been the evolvement of a culture of disrespect for the rule of law, unbridled corruption, endemic crime, violence, infrastructural deficit and a general malaise in the polity. All these constituted a direct manifestation of disrespect for law and order. This background has informed our administration's total and absolute commitment to entrenching an enduring culture of unqualified respect for the rule of law and constitutionality in the conduct of all government business. Persistent peace, stability and progress cannot abide in a system that is not rooted in equity, justice, the rule of law and the fear of God.'

[64] (2004) 18 NWLR (PT 904) 127 (SC).

> democracy, all the governments of this country as well as organisations and individuals must bow to due process of law and this they can vindicate by resorting to the courts for redress in the event of any grievance. In the military *Governor of Lagos State v Chief Ojukwu* (1980) NWLR (PT 18), the court condemned self-help on the part of the Military Governor of Lagos State. The court held that it was not for the Governor to take a unilateral action against the respondent in respect of his father's property when the matter was pending in the court. The court held that no one (including Governors) is entitled to take the law into his own hand[s]. If this court went the whole hog of protecting the rule of law in a military regime which is a dictatorship, there cannot be any valid or justifiable reason to take a less position in civilian regime where access to court is a desideratum.

Without the rule of law and due process as limits on the exercise of legislative and executive powers, popular will can easily be corrupted by passions, emotions, sentiments, and short-term irrationalities. Against this background therefore, the legislature and the executive must follow legal procedures that are prefixed in the exercise of their constitutional powers. In this way, constitutionalism and democratic values can be entrenched.

### 5.3 Entrenched military culture

A stabilized democratic political system exists only where there is democratic tradition. Democratic tradition on the other hand entails a high level of development of political culture and effective institutionalization of its components. Thus, when democratic values and processes are institutionalized within a political system, such a system is classified as having a developed culture and democratic tradition. In this regard, Almond and Verba argue that a political culture of a country refers to the political system internalized in the cognitions, feelings, and evaluations of its populations.[65] A military regime by its nature is elitist, restrictive, and authoritarian.[66] In Nigeria, the military regimes in their various forms claimed to be concerned with the Nigerian geopolitical and cultural entity. This was evident in their emphasis on structural engineering and institution creation and building. However, they showed little or no concern for issues of constitutionalism and democracy. Public policies were invariably less concerned about the question of human rights, rule of law, transparency and accountability, freedom, justice, and the dignity of the people. Therefore, government action was often oriented towards the accomplishment of policies regardless of how the policies afflicted the rights and welfare of the people. For instance, during the first military regime, the government enacted the State Security (Detention of Persons) Decree No 3 of 1966. The Decree was considered draconian for its provisions which, amongst other things, ousted the jurisdiction of courts from entertaining anything done under the Decree. For example, it provided for the arbitrary arrest and detention of individuals for six months without trial.

[65] Almond Gabriel and Verba Sidney, *The Civil Culture* (Little Brown and Company 1963) 12.
[66] Geriant Parry, *Political Elites* (George Allen and Unwin Ltd 1969) 157.

The lack of institutionalization of political organizations and procedure during the military regimes in Nigeria led to institutional fragility, systemic flaws, and a low level of political culture. Also, the absence of effective institutional checks and limitations on the exercise of executive powers during the military regimes, as well as the 'carry-over' of retired military personnel into the legislature and the executive, have grave implications for legislative–executive relationships in the conduct of government business. This was evident from the resort to undemocratic practices in the operation of the constitution, especially during the presidency of General Olusegun Obasanjo (Rtd). The conflict between the National Assembly and the executive reached its highest point in 2001 following the State of the Nation debate conducted by the House of Representatives during which allegations of highhandedness, dictatorial tendencies, failure to grapple with economic and social problems, lack of political will to tackle corruption, non-implementation of budgets, and gross violations of the constitution were levelled against the president.[67] At the state level, the governors of Oyo State, Plateau State, Ekiti State, Bayelsa State, and Anambra were removed from office by their State Houses of Assembly for gross misconduct arising from financial misappropriation and violation of section 188(2)(a) of the constitution. However, the Supreme Court[68] and the Court of Appeal reversed the decisions because the State Houses of Assembly had not complied with the procedure for removing a governor laid out in the constitution.[69] Thus, in spite of sixteen years of democratization, the military culture of impunity and flagrant disregard of the rule of law and due process in governance has remained one of the key triggers of conflict between the legislature and executive in Nigeria at the federal and state levels of governance.

[67] The House compiled a total of seventeen allegations of constitutional breaches against the president. Most of the allegations centred around unauthorized spending and outright violations of the Revenue Allocation Act which amongst others include: issuance of a presidential order purportedly amending the Revenue Allocation Act, contrary to ss 161(1), (2), and 313 of the 1999 constitution; engaging in extra budgetary spending including N60 billion on the national stadium, Abuja; payment of N12 billion to Julius Berger plc and the purchase of sixty-three houses for ministers to the tune of N3 billion in violation of s 80 (2), (3), and (4) of the 1999 constitution; deployment of troops to Odi in Bayelsa State and Zaki Biam in Benue State resulting in the murder of innocent citizens and massive destruction of property without lawful authority in clear violation of s 217 of the 1999 constitution; refusal to fully implement successive budgets as they affected the salaries of staff and overhead costs of ministries contrary to the provisions of the Appropriation Act, 2002; unilateral decision to make across the board cuts of 50% of overhead costs contained in the 2002 Appropriation Act, without the approval of the National Assembly; unilateral decision to merge the Federal Road Safety Commission and the Nigeria Police Force without a bill for an Act to harmonize the two bodies or repeal the Federal Road Safety Commission Act; merging, without enabling legislation, the National Bank for Commerce and Industry, the National Economic Reconstruction Fund, and the Nigerian Industrial Bank to form the Bank of Industry while the laws establishing each of these institutions were still valid and subsisting; and the appointment without consultation with the Police Council, an Inspector General of Police, contrary to the 1999 constitution and extending the appointment of the Acting Auditor-General of the Federation beyond six months without a resolution of the Senate, contrary to s 86(1) of the 1999 constitution.

[68] The Supreme Court set aside the removal of the governors in the following cases: *Alamieyeseigha v Igoniwari* (No 2) [2007] 7 NWLR (Pt 1034) 524 (SC); *Dapianlong v Dariye* (2007) 8 NWLR (Pt 1038) 332 (SC); *Balonwu v Peter Obi* (2007) 5 NWLR (Pt 1028) 488 (SC); *Inakoju v Adeleke* (2007) 4 NWLR (Pt 1025) 423 (SC); *Okoli v Udeh* (2008) 10 NWLR (Pt 1095) 213 (SC).

[69] The procedure for removal of a governor or deputy governor is provided in s 188 of the constitution.

## 5.4 High-handedness of the executive over the legislature

The executive in the presidential system tends to monopolize power and discretionary authority not only in Nigeria but in presidential regimes across the world.[70] In the case of Nigeria, the unified nature of the executive, coupled with its power to initiate and enact laws, and its control over the administration of the country, places tremendous power and discretion at the disposal of the executive.[71] In fact, executive dominance of the legislature is related to Nigeria's colonial and post-colonial history and the continued strengthening of the executive branch because of the disruption of the constitutional framework of governance occasioned by the long history of military rule. The Nigerian legislature developed as an appendage and necessary extension of the colonial state which was brought into existence not to perform legislative functions as the most important institution of liberal democratic state, but to ratify executive directives issued by the colonial governor. The colonial legislatures had no independence in the discharge of their legislative functions as their role was merely ratificatory. In contrast to their predecessors, they were merely designed to complement the work of the colonial governments by serving as agencies for articulation of views and ventilation of popular feelings that were not expected to radically change the patterns and policies of the colonial governments.[72] This orientation has continued to impact the performance of the legislature, not only during the colonial era but even after independence.

To manage the tension and conflicts in legislative–executive relations, a department in the presidency headed by a special adviser and supported by four special assistants was created. The creation of the department epitomizes, in action and spirit, the deliberate and conscious effort being made to ensure harmonious relationship between the legislature and the executive. The department carries out advisory, administrative, monitoring, supportive, and defensive functions on behalf of the president at the National Assembly. The special adviser and the special assistants constitute the eyes and ears of the president of the Federation in the National Assembly to ensure that the requests emanating from the president are properly presented and approved, while his actions are satisfactorily defended and justified.

Clearly, the 1999 constitution explicitly states that the legislature and the executive have a constitutional responsibility to provide good governance[73] but the quest for good governance in the country has continued to be unsuccessful because of the persistent tensions between the legislative and executive branches. As noted by Nwabueze, decision-making in any presidential democracy is designed to be a joint effort of the legislature and the executive.[74] While policy decisions are in most cases initiated in

[70] Aiyede (n 62) 73.

[71] Stephen Akinyemi Lafenwa, 'The Legislature and the Challenge of Democratic Governance in Africa: The Nigerian Case' (Seminar paper delivered at a conference on Governance and Development on Democratization in Africa: Retrospective and Future Prospects, University of Leeds, United Kingdom, 4–5 December 2009).

[72] Mojeedv Olujinmi Alabi and Joseph Yinka Fasagba, 'The Legislature and Anti-Corruption Crusade under the Fourth Republic of Nigeria: Constitutional Imperatives and Practical Realities' (2010) 1 *IJPGG* 1, 2.

[73] Constitution of the Federal Republic of Nigeria 1999, ss 4(2) and 14(2)(b).

[74] Ben Nwabueze, *The Presidential Constitution of Nigeria* (Nwamife Publishers 1982) 166.

the form of bills by the executive, the legislature, as the peoples' representative, debates and approves such initiatives and through that process, brings the interests of the people to bear on the decisions and policies of government. Therefore, the legislature and the executive must see themselves as partners in progress and the separation of powers should not mean or be seen as separation of government.

## 6. Conclusion

The relationship that exists between the legislature and the executive is crucial for facilitating good governance in any democratic system. This makes cooperation preferable to conflict in legislature–executive relation. As Remington[75] observes, for legislators to be able to fulfil their roles of representation, oversight, and law-making, there has to be a certain degree of cooperation between the legislature and the executive in policy-making. The legislature must have the capacity to monitor the executive, and the executive needs to be willing to comply with the legislative enactments. The realization of democratic governance in Nigeria is determined by the extent to which the National Assembly and the State Houses of Assembly independently and vibrantly perform their pivotal roles as citizens' representative through legislation and oversight. The health of any democracy declines when there is no level playing field and the capacity for the legislature to effectively influence policy and oversee the executive is weak. The presidential system ushered in by the 1999 constitution in Nigeria has not led to democratic order and political stability. This does not seem to be attributable to problems with the institutional design, but rather, a legacy of military dictatorship. This may be considered inevitable when it is noted that since the return to civilian rule in 1999, two of the four democratically elected presidents have been former military heads of state. Thus, the consolidation and sustenance of Nigeria's nascent democracy depends to a great extent on how the legislature could assume its constitutional role as an important check on executive excesses. It will also depend on the willingness of the executive to operate within its constitutional limits.

Nigeria is a complex country with diverse interests and problems. The constitution makes ample provision for a clear separation of power between the legislature, the executive, and the judiciary. The constitution also provides for checks and balances to guide the relationship between the three organs of government. However, owing to the military culture that existed between 1966 and 1999, democratic principles have not been fully embraced. Although the 2015 elections have brought another former military ruler to power, there are hopes that there will be a change of attitude because those elections also marked the first time that an incumbent government was defeated at the ballot box. It is to be hoped that the voice of the people will now be heard and reflected in government policies and in the way the three branches of government operate, today more than before.

[75] Thomas Remington, 'Separation of Powers and Legislative Oversight in Russia' (Legislatures and Oversight, WBI Working Paper Series, World Bank Institute 2004) 43.

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# PART III

# THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE POLITICAL BRANCHES

# 6

# An Overview of Judicial and Executive Relations in Lusophone Africa

*Fernando Loureiro Bastos*

## 1. Introduction

The analysis of the relations between the judiciary and the executive is an issue that has not been raised as being of any relevant interest in the legal literature[1] devoted to Lusophone African states until now.[2] To understand this overview, we must understand the *image* Lusophone African lawyers have of the law and how legal systems operate.

First, Lusophone African jurists believe that the courts do not create law and that they must act in subordination to the sources of law that result from the activity of the legislative and executive bodies. Secondly, lawyers in Lusophone Africa perceive that the exercise of political power is basically divided between legislative and executive bodies and the courts are seen as playing a distinctly secondary role in the organization of their communities. Thirdly, the existence of judicial power and the exercise of judicial activity are understood in Portuguese-speaking African states as something taken for granted that does not deserve any special attention.

When Lusophone African jurists consider law and the functioning of their states' legal systems, courts exist because they are supposed to exist, but the exercise of the judicial function is mostly confused in practice with the delays and the formalism of pleadings.[3] Moreover, as Lusophone African countries still have a very small number of

[1] See the legal bibliography of the Lusophone African states prepared as part of the activities developed in the Institute for International and Comparative Law in Africa (ICLA), Faculty of Law, University of Pretoria in 2012 and 2013: Fernando Loureiro Bastos, *Juridical Bibliography of the African Portuguese-speaking Countries (1974–2013): Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe* (2013) <http://www.icla.up.ac.za> accessed 31 July 2015.

[2] Lusophone Africa includes five African countries—Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tome and Príncipe. These countries are former Portuguese colonies, which adopted Portuguese as the official language (the choice of Portuguese as the official language has a constitutional basis in the following Lusophone African states: Angola (art 19(1) of the 2010 constitution); Cape Verde (art 9(1) of the 1992 constitution) and Mozambique (art 10 of the 2004 constitution)) and which structured their legal systems on the existing legal systems prior to their independence, which they achieved in the 1970s. The five Portuguese-speaking African states include: two large territorial states, Angola and Mozambique; two small archipelagos, Cape Verde and São Tomé and Príncipe; and a small coastal state, Guinea-Bissau. In order to understand the states concerned more clearly, attention should be given to the following data on their territorial extent and estimated population: i) Angola: 1,246,700 km$^2$; estimated population 19 million inhabitants (2014); ii) Cape Verde: 4033 km$^2$; estimated population of 538,000 inhabitants (2014); iii) Guinea-Bissau: 36,125 km$^2$; estimated population of one million and 700,000 inhabitants (2014); iv) Mozambique: 799,380 km$^2$; estimated population of 24 million and 700,000 inhabitants (2014); v) São Tomé and Príncipe: 964 km$^2$; estimated population of 190,000 inhabitants (2014).

[3] The data contained in the report of the International Bar Association, 'Angola, Promoting Justice Post-Conflict: An International Bar Association Human Rights Institute Report, Supported by the Open Society

qualified lawyers, the choice to be a magistrate offers neither material advantages nor the social prestige that can be obtained by choosing other legal professions, pursuing a political career, or having access to top jobs in the public administration of their respective states.

Confronted with this image of the judiciary, this chapter aims to achieve three main objectives. On the one hand, it aims to show how the constitutional texts organize the relations between the judiciary and the executive in African Portuguese-speaking states. On the other hand, there is a need to realize that the choice of a democratic model in the constitutional texts in the past two decades cannot ignore the legal and cultural structures that underlie their proclamation. And, finally, it aims to contribute some elements to an understanding of how the adoption of the separation of powers and the independence of the courts *de jure* does not necessarily imply the existence of the concept of the separation of powers *de facto*.

In contrast, despite its importance for understanding the effective observance of fundamental rights in the African Portuguese-speaking countries, the present overview will not address the issue of the mechanisms made available to individuals for the protection of their rights when they are being harmed by activities pursued by the administration of their states.[4]

Before proceeding with the understanding of the judicial and executive relations in the Lusophone African states, it is important to pay attention to some framework assumptions applicable to this matter, such as the influence that Portuguese law still has in former Portuguese colonies and the relevance of the traditional mechanisms of conflict resolution as opposed to the exercise of a judicial system organized according to a Western system.

## 2. Historical Background and Framework Assumptions

### 2.1 The Persistent Influence of Portuguese Law in the Legal Orders of the Lusophone African States

The ties maintained by each of the Lusophone African states with the Portuguese legal order is a key factor to understanding the functioning of their legal systems. An

Initiative for Southern Africa' (2003) 29 is particularly expressive in relation to this subject especially as a result of an interview with the Deputy Minister of Justice of that time, when he says, that 'almost all Portuguese lawyers and many Angolan lawyers left Angola when it became independent in 1975. The civil war that followed independence slowed the creation of a new generation of lawyers. Since judges are usually—and ideally—lawyers, the same factors—and additional factors—led to a scarcity of judges that continues to this day. In 1975, many unqualified lay people became judges, including courthouse janitors. Janitors were named judges because they literally knew their way around the courthouses, and may have known more about court procedure than other lay people.'

[4] A very thorough historical evolution of the Portuguese administrative litigation system, indispensable for the understanding of the systems in force at the Lusophone African states, can be found in José Manuel Sérvulo Correia, *Direito do Contencioso Administrativo,* vol I (Lex 2005) 439–791. Also useful are: João Biague, *O controlo jurisdicional da Administração Pública na Guiné-Bissau: Os modelos português e brasileiro como bases de referência* (Almedina 2013), as a general framework and specifically, for discussion of the case of Guinea-Bissau; and João Damião, *A precedência obrigatória no contencioso administrativo angolano* (Almedina 2014) that addresses some issues related to Angola.

awareness of the importance of this connection is also very significant in assessing the relationship between the executive and the judiciary, taking into consideration the image of subordinate power that the courts have in these states.

Two aspects of the legal ties that bind the Portuguese-speaking African countries and Portugal should be highlighted: on the one hand, there is the similarity between the legal texts that are used in these states; and, on the other hand, there is the model that has been followed in the training of Portuguese-speaking African jurists, particularly with regard to the magistrates.

The importance of this framework has as its starting point the existence of a common language between the various African Lusophone states and Portugal, but it goes far beyond the mere sharing of a common instrument of communication. Indeed, the understanding of what law is (and what its mechanisms of action are) remains identical in these states, even four decades after their independence. In fact, the understanding that lawyers of those states have of the central issues of the legal systems, in particular in matters of constitutional law, can be properly understood only if the personal and institutional links to the former colonial power behind them are properly acknowledged. It follows then that to understand the actual content of the concepts of separation of powers and independence of the judiciary in Portuguese-speaking African states implies taking into account what the Portuguese doctrine has taught on the subject in recent decades, regardless of what those concepts mean outside Portugal, or even whether the origin of the concepts have any connection with Portugal.

First of all, it should be noted that a very large percentage of the written legal sources used in Lusophone African states is substantially identical to those that were in force, or are in force, in Portugal.

The Portuguese influence on the legal systems of African countries with Portuguese as their official language is manifested, first, at the level of constitutional texts currently in force. A comparison between the different constitutions shows many similarities in the structure and nature of the legal institutions[5] and even in the wording of the provisions in the constitutional texts.

In the wording of the articles, it is possible to find some cases where articles or paragraphs of articles of the Portuguese constitution of 1976 have been reproduced virtually without any change into the articles of the constitutions of African Portuguese-speaking states. As an example, in the rules governing the judiciary, the wording used in article 202(1) of the Portuguese constitution, namely, '[t]he courts are the sovereign bodies with competence to administer justice on behalf of the people', can also be found in article 120(1) of the constitution of São Tomé and Príncipe, in article 119 of the constitution of Guinea-Bissau, and in article 174(1) of the constitution of Angola. In similar terms, article 202(2) of the Portuguese constitution of 1976—'[i]n the administration of justice the courts should act in defence of the rights and legally protected interests of the citizens, punish breaches of democratic legality and to resolve conflicts of public and private interests'—is the source of article 120(2) of the

[5] At the level of legal institutions the similarities in the solutions used at the level of the catalogues of fundamental rights and the processes used to amend constitutional texts are particularly interesting.

constitution of São Tomé and Príncipe, of article 209 of the constitution of Cape Verde, and of article 174(2) of the constitution of Angola.

The similarity between the wording of the legal texts in force in the Portuguese-speaking African states and in Portugal could be seen as being something merely secondary, had the ties between these legal systems not been maintained and continually enhanced by the legal training that has been given to the Lusophone African jurists in the last two decades.[6]

Indeed, since the adoption of a model of democratic political organization of Western origin, the training of the majority of the Lusophone African jurists has followed the model of teaching used in Portuguese law schools and in the Portuguese institutions providing training for magistrates. The influence of the Portuguese model of training can be observed at various levels in the Faculties of Law of the Lusophone African states: in the organization of their curricula; in the legal literature recommended in undergraduate courses; in the professors invited to teach on masters and doctoral courses and at postgraduate level; in the professors who are invited to join panels to evaluate masters and PhD students; and in the professors who are invited to join panels whose role is to determine the progress of those who teach in those universities. Additionally, the influence of the Portuguese training model can be fully appreciated if one also takes into account the number of professors of the Faculties of Law of the Portuguese-speaking African states who, in the last two decades, have obtained their Masters and PhD (Doutor em Direito) degrees at Portuguese universities.[7] Finally, note should be taken of the influence that the Portuguese model has in the training of the magistrates of the Portuguese-speaking African states, either indirectly through participation in the organization of training centres for judges on the Lusophone African states,[8] or directly through the attendance of training courses in Portugal by Lusophone African judges.[9]

One manifestation of this persistent influence is the express quotation of Portuguese doctrine in judicial decisions of the higher courts in Portuguese-speaking

[6] See Dário Moura Vicente, *Direito Comparado, Introdução e Parte Geral,* vol I (2nd edn, Almedina 2012) 409 expressly stating, that 'A meeting of minds was forged between the Portuguese lawyers and the lawyers of these countries, which allows them able to exercise their profession in the territory of any of these countries' (original in Portuguese).

[7] A very good example of this are the titles published at the Colecção Estudos de Direito Africano [Collection of African Law Studies], organized by the Instituto de Cooperação Jurídica da Faculdade de Direito da Universidade de Lisboa [Institute of Legal Cooperation of the Faculty of Law of the University of Lisbon].

[8] In the African Commission on Human and Peoples' Rights, 'Report from the Government of the Republic of Mozambique submitted in terms of article 62 of the African Charter on Human and Peoples' Rights (Combined Report 1999–2010)' (2012) 17–18, it is stated that '74. [w]ith a view to improving efficacy and efficiency in the provision of justice, a Legal and Judicial Training Centre (CFJJ) has been established. This State institution is subordinate to the Ministry of Justice. Since the start of its activities in 2000 and up to 2010, the CFJJ gave 12 courses for admission to both the Courts and the Public Prosecution Office, training 300 magistrates and prosecutors.'

[9] According to the information available on the website of the Centro de Estudos Judiciários (CEJ) (Portugal) '[u]ntil 2011, the number of trainees . . . that attended the CEJ normal courses, special courses, and courses for trainers, distributed according to the country of origin: Cape Verde–119; Guinea-Bissau–104; São Tomé and Príncipe–48; Angola–147; Mozambique–100; Timor-Leste–14 amounted to 532'.

African states.[10] The following examples can be given: i) Judgment No 7/2011 of 31 January 2011, of the Supreme Court (acting as Constitutional Court) of Cape Verde, about the reasoning for a judicial decision;[11] ii) Judgment No 1/CC/2010 of 6 January, of the Constitutional Council of Mozambique, about granting authorization to open and run a casino; iii) Judgment No 4/CC/2009 of 17 March, of the Constitutional Council of Mozambique, on the issue of the competence of sovereign bodies;[12] and iv) Judgment No 40/2010 of 18 November 2010, of the Supreme Court (acting as Constitutional Court) of São Tomé and Príncipe about the use of pre-trial detention.

### 2.2 The judiciary of Western origin versus the traditional mechanisms of conflict resolution

Any attempt to analyse the functioning of the legal systems of the three continental Lusophone African states, Angola, Guinea-Bissau, and Mozambique, without taking into account traditional authorities,[13] customary law, and the mechanisms those countries use to resolve conflicts,[14] would lead to an incomplete and inaccurate understanding of the legal structures of these states.

Indeed, the more recent Lusophone African constitutions make an express reference to these matters. Accordingly, article 4 of the 2004 constitution of Mozambique provides that '[t]he State recognizes the different normative systems and mechanisms for conflict resolution that exist within the Mozambican society, insofar as they do not contradict the fundamental values and principles of the Constitution'. In a similar sense, article 223(1) of the 2010 constitution of Angola states that '[t]he State recognizes the status, role and functions of the institutions of traditional power according to customary law insofar that they are not contrary to the Constitution'.

The constitutional framework of these issues is, however, only the starting point of a more appropriate approach to the problems that are posed by the existence of traditional mechanisms of conflict resolution. The use of traditional mechanisms of conflict resolution does not seem to be a way to negate a judicial system of Western origin, but

[10] In the Mozambican response to an inquiry made by the União Internacional de Juízes de Língua Portuguesa [International Union of Portuguese-speaking Judges] it is expressly stated, that 'we have a small number of cases and make more use of the Portuguese jurisprudence (of the colonial period)' <http://www.uijl.org/docs/moçambique%20%20respostas%20ao%20questionário%20membros%20da%20UIJIP.pdf> accessed 20 March 2015.

[11] *Boletim Oficial da República de Cabo Verde*, I Série (14 de Fevereiro de 2011) <http://www.uijlp.org/docs/LOCSMJ-%20Cabo%20Verde.pdf487> accessed 31 July 2015.

[12] *Boletim da República*, I Série, no 16 (23 de Abril de 2009) 86 (4).

[13] On this issue, in Portuguese, with a specific reference to Mozambique, see Fernando Florêncio, *Ao encontro dos Mambos. Autoridades tradicionais vaNdau e Estado em Moçambique* (Imprensa das Ciências Sociais 2005) 44–78.

[14] The relevance of traditional power structures during the period prior to independence was the result of the very infrequent enforcement of Portuguese law with regard to local populations. Art 22 of the Colonial Act is an example of this approach and it is considered to have constitutional value under art 132 of the Portuguese constitution of 1933, according to which: '[i]n the colonies taking into consideration the state of evolution of the native peoples, there will be special statutes for indigenous peoples, establishing for them, under the influence of the Portuguese public and private law, legal regimes to make a compromise with their uses and individual, domestic and social customs, which are not inconsistent with morality and the dictates of humanity'.

rather a way to overcome the inadequacy of such a system, or its absence, in many parts of the territory of the states in question. The information relating to the spread of the judiciary in the Angolan territory is particularly significant in this context. In 2003, in an International Bar Association report on justice in Angola it was reported that: '[o]nly 23 of the 168 municipal courts are actually operational. All provincial courts are functioning and in areas without courts cases are sent to the provincial courts. The situation has created delays and a large backlog of cases. Many courts are in a poor state of repair.'[15] Five years later, in 2008, the 'Report of the Working Group on Arbitrary Detention' of the Human Rights Council of the United Nations was in agreement in its reference to that insufficient distribution, stating: '[o]nly 14 out of 165 municipalities have municipal courts and there is still a shortage of qualified judges in the country'.[16, 17] In 2010, the shortage of judges in the territory was officially confirmed by the Angolan government in *Implementation of the African Charter on Human and Peoples' Rights*, when it stated that: i) nineteen provincial courts, with a total of 129 judges, are in operation, of whom forty-eight judges are located in Luanda and thirteen judges in Lobito-Benguela; and ii) there are nineteen municipal courts, with a total of seventy-seven judges, of whom twenty-three judges were in the Municipal Court of Ingombota, and nine judges in the Municipal Court of Caala.[18]

In any case, further analysis of this issue can be undertaken properly only with the use of updated data on the content of customary law that is actually applied by traditional authorities. Only by comparing these data with the written law of Western origin does it become possible to ascertain the areas of incompatibility which exist and to find appropriate ways to overcome them.

The collection and codification of customary law applied in the six major ethnic groups of Guinea-Bissau carried out between 2008 and 2011, enables us to reach three important conclusions in this area. The first of these is that customary law is not static and adapts to the changing circumstances of the populations to which it applies. Secondly, members of a particular ethnic group must be aware that the use of the rules of conduct available in the written law of Western origin is an option which may be exercised, particularly when customary law does not adequately safeguard their interests. And, finally, the resolution of conflicts is usually understood as an integrated

[15] International Bar Association, *Angola. Promoting Justice Post-Conflict* (International Bar Association 2003) 4, 20. In more developed terms, it is further stated, that '[a]s a consequence, the administration of justice at the provincial level is largely carried out by traditional authorities. Their customary jurisdiction is, however, limited and they are not competent to order detention, a factor which adds to a large backlog of criminal cases. In such circumstances, it is difficult to ensure a fair trial and compliance with the prescribed time limits when the defendant is in detention.'

[16] Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Working Group on Arbitrary Detention. Addendum. Mission to Angola* (A/HRC/7/4/Add.4, 29 February 2008) 20.

[17] Regardless of the different number of municipalities referred to, the previous two footnotes are relevant because they illustrate the disparity between the courts considered to be in operation and those that should exist in the country.

[18] *Implementation of the African Charter on Human and Peoples' Rights* (Luanda August 2012) 17, 18 (Original: Portuguese). In this document is further stated that '[a]s part of the ongoing justice and legal reform exercise, alternative forms of mediation and conflict resolution have been taken into consideration, permitting citizens to have access to justice without having to resort to courts. The aim is to ease the burden imposed on courts where delays have occurred due to the accumulation of cases.'

task in the exercise of traditional power, and there is no institutional distinction between members of the traditional authorities that govern and members of the traditional authorities that resolve disputes.[19]

The relevance of customary law and of the traditional mechanisms of conflict resolution is something that can remain relatively invisible in a first encounter with Lusophone Africa states, but the importance of Portuguese law and the Portuguese legal system in the Portuguese-speaking African countries and for African Lusophone lawyers is an unavoidable aspect of any attempt to understand how the Portuguese-speaking African states' legal systems really work.

Bearing in mind this historical background and the framework assumptions, we can move on to consider an overview of the relationship between the judiciary and the executive in constitutions in force in Portuguese-speaking African states.

## 3. The Relations Between the Judiciary and the Executive in the Lusophone African States

### 3.1 Introduction

The power structure in the constitutions of the African Portuguese-speaking states is organized in line with a democratic model of political organization of Western origin (using the concepts of 'separation' and 'interdependence' of state bodies). The organization of political power has, at its base, the existing organs of sovereignty that can be found in the Portuguese constitution of 1976 (after the 1982 constitutional revision), namely the president, the parliament, the government, and the courts. The concrete interrelationships between the organs of sovereignty vary according to the political evolution of the individual state concerned, and these political variations have led to the different adaptations of the basic Portuguese semi-presidential model to incorporate innovative solutions such as the presidential concentration of power that can be found in the Angolan constitution.[20] To understand the relations between the executive and the judiciary, it is first necessary to consider briefly the distribution of executive and judicial power within the constitutions of these Lusophone African states.[21]

In Angola,[22] according to article 108(1) of the constitution, the 'President of the Republic shall be the Head of State, the Executive Power, and the Commander-in-Chief

[19] See Fernando Loureiro Bastos, 'The collection and codification of customary law in force in the Republic of Guinea-Bissau' in S Mancuso and CM Fombad (eds), *Comparative Law in Africa: Methodologies and Concepts* (Juta 2015) 142–61 (also published as 'A recolha e a codificação do direito costumeiro vigente na República da Guiné-Bissau' in M Rebelo de Sousa, F de Quadros, P Otero, and E Vera-Cruz Pinto (eds), *Estudos de Homenagem ao Prof. Doutor Jorge Miranda*, vol. I (Coimbra Editora 2012) 697–721).

[20] It should be pointed out that according to Bernd Hayo and Stefan Voigt, *Explaining De Facto Judicial Independence* (2004) Working Paper No 1, 8, the organization of the judicial system is an option that can influence the functioning of the courts, because '[w]hereas the origin of the legal system is not subject to deliberate choice, the court system can be chosen'.

[21] An updated synthesis about the constitutions of the Portuguese-speaking African countries can be found in Jorge Miranda and Emílio Kafft Kosta, *As Constituições dos Estados de Língua Portuguesa: Uma visão comparativa* (Editorial Juruá 2013).

[22] Constitution of Angola of 5 February 2010 (CRA), with 244 articles.

of the Angolan Armed Forces'. According to article 176(1), the Angolan judicial system comprises the following High courts: the Constitutional Court (article 180); the Supreme Court (article 181); the Court of Auditors (article 182); and the Supreme Military Court (article 183). The management of the judiciary is carried out by the High Council of Judicial Bench (article 184), a body chaired by the President of the Supreme Court. The representation of the state, the defence of legality, the promotion and exercise of prosecution is in the hands of public prosecutors (article 186). The management of the public prosecutor's office is the responsibility of the Supreme Judicial Council of the Public Prosecutor's Office (article 190), a body chaired by the Attorney-General.

In Cape Verde,[23] under article 185 of the constitution, the 'Government is the body that defines, directs and executes internal and external general policy of the country, and is the supreme organ of the Public Administration', and is politically responsible to the National Assembly (article 186). Under article 214, the judicial system of Cape Verde consists of the following courts: the Constitutional Court (article 215);[24] the Supreme Court (article 216); Courts of Appeal (article 217); Courts of First Instance (article 218); the Court of Auditors (article 219); Military Court of Instance (article 220); and Tax and Customs Courts (article 221). The management of the judiciary is the responsibility of the Superior Council of the Judiciary (article 223), a body chaired by one of the 'judges who are part of it, upon the proposal of the other members of that body' (article 223(6)). The defence of citizens' rights, democratic legality, and public interest, criminal prosecution, and the implementation of the criminal policy set by the government is carried out by the public prosecutor's office (article 225). The management of the public prosecutor's office is done by the Board of Public Prosecution (article 226), a body chaired by the Attorney-General.

In Guinea-Bissau,[25] under article 96(1) of the constitution, the 'Government is the supreme executive and administrative organ of the Republic of Guinea-Bissau', and it is established that the president may '[p]reside over the Council of Ministers when he wishes to do so' (article 68(m)). Articles 120 and 121 state that the Bissau-Guinean judicial system includes the following types of courts: the Supreme Court; the Military Tribunals ('who are responsible for the prosecution of essentially military crimes' in accordance with article 121(1); and Administrative, Tax, and Audit Courts. The management of the judiciary is the responsibility of the Supreme Judicial Council (article 120). The defence of legality, the representation of the state for public and social interests, and criminal prosecution are in the hands of public prosecutors (article 125). The Public Prosecutors' Office is organized according to a hierarchical structure under the direction of the Attorney-General of the Republic (article 125(1)).

[23] Constitution of Cape Verde of 25 September 1992 (as amended on 3 May 2010) (CRCV), with 295 articles.

[24] According to art 294 of the constitution of Cape Verde, '[w]hile the Constitutional Court is not legally installed' its functions are exercised by the Supreme Court.

[25] Constitution of Guinea-Bissau of 26 February 1993, as amended by five modifications to the constitution text of 16 May 1984 (CRGB), with 133 articles. On this, see Fernando Loureiro Bastos, *Introduction to the Constitution of the Republic of Guinea-Bissau* (2013) 3–5, available at the website of the Institute for International and Comparative Law in Africa (ICLA), Country Reports, *Oxford Constitutions of the World* (Oxford University Press 2014).

For Mozambique,[26] pursuant to article 146(2) of the constitution, the 'President of the Republic is the Head of Government', the Council of Ministers is 'convened by the Prime Minister, by the President's delegation of power' (article 202(2)), and the formulation of government policies by the Cabinet 'is made during sessions chaired by the President' (article 202(2)). According to article 223, the Mozambican judicial system comprises, as a minimum, the Supreme Court (articles 225 to 227), the Administrative Court (articles 228 to 231), and ordinary courts. The judicial system also comprises of 'administrative courts, labour courts, tax courts, customs courts, maritime courts, arbitration courts, and community courts', and military tribunals 'during the duration of the state of war' (article 224). The constitution also provides for a Constitutional Council, with powers to 'administer justice in matters of a constitutional nature' (article 241(1)). Managing judges is the responsibility of the Superior Council of the Judiciary (article 220), a body chaired by the President of the Supreme Court (article 221(2)). The constitution also provides that the management of the administrative courts is the responsibility of the Superior Council of the Administrative Courts (article 232). The representation of the state, the defence of the legality, the protection of certain rights, including minors, incapacitated persons, the control of the duration of arrests, the direction of the pre-trial instruction of criminal cases, and criminal prosecution are the responsibility of the Public Prosecutors' Office (article 236). The management of the public prosecutors' office is done by the Board of the Public Prosecutor (article 238).

In São Tomé and Príncipe,[27] under article 108 of the constitution, the 'Government is the executive and administrative organ of the state, and shall conduct the general policy of the country', and the president may only '[p]reside over the Council of Ministers, at the request of the Prime Minister' (article 81(c)), but the president has the powers to '[c]onduct, in consultation with the Government, any negotiation process for the conclusion of international agreements in the area of defence and security' (article 82(e)). In accordance with article 126, the court system of São Tomé and Príncipe comprises the Constitutional Court,[28] the Supreme Court of Justice, the Court of First Instance, the Regional Court, and District Courts, and 'military courts and arbitration courts' may also be created. The defence of legality, the representation of public and social interest, and criminal prosecution are the responsibility of public prosecutors (article 130). The management of the judiciary is conferred on the Superior Council of the Judiciary (article 223), a body chaired by one of the 'judges who is part of it, upon the proposal of the other members of that body' (article 223(6)).

The relations between the judiciary and the executive in the constitutions in force in the Lusophone African states are organized in accordance with the principles of the

[26] Constitution of Mozambique of 22 December 2004 (as amended by Law no 26/2007 of 16 November 2007) (CRM), with 306 articles.

[27] Constitution of São Tomé and Príncipe of 20 September 1990 (as amended on 29 January 2003) (CRSTP), with 160 articles. On the constitution of the Republic of São Tomé and Príncipe, see Fernando Loureiro Bastos, *The Democratic Republic of São Tomé and Príncipe: Introductory Note* in *Oxford Constitutions of the World* (online version available).

[28] According to art 156 of the São Tomé and Príncipe constitution '[w]hile the Constitutional Court is not legally installed' its functions are exercised by the Supreme Court.

separation of powers and of the independence of the courts. The importance given to these two principles is so central to the structuring of the relations amongst the different branches of government that amending constitutional provisions dealing with these matters is strictly restricted in the Constitutions of all Lusophone African states.

It should also be noted that the treatment of judicial and executive relations is not comparable to the level of attention accorded to the relations between the executive and the legislative branches of power, which is another demonstration that the matter is perceived as being relatively minor in the organization of political power. According to the most widespread perception of the exercise of political power in these states, the position of the judiciary in the political system is subordinate because it has very limited powers concerning the interpretation or application of legislation. In addition, following the powers that were actually granted to courts in Portugal during the Estado Novo (1926–74), the decisions of the legislative and executive powers are not seen as capable of being contested by using the judiciary in the African Lusophone states. In line with the prevailing attitude before the establishment of democracy in Portugal, the courts ultimately serve to resolve conflicts between private persons, and not for the defence of the rights of private persons when they are subject to acts of the political power by the state or by other public bodies.

It is now time to turn our attention to some of the most striking aspects of the relations between the judiciary and the executive. First, we will consider the rule of law and the principles of the separation of powers and of the independence of the courts and the constitutional guarantees that are set to safeguard the principle of independence of the courts. Secondly, the rules governing the appointment of the judges of the High Courts, the Attorney-General, and the members of the supervisory bodies of the judiciary in the constitutions of the Lusophone African states will be examined. Finally, to conclude this overview, mention will be also made of the power of pardon and the power of commutation of sentences provided for in the constitutions of the Lusophone African states.

Although the independence of the courts is unquestionable in terms of the texts of the constitutions of Lusophone African states, it is important to stress the way the relationship between the judiciary and executive works in practice. This relationship is, essentially, a practical expression of the effectiveness of constitutional texts that can be found in Portuguese constitutional doctrine, especially in the work of the Portuguese constitutional scholar, Jorge Miranda, based, as it is, on the opposition between normative constitutions and semantic constitutions.[29] The work of Jorge Miranda is widely used by lawyers in the African Portuguese-speaking states and constitutes a reference point for the understanding of the constitutional law in these states. There is a particular focus on the fact that the express reference in the constitutional texts to constitutional concepts does not mean that these concepts are properly understood or adequately used in these legal systems. In this regard, attention is drawn to the fact that only after the Revolution of 25 April 1974 was the teaching of constitutional law in

[29] On this question, see Miranda and Kafft Kosta (n 21) 32.

Portugal given a democratic context taking into consideration the authoritarian nature of the political regime in Portugal from 1926 and the fact that the provisions of the 1933 constitution, especially those concerning the protection of fundamental rights, were hardly respected.

In many respects, there is a gap in the African Lusophone countries between the constitutional concepts in the constitutional texts and the real understanding and application of these constitutional concepts. There is also a difference between judicial independence *de jure* and judicial independence *de facto*.[30] Drew A Linder and Jeffrey K Staton bring this out very clearly in their study entitled: 'The Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence'.[31] These authors present the following data regarding the independence of the courts with regard to the Lusophone African countries during the period since their independence to 2010 (considering 1 as the value for the most independent courts): i) Angola: virtually a constant underperformance at 0.3 between the time of independence and 2010; ii) Cape Verde: a variation from 0.2 at the time of independence to 0.8 in 2010; iii) Guinea-Bissau: a variation between 0.3 at the time of independence and 0.4 in 2010; iv) Mozambique: a variation between 0.2 at the time of independence and 0.4 in 2010; and v) São Tomé and Príncipe: virtually a flat line of 0.4 between the time of independence and 2010, with a rise and a fall in the 1980s.

### 3.2 The proclamation of the rule of law and the principle of the separation of powers in the constitutions of the Lusophone African states

It is necessary to preface this section by reiterating the fact that the constitutions of the Lusophone African states are based on the model of the rule of law of Western origin with an explicit recognition of the predominance of law and of the separation of powers amongst the organs of political power. The wording adopted in the constitutional norms has its origin in the Portuguese constitution of 1976. The constitutional texts incorporate the idea of the separation powers of Western origin even when it is not compatible with the political philosophy of the ruling elites of these states. In fact, with the possible exception of Cape Verde, they still apply the concepts of the exercise of power, rooted in the organization of political power of Marxist origin that prevailed until the end of the 1980s. Similarly, the references to written law are difficult to understand in countries such as Angola, Guinea-Bissau, and Mozambique, where a significant part of their legal system is still based on customary law and the resolution

[30] In this context, the United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations 2007) 40, expressly states that: '[t]he adoption of constitutional proclamations of judicial independence do not automatically create or maintain an independent judiciary. Judicial independence must be recognized and respected by all three branches of government. The judiciary, in particular, must recognize that judges are not beholden to the government of the day'.

[31] Drew A Linder and Jeffrey K Staton, 'The Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence' (Southern Political Science Association Conference, 12–14 January 2012) 37–8.

of conflicts does not greatly rely on the use of formal mechanisms contained in written legislation.

In the 2010 constitution of Angola we find: i) in article 2(1), that '[t]he Republic of Angola shall be a democratic state based on the rule of law . . . the primacy of the Constitution and the law, the separation of powers and the interdependence of functions . . . '; ii) in article 6(2), that '[t]he State shall be subject to the Constitution and shall be based on the rule of law and ensuring that the law is respected'; and iii) in article 105(3), that '[t]he sovereign bodies must respect the separation and interdependence of functions established in the Constitution'.[32]

In the 1992 constitution of Cape Verde it is stated: i) article 2(1), that '[t]he Republic of Cape Verde shall be organized in a democratic State based on the rule of Law . . . ', recognizing and respecting the 'separation and interdependence of powers' (article 2(2)); and ii) in article 3(2), that '[t]he State shall be subordinated to the Constitution and based on democratic legality and shall respect and impose the respect of the law'. The Supreme Court of Cape Verde expressly used the principle of the separation of powers to declare the unconstitutionality of Arbitration Committees of Automobile Accidents, in the Judgment of the Supreme Court (SN/1994) of 16 May 1994.[33]

In the constitution of Guinea-Bissau 1993 it is established: i) in article 3, that '[t]he Republic of Guinea-Bissau shall be a State of constitutionally-instituted democracy . . . '; ii) in article 8(1), that '[t]he State shall be subordinate to this Constitution and shall be based on democratic legality'; and iii) in article 59(2), that '[t]he organization of political power is based on the separation and interdependence of sovereign bodies and in tying them all to the Constitution'.

The 2004 constitution of Mozambique states: i) in article 2(1) that '[t]he State is subordinate to the Constitution and is founded on legality'; ii) in article 3, that '[t]he Republic of Mozambique is a State governed by the rule of law . . . '; and iii) in article 134, that '[t]he organs of sovereignty are established on the principles of separation and interdependence of powers enshrined in the Constitution, and shall owe obedience to the Constitution and the laws'.

The 1992 constitution of São Tomé and Príncipe provides: i) in article 6(1) that '[t]he Democratic Republic of São Tomé and Príncipe is a State of democratic law'; ii) in article 7 that '[t]he State of democratic law implies the safeguard of justice and legality as fundamental values of collective life'; and iii) in article 69(1), that 'sovereign bodies shall observe the principles of separation and interdependence laid down in the Constitution'.

[32] The approach taken by the Constitutional Court of Angola to the powers of the president as holder of the executive power and the principle of separation of powers in relation to the creation of a Petroleum Fund can be seen in the judgment of the Constitutional Court no 233/13 of 15 November 2007 (Diário da República, Série I, no 220, 15 November 2007) 3147–9.

[33] This ruling was later reaffirmed in Judgment 83/2003, 21 October 2003, of the Supreme Court, with the following summary: 'With the entry into force of the 1992 Constitution the Committees of Arbitration Committees of Automobile Accidents can no longer compose and settle disputes, since that is a judicial function exclusively entrusted to the courts with judges equipped with the essential guarantees of independence'.

### 3.3 The proclamation of the independence of courts in the constitutions of the Lusophone African states

The constitutions of the Portuguese-speaking African states, moreover, proclaim the independence of courts and its judges without any restriction. This is done in different ways: i) in Angola, article 175 of the constitution provides that '[i]n the exercise of their jurisdictional functions, the courts shall be independent and impartial and subject only to the Constitution and the law'; ii) in Cape Verde,[34] article 211(1) of the constitution provides that '[i]n the exercise of their functions, the courts are independent and subject only to the Constitution and the law'; iii) in Guinea-Bissau,[35] article 123(2) of the constitution provides that '[i]n the exercise of their duties, every judge shall be independent and should only obey the law and his conscience'; iv) in Mozambique, article 217(1) of the constitution states that '[i]n the exercise of their functions, judges shall be independent and shall owe obedience only to the law'; and v) in São Tomé and Príncipe,[36] article 121 of the constitution provides that '[t]he courts are independent and are subject only to the laws'.

In practice, despite the unequivocal constitutional affirmation of the independence of the courts, the actions of the judiciary are strongly influenced by the executive branch, as shown by international studies. The examples of Angola and Mozambique are particularly significant because of their size and the way they are considered particularly attractive as foreign investment destinations.

For Angola, the following excerpts of *Bertelsmann Stiftung's Transformation Index (BTI)* 2014, covering the period from 31 January 2011 to 31 January 2013, are relevant

[34] In World of Freedom, *Freedom House Reports: Freedom in the World* (2013) and World of Freedom, *Freedom House Reports: Freedom in the World* (2014), for Cape Verde it is stated for the two years under review: 'Cape Verde's judiciary is independent. However, the capacity and efficiency of the courts are limited, and lengthy pretrial detention remains a problem'. Data available at the World of Freedom website <http://www.freedomhouse.org> accessed 31 July 2015.

[35] In the World of Freedom (2013 and 2014) reports (n 34) regarding Guinea-Bissau, it is said for the two years under review that: '[s]cant resources and endemic corruption severely challenge judicial independence. Judges and magistrates are poorly trained, irregularly paid, and highly susceptible to corruption and political pressure'. Data available on the World of Freedom website <http://www.freedomhouse.org> accessed 31 July 2015.

[36] In the World of Freedom (2013 and 2014) reports for São Tomé and Príncipe it is stated that: i) in 2013 that: '[t]he Constitution provides for an independent judiciary, though it is susceptible to political influence, and is understaffed and inadequately funded. The Supreme Court has ruled in the past against both the government and the president. However, in August 2012, the court cited lack of evidence for dismissing corruption charges against three businessmen involved in the controversial STP Trading case, which involved government officials. The decision was contested by the Attorney General but confirmed in November by the Supreme Court'; and ii) in 2014 that: '[t]he constitution provides for an independent judiciary, though it is susceptible to political influence and is understaffed and inadequately funded. In January, Elsa Pinto was appointed as the new Attorney General by presidential decree. As Pinto is prominent in the MLSTP-PSD party, the Bar Association and others argued that her political ties jeopardized the office's independence. Just two weeks after her appointment, Pinto was dismissed. She was replaced by Frederique Samba. On July 30, after an audit of the court's finances and rumours of poor management, the head judge of the Supreme Court, José Bandeira, dissolved the courts' board of administration and nominated a new board that he presides over. Critics called it an abuse of power, arguing that only the National Assembly may perform this type of structural change.' Data available on the World of Freedom website <http://www.freedomhouse.org> accessed 31 July 2015.

to an understanding of the relations between the judiciary and the executive branches of power:

i) Although legally, government powers are formally separated, there is in practice a predominance of the executive over the legislative and the judiciary, which was further consolidated in the 2010 reform of the constitution. More than just the executive, it, is, in fact, the president and his close advisors that can overrule parliamentary and ministerial decisions by presidential decree;[37]

ii) Judges and members of government commissions are appointed by the president according to political loyalty, and are routinely subject to political interference; in large parts of the country, especially in the provinces, the courts are largely irrelevant;[38]

iii) Although there is a Supreme Court, a Constitutional Court, a state attorney general and an ombudsman, these positions are filled according to political loyalty and are subject to political influence. Investigations are routinely opened or closed according to the 'superior orientations', that is, directives from the presidency while complaints filed by the opposition or civil society activists are dismissed or simply not pursued . . . By contrast, the courts are quick to prosecute opposition figures for libel, defamation, unpaid fines or even abuse of professional titles. At lower levels, the judiciary functions more independently (in civil and criminal courts), but corruption is rife, and condemnations of persons linked to the elite only happen in cases of a political settling of accounts, when the person in question somehow fell out of favour.[39]

For Mozambique,[40] in similar terms, the following excerpts from the *BTI* 2014,[41] are relevant to an understanding of the practice of relations between the judiciary and the executive branches of power:

i) Given the FRELIMO party's dominance of society and the state administration, including the justice sector, the separation of powers does not exist in Mozambique de facto;[42]

ii) De jure, the constitution speaks of a separation of powers in article 134. However, rather than looking to the constitution and their own institutional independence in the course of decision-making, representatives of the judiciary, executive and

[37] Bertelsmann Stiftung, 'Transformation Index' (BTI) (2014) 8 <http://www.bti-project.org/index> accessed 31 July 2015.

[38] ibid 8.

[39] ibid 12.

[40] In the World of Freedom (2013 and 2014) reports (n 34), for Mozambique it is stated that: i) in 2013: '[c]orruption, scarce resources, and poor training undermine judicial independence. The judicial system is further challenged by a dearth of qualified judges and a backlog of cases'; and, ii) in 2014 that: '[f]ollowing the establishment of the superior appeals court in late 2012, the national assembly passed a new penal code in December 2013, the first new code in 120 years. Irrespective of these modernization efforts, judicial independence remains limited due to scarce resources, poor training, a backlog of cases, and corruption.' Data available on the World of Freedom website at <http://www.freedomhouse.org> accessed 13 August 2015.

[41] Available at Bertelsman Stiftung, 'Mozambique Country Report 2014' (2014) <http://www.bti-project.org/uploads/tx_itao_download/BTI_2014_Mozambique.pdf> accessed 31 July 2015.

[42] Bertelsmann Stiftung (n 37) 10.

legislature look instead to the party line and decisions from the party presidency;[43]

iii) The independence of the judiciary is heavily impaired by political authorities;[44] and

iv) An assessment conducted by the United Nations in 2010 revealed the inefficiencies of the sector due to interferences by political authorities. When, for example, President Guebuza moved judges from the Supreme Court to the Constitutional Court, the vacancies were not filled for over a year. The poor functioning of the Supreme Court has earned it a reputation as a 'cemetery for court cases'. FRELIMO party affiliation is a must for anybody wishing to enter the justice system or, once there, to advance his or her career. Only half of the cases that have reached the Supreme Court are being currently attended to. In total, the justice sector has a backlog of more than 100,000 cases each year.[45]

The Angolan and Mozambican practice can be properly understood only if one takes into consideration that the elites currently in power form part of political parties whose creation had their origin in the national liberation movements that led to the independence of these states. Having been structured in accordance with a centralized model of power of Marxist origin, the internal functioning of the political parties which has been controlling the state administration since independence is not organized according to the democratic model that is provided for by the constitutions currently in force.

## 3.4 The guarantees of independence of the courts in the constitutions of the Lusophone African states

The independence of the judiciary is guaranteed in the constitutions of Lusophone African states in a relatively homogeneous way[46] with an emphasis on the technical and formal precision of the more recent constitutional texts, like that of the constitution of Cape Verde in the version amended by the 2010 constitutional revision, and that of the 2010 constitution of Angola.

In Angola: i) serving judges may not be candidates for election as President of the Republic (article 110(2)(b)–(d)) or members of the National Assembly (article 145(1)(a), and article 149(1)(d)); ii) judges are independent with regard to the exercise of their duties (article 179(1)); iii) judges are irremovable and may not be transferred, promoted, suspended, retired, or dismissed unless under the terms of the constitution and the law (article 179(2)); iv) judges are not responsible for the decisions they make during the course of their duties, except for the restrictions imposed by law (article 179 (3)); v) serving judges may not become affiliated to political parties or become involved in party political activities (article 179(6)); vi) the courts shall enjoy administrative and

[43] ibid 11. [44] ibid. [45] ibid.

[46] The importance of the guarantees of the independence of the courts is highlighted in the Belém Charter [Carta de Belém] (29 April 2015) signed by representatives of the associations that make up the International Union of Portuguese-speaking Judges [União International dos Juízes de Língua Portuguesa], on 22 November 2012, when it stated that 'the independence of judicial power is an essential principle of the rule of law and also directly protects the fundamental rights of citizens'.

financial autonomy, and the law must define mechanisms to enable the participation of the judiciary in the process of drawing up their budget (article 178); vii) organs of the judicial power may present opinions on matters relating to the organization of the judiciary, the status of judges, and the functioning of the courts during the legislative process relative to those matters (article 167(2)); and viii) the independence of the courts is subject to a limit on constitutional revisions (article 236(i)).

In the concluding remarks made in the initial report submitted on Angola in 2013 under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee[47]said with reference to the independence of the courts:

> The Committee is concerned at the reported lack of independence as well as corruption of the judiciary, and the insufficient number of judges, lawyers, tribunals and courts, all of which may create difficulties regarding access to justice; [...and the] State party should strengthen the independence of the judiciary and effectively combat corruption. It should also increase the number of trained judges and lawyers. The State party is encouraged to implement its plan aimed at increasing the number of tribunals and courts (municipal and provincial) in order to ensure that justice is accessible to all, in particular to disadvantaged persons and those living in rural areas.... [48]

In Cape Verde: i) judges are independent in the exercise of their functions (article 222(3) of the constitution); ii) judges are irremovable and may not be transferred, suspended, retired, or dismissed peremptorily except in cases specified by law (article 222(4) of the constitution); iii) judges are not responsible for their judgments and decisions, except in cases specified by law (article 179(6) of the constitution); iv) judges in office may not be affiliated to any political parties or devote themselves, in any way, to party political activities (article 222(8) of the constitution); and v) there are limits to the amendment of the provisions dealing with the independence of the courts (article 290(f) of the constitution).

In Guinea-Bissau: i) judges are independent with regard to the exercise of their duties (article 123(2) of the constitution); ii) judges are not accountable for their judgments and decisions and may be subject to civil, criminal, or disciplinary liability only in cases specified by law (article 123(3) of the constitution); iii) the appointment, removal, placement, promotion, and transfer of judges and the exercise of discipline is a competence of Supreme Judicial Council (article 123(4) of the constitution); and iv) there are limits to the amendment of the provisions dealing with the independence of the courts (article 130(j) of the constitution).

In Mozambique:[49] i) the offices of President of the Supreme Court, the President of the Constitutional Council, President of the Administrative Court, Attorney-General

[47] United Nations Human Rights Committee, International Covenant on Civil and Political Rights, 'Concluding Observations on the Initial Report of Angola, Adopted by the Committee at its 107th Session (11–28 March 2013)' (CCPR/C/ASM/CO/1, 29 April 2013).

[48] ibid 6.

[49] In 2012, on the discourse of the solemn opening of the judicial year the President of the Supreme Court of Mozambique stated that, '[w]e advocate a model in which the judiciary enjoys greater financial autonomy and that the Constitution should set a minimum percentage of the budget allocated to the courts, as happens in some countries, without prejudice with regard to the harmonization and balance in the execution of the State Budget'.

of the Republic, Vice-president of the Supreme Court, and the Deputy Attorney-General of the Republic are mutually incompatible with other public offices (article 137(1) of the constitution); ii) judges in office may not be deputies (article 172(1)(b) of the constitution); iii) judges are independent with regard to the exercise of their functions (article 217(1) of the constitution); iv) judges are given guarantees of impartiality and of irresponsibility (article 217(2) of the constitution); v) judges shall be irremovable from office and may not be transferred, suspended, retired, or dismissed, except in accordance with the law (article 217(3) of the constitution); vi) judges may be held responsible in civil, criminal, and disciplinary proceedings for acts performed in the exercise of their duties only in cases prescribed by law (article 218(1) of the constitution); and vii) there are limits to the amendment of the provisions dealing with the independence of the courts (article 292(i) of the constitution).

The UN Human Rights Commission, in their concluding remarks made in the initial report submitted on Mozambique in 2013, drew attention to the following concerning the courts:[50] i) 'While noting the efforts made by the State party regarding the training and employment of more judges, the Committee remains concerned about the insufficient number of judges and their inadequate training. It is further concerned about the lengthy delays in the administration of justice, the lack of clarity on the calculation of court fees and difficulties encountered by disadvantaged persons in accessing legal assistance. The Committee is also concerned at reports that the system of community courts inherited from colonial times does not appear to function according to basic fair trial principles and their decisions can contradict human rights principles (articles 2 and 14)'; and ii) 'The State party should continue to increase the number of qualified and professionally trained judicial personnel, as a matter of urgency; continue efforts to decrease delays in proceedings, simplify and make transparent the procedure by which court fees are calculated and ensure that legal assistance is provided in all cases where the interest of justice so requires. The state party should also ensure that the system of community courts functions in a manner consistent with article 14 and paragraph 24 of general comment no 32 (2007) on the right to equality before courts and tribunals and to a fair trial, and decisions emanating from these bodies do not run counter the state party's obligations under the Covenant.'[51]

The 'Report of the Special Rapporteur on the Independence of Judges and Lawyers', dedicated to Mozambique, was presented by Gabriela Knaul, in 2011, to the United Nations Human Rights Council. The following excerpts from the report are particularly relevant:

> i) During her visit, the Special Rapporteur observed that CSMJ [the Higher Judicial Magistrates' Council] has found it difficult to exercise its mandate in an effective and independent manner, due to a number of factors: it is understaffed and has not

[50] For Mozambique, some relevant data can be found in the speeches delivered by the President of the Supreme Court on the occasion of the solemn opening of the judicial years. In 2013, on the issue of the number of judges, it was stated that '[n]ow the country has a total of 295 magistrates, of which 258 are on duty, 11 on commission and 26 are full-time students' (at 15), also adding that at the time '[f]rom the 295 judges, 248 are law graduates, a figure that represents 84% of the judges, against 230 last year, a figure that represented 77%, indicating an increase of about 7%'.

[51] United Nations (n 47) 5.

adopted internal statutes governing its functioning, thus leaving its effective control in the hands of its President, who is also the President of the Supreme Court. CSMJ should undertake planning processes, including determining staffing and budgeting needs. It should also publish its activities. In the Special Rapporteur's view, these factors, together with the nomination process of its members, seriously undermine the functioning of CSMJ, which is crucial to ensuring the independence of the judiciary;[52]

ii) Budget allocations are used in some instances to undermine the independence of the judiciary. Several interlocutors inquired how judges and prosecutors could carry out their mandates independently and impartially when the same judges and prosecutors often need to negotiate the budget for their respective offices. The possibility of making concessions to obtain suitable budget allocations was mentioned;[53]

and

iii) The Special Rapporteur heard from many stakeholders that the concentration of powers in the President of the Republic is a major factor having a detrimental impact on the independence of the judiciary.[54]

In São Tomé and Príncipe: i) the courts are independent and subject only to the laws (article 121 of the constitution); ii) judges are irremovable and may not be transferred, suspended, retired, or dismissed except in accordance with the law (article 125(1) of the constitution); iii) judges cannot be held accountable for their decisions, unless otherwise provided for by law (article 125(2) of the constitution); and iv) the independence of the courts is subject to a limit of constitutional revision (article 154(h) of the constitution).

## 3.5 The appointment of judges to the High Courts, the Attorney-General, and members of the supervisory bodies of the judiciary in the constitutions of the Lusophone African states

It is in the matter of the appointment of judges to the High Courts, the Attorney-General, and members of the supervisory bodies of the judiciary where it is possible to find the greatest differences between the constitutions of the Portuguese-speaking African states. From a strictly legal perspective, these differences are a consequence, first of all, of the type of system of government adopted in the respective states. From another perspective, taking into account the effective functioning of the political system, the differences listed are the translation to a greater or lesser degree of the independence of members of the judiciary from the executive.[55]

[52] Gabriela Knaul, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers on her Missions to Mozambique (26 August–3 September 2009 and 6–10 December 2010)' 7.

[53] ibid.

[54] ibid 8.

[55] See Lars P Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators' (2003) CESifo Working Paper No 906, on Category 2: Public Choice, assessing twelve constraints to the independence of the courts, who argue that '(3) The appointment procedure of the judges may have a notable effect on the independence of the court. As it is *inter alia* supposed to protect citizens from illegitimate use of powers by the authorities as well as to settle disputes between the branches of government, it ought to be as independent as possible from the other branches of

The possibility of executive power controlling the judiciary through the appointment of its members is particularly high in the case of Angola. In fact, article 119 of the 2010 constitution of Angola sets out that the President of the Republic, as Head of State, with the responsibility of: i) appointing the Presiding Judge of the Constitutional Court and other judges of the said court (article 119(e)); appointing the Presiding Judge of the Supreme Court, the Deputy Presiding Judge, and the other judges of the said court on the recommendation of the Supreme Judicial Council (article 119(f)); iii) appointing the Presiding Judge of the Court of Auditors, the Deputy Presiding Judge, and the other judges of the said court, under the terms of the constitution (article 119(g)); iv) appointing the Presiding Judge, the Deputy Presiding Judge, and the other judges of the Supreme Military Court (article 119(h)); v) appointing and discharging from office the Attorney-General, the Deputy Attorney-General, and, on recommendation of the Supreme Judicial Council, the Assistant Attorneys-General, as well as the Military Prosecutors of the Supreme Military Court (article 119(i)); and vi) appointing members of the Supreme Judicial Council, under the terms prescribed by the constitution (article 119(t)).

The issue of the compatibility of the independence of the courts and the appointment of office holders in the justice system was explicitly acknowledged in Judgment No 111/10, of 21 January, of the Constitutional Court of Angola. The reasoning used by the Constitutional Court is of particular interest since it stated that the intervention of the executive in the appointment of judges is required by the need to overcome the lack of democratic legitimacy in the exercise of their functions. In addition, based on a strictly formal approach to the matter, it is assumed that the existence of a process where candidates are selected based on a study of their curriculum vitae is a sufficient guarantee for the appointment of judges independent from the executive manipulation.

Given the rarity of such judgments in the African Portuguese-speaking countries, a fairly extensive quotation from the judgment may aid an understanding of the terms under which the matter is approached using a merely legalistic reasoning. The Court stated:

> The Constitution provides for the intervention of the President to appoint four of the 11 judges of the Constitutional Court, as does the National Assembly (Article 180); it also provides for the appointment by the President of the Judges of the Supreme Court (Article 181), the Judges of the Military Court, and the Court of Auditors.
>
> It is also provided that the President and the National Assembly may intervene in the appointment of members of the Supreme Judicial Council (article 184).
>
> It is important to assess whether these appointments and designations made by the executive branch (the President) and the legislature (National Assembly) violate the principle of the independence of the courts.
>
> With regard to the Supreme Court judges, we can immediately stress that the power committed to the President is a simple formalization of the designation, as the

government. We hypothesize that the most independent procedure for judicial appointment is by professionals (other judges or jurists). The least independent method is appointment by one powerful politician (the prime minister or the minister of justice, eg).'

> Supreme Court judges are selected by curricular tender, with the appointment of the President subject to a proposition from the Supreme Judicial Council. A similar solution prevails in the light of its organic law for the appointment of the judges of the Court of Auditors which is preceded and conditioned by a curricular tender.
>
> On the other hand, it is common in the democratic law state, that the powers of the state democratically legitimated by direct universal suffrage (as the President and the National Assembly) intervene in the process of appointment of Judges, either to avoid or limit corporatist access to the Courts and the Judiciary, and also, although indirectly, to contribute to a reduction of the democratic deficit of the judiciary itself.
>
> Therefore, and because the Judges so appointed are constitutionally protected by the guarantees of tenure, exempt from bearing responsibility for judgments, independence, and of no subordination to the entities that appoint or elect them, the Constitutional Court understanding is that the text of the Constitution under consideration does not violate the principle of the independence of the courts.

The wording of Cape Verde's 1992 constitution, in contrast to the constitutions of the other Lusophone African countries, incorporates the most appropriate legal conditions to ensure the effective independence of the judiciary from the executive power. Article 135 of this constitution provides that the President of the Republic is competent: i) to appoint the Chief Justice of the Supreme Court from amongst the judges of such court, following nomination by the candidate's peers (article 135(1)(k)); ii) to appoint a judge to the Supreme Council of Magistrates (article135(1)(l)); iii) to appoint the President of the Supreme Council of Magistrates, following nomination by the members of that body (article 135(1)(m)); iv) to appoint, following the government's proposal, the President of the Court of Auditors (article 135(2)(k)); and v) to appoint, following the government's proposal, the Attorney-General of the Republic (article 135(2)(f)).

In Guinea-Bissau's fairly short and concise constitution, the issue of appointment of members of the judiciary is not subject to a very detailed treatment. It states inter alia that: i) the President of the Republic has the right: a) to induct the judges of the Supreme Court (article 68(n)); b) to appoint and dismiss, after hearing the opinion of the Government, and the Attorney-General of the Republic (article 68(p)); and ii): a) the judges of the Supreme Court are 'appointed by the Supreme Judicial Council' (article 120(1)); and b) 'in its composition, the Supreme Judicial Council will have, at least, representatives of the Supreme Court and of the other courts, and representatives from the National Assembly, in terms to be fixed by law' (article 120(6)).

In Mozambique, in terms similar to those applying in Angola, the progressive presidentialization of the system of government has led to a process for the appointment of members of the judiciary that can be used to put them in a position of subordination in relation to the executive branch. In the constitution it is stated: i) that it is the responsibility of the President of the Republic: a) to appoint the President of the Supreme Court, the President of the Constitutional Council, the President of the Administrative Court, and the Vice-President of the Supreme Court (article 159(g)); b) to appoint, exonerate, and dismiss the Attorney-General of the Republic and the Deputy Attorney-General of the Republic (article 159(h)); and ii) in article 179(2)(h) that the Assembly of the Republic shall have exclusive power to ratify

the appointment of the President of the Supreme Court, the President of the Constitutional Council, the President of the Administrative Court, and the Vice-President of the Supreme Court.

In São Tomé and Príncipe, besides the fact that the judicial power of appointing members to the judiciary is not subject to detailed treatment in the constitution, it must also be added that the selection of the members of the judiciary is considerably influenced by the very small number of qualified lawyers available. In the 1990 constitution it is provided: i) that it is the responsibility of the President of the Republic: a) to appoint a judge to the Constitutional Court (article 81(k)); b) to appoint and dismiss the Attorney-General of the Republic, according to government proposals (article 81(l)); and ii) in article 97(e) that it is the responsibility of the National Assembly to appoint and dismiss the judges of the Supreme Court of Justice.

### 3.6 The power to pardon and commute sentences in the constitutions of the Lusophone African states

The power to pardon and to commute sentences appears in all the constitutions of Lusophone African states as a power granted to the President of the Republic, regardless of the form of government adopted in that state. In Angola, this is referred to in article 119(n) of the constitution and it appears under the 'powers as Head of State'.[56] In Mozambique, it is referred to in article 159(i) of the constitution and is included within the so-called 'general powers'.[57] In Guinea-Bissau, in accordance with article 68(t) of the constitution, that power is attributed solely to the president.[58] In Cape Verde and São Tomé and Príncipe it is a competence of the President of the Republic that can be exercised only after 'consulting with the Government' under, article 135(1)(n)[59] and article 80(f) of the respective constitutions.[60]

Following the Portuguese tradition, this presidential power is not considered to be of great importance in any of the Lusophone African systems, nor is it considered to constitute a potential interference by the executive in the judiciary. The justification for this view results from the fact that amnesties have been granted when criminal matters involving a component of political nature need to be solved.

## 4. Conclusions

It is possible to draw six brief conclusions from this overview on the relationship between the judiciary and the executive in Portuguese-speaking African states. First, a strictly legal analysis, particularly at the level of the constitutional texts, shows the

[56] Pursuant to CRA (n 22) art 161(g), the National Assembly has the power to 'grant amnesties and general pardons'.

[57] Pursuant to CRM (n 26) art 179(2)(v), the National Assembly has the power to 'grant amnesties and pardons'.

[58] Pursuant to CRGB (n 25) art 85(n), the National Assembly has the power to 'grant amnesty'.

[59] Pursuant to CRCV (n 23) art 175(l), the National Assembly has the power to 'grant amnesties and general pardons'.

[60] Pursuant to CRSTP (n 27) art 97(f), the National Assembly has the power to 'grant amnesty'.

existence of articles applying the principles of the separation of powers and the independence of the courts in all Portuguese-speaking African states. Secondly, studies being undertaken on the relationship between the judiciary and the executive powers in these states cannot ignore the historical dominance of the executive and a similar subordination of the judiciary in Portuguese-speaking African states, with the reason for this being the image Lusophone African lawyers generally have of courts and their role in the exercise of power. Thirdly, the insufficient number of courts and judges in Portuguese-speaking African states very significantly affects the relevance that the courts have in those states, and this inadequacy in Angola, Guinea-Bissau, and Mozambique is partly overcome by the use of traditional mechanisms of conflict resolution (despite the incompatibilities that the applied customary law can have with the written law of Western origin). Fourthly, the legal systems of the Portuguese-speaking African states and the understanding that Lusophone African jurists have of the law and its function is strongly influenced by the Portuguese legal system and Portuguese legal doctrine, which is particularly relevant in terms of the training and the role of Lusophone African magistrates. This can only be properly understood if one takes into account the very strong nature of legal cooperation and the personal and institutional relationships between lawyers of Portuguese-speaking African states. Fifthly, a proper understanding of the relationship between the judiciary and the executive branches of power requires consideration of the practice of judicial activity in Portuguese-speaking African states, and this implies the clarification of the mechanisms for the appointment of judges and the material conditions that are placed at their disposal for the performance of their duties. Finally, despite the limited information available, it seems that the image of subordination of the courts remains the rule in Portuguese-speaking African countries, Cape Verde being the only Portuguese-speaking African state where a rapprochement between the legal and constitutional framework of the independence of the courts and a practice of independence of the judiciary has begun to emerge.

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# 7

# Super-presidentialism in Angola and the Angolan Judiciary

*André Thomashausen*

## 1. Origins and Historical Development of the Constitution

### 1.1 Pre-independence constitutional status

Angola's constitutional development thus far has not claimed a place in the writings and debates of constitutionalists and constitutional law practitioners outside the community of Portuguese-speaking scholars. This chapter aims to introduce to the community of constitutional law experts in Southern Africa and beyond, the evolution of the current Angolan constitution of 2010. The chapter further introduces the new Angolan Constitutional Court and cites and discusses the first and thus far only substantive decision of this Court, in a serious constitutional conflict between parliament and the president, the *Parliamentary Oversight* Judgment of 9 October 2013. Although the conservative leaning of the Court in this dispute disappointed the opposition and many commentators, the judgment nevertheless strengthened the rule of law and of the constitutional state and contributed to a wider debate about the future of how governance can and should be organized in a modern African state.

Angola has a five-century-long centralist and presidentialist tradition. The country's seat of government was established in the city of Luanda in 1576, eighty-two years after the territory had been occupied by Portuguese explorers.[1] Following independence in 1975, the colonial administrative tradition was easily absorbed and reinforced by the *Movimento Popular de Libertação de Angola* (MPLA) liberation movement.[2] Article 60 of the independence 'Constitutional Act' of 11 November 1975 recorded that the Independence Constitution was enacted by resolution of the Central Committee of the MPLA liberation movement, in the absence of any constituent assembly process or elections.[3]

[1] On the colonial constitutional history see most recently: Jorge Bacelar de Gouveia, *Direito Constitucional de Angola* (IDILP 2014) 99–105.

[2] André Thomashausen, 'Constitutional Power and Legitimacy in the Political Evolution of Southern Africa' (2010) 1 *Lusíada Política Internacional e Segurança* 45, 50.

[3] Interestingly, the *World Constitutions Illustrated: Contemporary & Historical Documents & Resources* (William S Hein & Co, Inc & HeinOnline 2011) is the only relevant text for Angola's 1975 constitution. This text was already superseded in 1978 and has since that time been of historical interest only. For the complete documentation of all Angolan constitutional enactments see Adérito Correia and Bornito de Sousa, *Angola História Constitucional* (Coimbra 1996). For the English text of the 1975 constitution see, Constitution of Angola (1975) (*Wikisource*) <http://en.wikisource.org/wiki/Constitution_of_Angola_(1975)> accessed 9 July 2015.

Article 1 of the 1975 constitution declared the new independent state of Angola to be a country where 'any form of exploitation of man by man' would be abolished,[4] and article 2 announced that the MPLA party was vested with the status of the only lawful political party in Angola, with the constitutional mandate to exercise complete control over the state and all its organs. Accordingly, the new government replaced the colonial administrators throughout the country and at all levels of administration with party commissars, as mandated in articles 31 to 52 of the new constitution, and later in Act No 1 of 1976.[5]

The self-proclaimed 'People's Republic of Angola' established political party primacy over all political, social, cultural, and economic activity. All natural resources, land, industries, private enterprises, real estate, and other private assets (such as private bank account balances or insurance policies), were nationalized and transformed or merged into so-called 'State Economic Units' (*Unidades Economicas Estatais*; UEE) under the concurrent management and control entrusted to the Ministries of Planning and Economy. This policy persisted well into the 1990s.

Three amendment Acts of the Independence Constitution, each passed by resolution of the Central Committee of the MPLA, served to reinforce the centralist and executive system of government. First, Act 13/77 of 7 August 1977 transferred the power to appoint the prime minister and any ministers from the legislative Revolutionary Council to the state president alone, and further gave the president the right to appoint anyone to act in his place, in the event of his absence or illness. Second, on 7 February 1978 the MPLA Central Committee resolved to 're-enact' the Independence Constitution and in the process, further formalized Leninist government ideals, whilst at the same time introducing fundamental new concepts, such as the notion of 'Socialist Property' (article 9). Third, Act 1/79 abolished the offices of the prime minister and deputy prime minister, concentrating further political power in the office of the state president. Shortly after this amendment the first Angolan president, Agostinho Neto, who was suffering from severe cirrhosis of the liver, died on 10 September 1979 during treatment in Russia.

The successor of President Neto, José Eduardo dos Santos, appointed by the MPLA Central Committee on 20 September 1979, initiated the establishment of a system of local, regional, and one national 'Peoples' Assemblies'. Almost exactly a year after the demise of President Neto, a Constitutional Amendment Act was passed on 23 September 1980, again by resolution of the MPLA Central Committee, to institute the first elected state organ, namely an indirectly elected, national 'People's Assembly'. The People's Assembly replaced the earlier 'Revolutionary Council'. However, most of the envisaged local and provincial peoples' assemblies that should have secured an indirect electoral legitimacy for the People's Assembly were never constituted. Instead, Act 1/86 of 1 February 1986 created the position of 'state minister', namely ministers appointed by the president, to function in the state president's office (as opposed to government ministers). The measure strengthened the day-to-day grip of the president on the country's affairs and relegated the Cabinet and its ministers to a secondary level.

[4] Correia and de Sousa (n 3) 21–3, 177–90.

[5] Enacted on 5 February 1976.

At that point in the history of post-colonial Angola, negotiations were underway to end the civil war that had continued since the declaration of independence, in view of the exclusion of two other important liberation movements, namely *União Nacional para a Independência Total de Angola* (UNITA) and *Frente Nacional de Libertação de Angola* (FNLA).[6] The first formal peace agreement between the three rival movements was the Tri-Partite Agreement of 22 December 1988 between Angola, South Africa, and the United States. It gave rise to a United Nations Angola Verification Mission (UNAVEM I), from 20 December 1988 until 1 July 1991.[7] There were two main objectives, namely to create the conditions regionally for an honourable withdrawal of the South African military from Angolan territory, and for the proclamation of the independence of South West Africa, as the new independent State of Namibia.

A month before the UNAVEM I mission ended, Portuguese mediation efforts produced a new ceasefire agreement, as part of the so-called Bicesse Accords of 31 May 1991. The Bicesse Accords envisaged the political transformation of Angola into a multi-party democracy, motivated by the general anticipation of the dissolution and prohibition of the Communist Party of the Soviet Union on 29 August 1991.

## 1.2 The 1991/92 constitutional reforms (multi-party democracy)

The fundamental change of Angola from a one-party state into a multi-party democracy prompted the passing of Constitutional Act 12/91 of 6 March 1991.[8] When the March 1991 amendment was rejected by UNITA, a Constitutional Amendment Act No 92 of 16 September 1992 was passed. Technically this was an amendment of the 6 March 1991 Constitution Act. In reality however, Act No 92 of 16 September 1992 introduced an entirely new constitutional text. Act 92 of 1992 remained in force as Angola's constitution for nearly eighteen years, until 5 February 2010, simply because the Angolan civil war resumed just before the conclusion of the October 1992 elections, making it impossible to take the envisaged further constitution-making steps.

The last remaining rebel forces of UNITA were overrun on 22 February 2002. UNITA President Savimbi was captured and executed. The Luena Protocol of 30 March 2002 formalized the surrender of all UNITA forces and ended twenty-seven years of civil war by military victory, thus opening a new chapter in the constitution-making process in Angola.

## 1.3 The road to a democratic constitution-making process

The 1992 constitution vested, in its article 158, constitution-making authority in the National Assembly, empowering it to adopt a 'New Constitution' as well as to amend

[6] See André Thomashausen, 'Angola: The Role of the International Community' (2001) 9 *South African Journal of International Affairs* 17.

[7] UN SC Res 626 (1988); see, on the basic facts, United Nations, *The Blue Helmets—A Review of United Nations Peace-keeping* (2nd edn, United Nations Department of Public Information 1990) 336–40.

[8] English text available at the Embassy of the Republic of Angola, 'Constitution Law' <http://www.adh-geneva.ch/RULAC/pdf_state/Angola-Constitution-Law-Engl-unoffical-Embassy-Angola-2006-.pdf> accessed 9 July 2015.

the 'current constitutional law' with a two-thirds majority of all its members.[9] The 1992 constitution had come into force as a provisional and circumstantial text, conditioned by the assumption that a first freely-elected national parliament would proceed to elaborate and approve a more final and inclusive constitution. When the first term of this Assembly came to its end in 1996, whilst the civil war was continuing unabated, it was not possible to hold new elections. A Constitutional Amendment Act of 14 November 1996[10] provided for an indefinite extension of the term of the 1992 legislature, whilst at the same time setting a number of conditions for the holding of the next general elections: amongst them, and most importantly, the elaboration and approval by the 1992 Assembly of a new constitution before the holding of any new elections.

The task of elaborating a new constitution commenced in 1998, when the Assembly appointed a forty-four-member Constitutional Committee.[11] It took the Constitutional Committee almost two years, until 16 February 2000, to agree on a list of twenty-seven constitutional principles that would guide the drafting process.[12] Finally, after the cease-fire agreement of Luena of 30 March 2002 put a definite end to the civil war, the National Assembly appointed a technical drafting team under the direction of Professor Rui Ferreira of Agostinho Neto University. The drafting team produced a final text for comment in January 2004, incorporating in it, as far as possible, the individual drafts submitted by the parties.[13]

At that stage, on 12 May 2004, the opposition in the National Assembly embarked on an indefinite boycott of the proceedings of the Constitutional Committee over the refusal of State President Dos Santos to commit his government publicly to an election date, not just for parliamentary elections, but for the direct presidential election as well. The government retorted by insisting that article 1 of Constitutional Amendment Act 18/1996 of 14 November 1996 had determined that a new constitution had to be adopted before any new parliamentary elections could take place, whilst being silent on presidential elections. Consequently, only a newly elected assembly would be in a position to establish the framework for presidential elections. Eventually, a compromise was found and expressed in Constitutional Amendment Act 11/05 of 21 September 2005,[14] amending the aforementioned Act 18/1996 by removing the requirement for the passing of a new constitution for the holding of parliamentary elections only. As a result, parliamentary elections took place on 8 September 2008, whilst the president as

[9] For the Portuguese text of the 1992 constitution see the very helpful webpage of the Community of Portuguese Speaking States (*Comunidade de Paises e Territórios de Língua Portuguesa* (CPLP)) <http://www.cplp.org/>. An English translation is provided at Chan Robles Virtual Law Library, 'Constitution of the Republic of Angola' <http://www.chanrobles.com/angola.htm> accessed 9 July 2015.

[10] *Lei* 18/96 of 14 November 1996. An English text can be found at <http;//www.adh-geneva.ch/RULAC/pdf_state/Law-No-23-1992-of-16-September-1992-Law-on-the-Amendment-of-the-Constitution-eng-unofficial-.pdf> accessed 9 July 2015.

[11] *Lei* 1/98 of 20 February 1998. An English text can be found at <http://library.fes.de/pdf-files/bueros/angola/hosting/l_const.pdf> accessed 21 August 2015.

[12] See text at <http://www.comissaoconstitucional.ao/principios_fundamentais.php> accessed 21 August 2015.

[13] See André Thomashausen, 'Constitutional Law in Extreme Emergencies' in Jürgen Bröhmer (ed), *Internationale Gemeinschaft und Menschenrechte—Festschrift für Georg Ress* (Heymanns 2005) 1295–304.

[14] Text of *Lei* 11/05 of 21 September 2005 <http://www.cne.ao/pdf/lei11_05.pdf> accessed 9 July 2015.

head of state continued in office for the twenty-ninth consecutive year, since 20 September 1979, as the original 'interim President' in terms of article 5 of the transitional and introductory provisions of Constitutional Amendment Act 23/92 of 16 September 1992.[15]

One of the first tasks of the newly elected Assembly was to pass the Act to constitute a new Constitutional Commission (CC).[16] This occurred on 15 December 2008. The CC commenced its work on 6 January 2009 and established on 7 March 2009 an all-important Technical Committee under the chair of Professor Carlos Feijó, who subsequently assumed the role of Minister of State in the Office of the President, tasked with the responsibility of directing the civilian administration of that office. The Technical Committee assumed the responsibility of consolidating a total of five complete constitutional proposals that had been submitted by the political parties. The consolidation produced three alternative model drafts, published by the CC on 1 November 2009.[17]

The main differences between the drafts focussed on the proposal by the governing MPLA party to circumvent the requirement of a direct election of the head of state and president contained in the list of entrenched principles in article 159 of the 1992 constitution.[18] In order to avoid tampering with the entrenchment clause, the MPLA proposed that the first name appearing on the list of candidates of the winning list of members of parliament would automatically be deemed to have been directly elected as president and head of state.

The final consolidation of the three alternative models favouring the MPLA proposal was approved in the National Assembly on 3 February 2010, after some last-minute changes to the wording of two provisions at the request of the Constitutional Court, exercising its pre-emptive review jurisdiction in respect of the CC's proposal.[19] The UNITA opposition party boycotted the final vote in the Assembly (its deputies

[15] Available at Geneva Academy, 'Angola National Legislation' <http://www.geneva-academy.ch/RULAC/national_legislation.php?id_state=7> accessed 21 August 2015. See also the characterization of the office of the current president made in the judgment of the Angolan Supreme Court of 22 July 2005 in the matter of *Pre-emptive Verification of the Constitutionality of the Draft Electoral Law of 26 April 2005*, available from the Registrar of the Supreme Court, as no law reports are published, see however the new webpages of the Supreme Court: Sepremo Tribunal Justica, 'Jurisprudencia' <http://www.stj.pt/jurisprudencia/basedados> accessed 21 August 2015.

[16] See for the composition and materials, the comprehensive webpages at Republica de Angola Assembleia Nacional Comissao Consticional <http://www.comissaoconstitucional.ao/> accessed 9 July 2015.

[17] See the graph and texts at Republica de Angola Assembleia Nacional Comissao Consticional, 'Modelos Constitucionais Em Debate' <http://www.comissaoconstitucional.ao/pfc.php> accessed 9 July 2015.

[18] The entrenched principles, according to art 159 are:

a) the national independence, territorial integrity, and national unity;
b) the rights and freedoms and guarantees of citizens;
c) the rule of law and the principle of multiparty democracy;
d) universal suffrage, direct, secret and regular elections of holders of the organs of the state and local government;
e) the secularity of the state and the principle of separation between the state and churches; and
f) the separation and interdependence of the organs of sovereignty and independence of the courts.

[19] Judgment of 30 January 2010, Acordão 111/2010 <http://www.tribunalconstitucional.ao/SIGAPortalAdmin/FileUpload/723118018-4009-436c-9930-47aaaa92632a_2_2_2010.pdf> accessed 21 July 2015.

abandoned the proceedings before the vote), in protest against what they stated had been a total exclusion of their views in the final drafting stages. The final text, currently in force, was promulgated by the state president and gazetted on 5 February 2010 and is thus known as the constitution of 5 February 2010.[20] The text was gazetted by the 'Constituent Assembly of the Republic of Angola' as the National Assembly elected in September 2008 was deemed to have acted as a 'constituent assembly' for the purposes of voting on the constitution.[21]

An obvious procedural point of criticism is that the constitution-making process was compromised by the defects of the electoral process in September 2008. In a document exceeding 300 pages, the opposition parties listed significant discrepancies and irregularities that affected the results.[22] What most observers believed to have been an 'over-correction' by the government-dominated election administration yielded an 81.64 per cent majority to the government party MPLA.[23] The overwhelming result would have been hard to match by any presidential candidate in a direct election, becoming an unintended but persuasive motivation to adopt a constitutional procedure whereby a direct presidential election could be avoided.

## 2. Separation of Powers in the Constitution

### 2.1 Separation of powers

The constitution mentions the principle of separation of powers twice. The principle is included in the definition of 'democratic state based on the rule of law' in article 2(1) whereby 'Angola is a democratic State based on the rule of law that has as its foundations in the sovereignty of the people, the supremacy of the Constitution and the law, the separation of powers and the interdependence of functions, national unity, pluralist freedom of expression and of political association as well as representative and participatory democracy'. As the most recent commentary by Araujo and Rangel Nunes laconically observes, the 'separation of powers' principle in the Angolan constitution is a 'relative' one.[24] Article 105(3) lists as the sovereign organs of the state, the state president, parliament, and the courts and stipulates that they shall respect 'the separation and interdependence of the functions' attributed to them by the

[20] A comprehensive review of the constitution is found in André Thomashausen, 'The Constitutions of Angola' in Rüdiger Wolfrum and Rainer Grote (eds), *Constitutions of the Countries of the World* (Oxford Constitutions Online) <https://global.oup.com/academic/product/oxford-constitutions-of-the-world-9780199799848?type=listing&lang=en&cc=za&subjectcode1=1136862|LAW00010> accessed 9 July 2015. Some parts of the introductory text herein are taken verbatim from my earlier (but updated) text in 'Constitutions of the World'.

[21] The official text appears in the government gazette, *Diário da República*, Ia Série No 23 of 5-02-2011, 141.

[22] Instituto de Desenvolvimento Democrático, *Angola Livro Branco sobre as Eleições de 2008—Contributo para a democratização dos processos eleitorais em Angola* (Luanda 2008), re-published 5 September 2009 <http://www.kas.de/namibia/en/publications/17396/> and *Angola—Weißbuch zu den Parlamentswahlen 2009, Erschienen 5 September 2009* <http://www.kas.de/namibia/de/publications/17396>.

[23] Comissao Nacional Eleitoral Angola, 'Eleições Legislativas 2008' (16 September 2008) <http://www.cne.ao/estatistica2008.cfm> accessed 21 August 2015.

[24] Raul Carlos Vasques Araújo and Elisa Rangel Nunes, *Constituição da República de Angola Anotada* (vol 1, CEDP 2014) 184.

constitution. Nevertheless, the principle of separation of powers is listed in article 236(j) as one of the 'entrenched' principles or guarantees that may not be abolished by constitutional amendment. The scope of application and the exact understanding of the principle of separation of powers are clearly left to interpretation, in the context of the other fundamental principles.

## 2.2 Constitutional principles

Articles 1 to 21 in Title I of the constitution provide individual provisions on the republican nature of the state (article 1); the principle of a democratic state based on the rule of law (article 2, a literal translation of the German concept of the '*demokratischer Rechtsstaat*'); the concept of sovereignty vested in the people (article 3); the exercise of political power through elected officials and organs (article 4); territorial integrity (article 5); the supremacy of the constitution and the rule of the law of the constitution (article 6); the subsidiary and thereby merely subordinate legal force of (African) customary law (article 7); the unitary (as opposed to federal) organization of the state (article 8); the Angolan nationality in terms of the *ius sanguinis* rule (article 9); the secularity of the state (article 10); commitments to international peace and national security (article 11); peaceful international relations (article 12); international law (article 13); the acknowledgment of the right to private property and free economic initiative (article 14); the state's original (but transferrable) right of ownership of land (article 15); the state ownership of all natural resources (article 16); the recognized role of political parties (article 17); the definitions of the national symbols (article 18); the official languages (article 19); the capital city (article 20); and the 'fundamental tasks of the State' (article 21; a term taken again from the German constitutional law concept of '*Staatsziele*').

## 2.3 Constitutional and democratic rule of law

The guarantees just listed indicate the constitution's strong leaning towards the liberal values of individual rights and freedoms, the rule of law, and a market economy. The latter is conditioned, however, by the principles stipulated in articles 14, 15, and 16, characterizing Angola as a typical developmental state, where ownership of all natural resources, including (in principle) land, is retained by the state. The 'Economic Constitution', retaining the duty of the state to plan the economy, is regulated in a separate Title III, containing articles 89 to 98. Thus, the fundamental principles and fundamental rights provisions cannot be read and fully understood without reference to the constitution's Part on 'Economic, Financial and Fiscal Organisation'.[25] The originally Marxist tradition of the primacy of the political over all aspects of law and government still inspired the provisions setting up the national bank, the '*Banco de*

[25] See Carlos Teixeira, *A Nova Constituição Económica de Angola e as Oportunidades de Negócios e Investimentos* (Faculdada de Direito, Universidade de Lisboa, 29 March 2011) <http://www.fd.ul.pt/LinkClick.aspx?fileticket=dVRLVjiE1dE% 3D&tabid=331> accessed 21 August 2015.

*Angola*', which is established in article 100 without any guarantees of autonomy or independence.

## 3. Super-presidentialism

### 3.1 Obligatory dual vote

The most controversial aspect of the 2010 constitution is its choice of a 'presidentialist' system of government in the absence of a direct election of the president. The procedure chosen in the constitution utilizes as a basis the Angolan party list or proportional representation electoral system and excludes the possibility of independent candidates. According to article 109, the first name appearing on the winning list of candidates for seats in the National Assembly is deemed to have been 'directly elected' to the office of state president, and no further vote in the Assembly is required for his assumption of office.[26] An original clause, whereby the president would nominate and appoint the deputy president who would succeed him in case of impeachment or illness or death, and represent him during his absence, was disallowed by the ruling of the Constitutional Court in its review of the draft constitution.[27] Instead, article 131(2) provides that the second name appearing on the list of candidates for election to parliament, of the list of candidates achieving the highest number of votes, shall be deemed to have been elected as vice-president.

The appointment of the president and deputy president by mere reference to their ranking on the winning list of candidates for election to the National Assembly established an appointment by way of legal fiction, referred to by some authors as 'parliamentary presidentialism'.[28] Article 111 determines that only political parties or coalitions of political parties can 'nominate' a candidate for the office of president. The nomination is achieved through the ranking of a candidate on the list of candidates for the parliamentary election. Also termed 'obligatory dual vote', the list-ranking determination for the appointment of the president and deputy president presupposes a proportional electoral system based on a national list, and takes the democratic deficit inherent to proportional list systems to the extreme. The party list of candidates for members of parliament that accumulates the majority of the votes automatically also 'generates' the appointments of the president and the deputy president, the first and second names appearing on that wining list being deemed to have been elected as president and deputy president.

[26] Art 109 in fact establishes a presidential election by way of a legal fiction. See André Thomashausen, 'A Globalização e as Reformas Constitucionais em África' (As Constituições e a Estabilidade dos Estados Democráticos e de Direito em África, Luanda, Angola, 6–8 April 2011) <http://www.scribd.com/doc/52981331/Globalizacao-Reformas0604011> accessed 21 August 2015.

[27] Judgment of 30 January 2010, Acordão 111/2010 (n 19).

[28] The term used is '*presidencialista-parlamentar*'. See Carlos Feijó, '*Teremos Presidente Executivo*' (*O Pais*, 11 September 2009) 26–8; Bornito de Sousa, '*Sistema Presidencialista Parlamentar defende Estado unitário*' (*ANGOP*, 4 September 2009) <http://www.portalangop.co.ao/motix/pt_pt/noticias/politica/2009/10/45/Sistema-Presidencialista-Parlamentar-defende-Estado-unitario,9fa2e643-52ca-4cd4-abb1-db08dc3dbea8.html> accessed June 2015.

Vital Moreira, one of the foremost authorities on constitutions and constitutionalism in Lusophone countries and a member of the European Union Parliament labelled the 2010 Angolan Constitution 'hyper-presidentialist'.[29] Another renowned Portuguese constitutional law expert, Jorge Miranda, equated the presidential powers granted by the 2010 constitution to those established by the 1933 Portuguese constitution of the authoritarian Salazar regime.[30] Others have pointed out that the concentration of presidential powers is not balanced by the checks and balances normally afforded by a direct election of the president and that the resulting parliament is weak.[31]

According to article 119(d), the president freely appoints and dismisses the ministers of state in his own office, as well as the ministers and deputy ministers making up his Cabinet (*Conselho de Ministros*) which he chairs, and all provincial governors and deputy governors.

The president further appoints all judges, based on different nomination procedures. In the case of the Constitutional Court, the president appoints and selects the Judge President plus a further three out of the total number of eleven judges as will be discussed in more detail in the next section. In the case of the Supreme Court, the president appoints and selects the Judge President and the Deputy Judge President from a list of three candidates proposed to the president by the Council of the Judiciary (*Conselho da Magistratura*). The judges of the Auditor-General Court and the Supreme Military Court, as well as the Attorney-General and his deputies and the Military Chief Prosecutor and his deputies, are all freely appointed by the president.

The president's power to declare war or national emergencies is exercised freely, requiring merely that the National Assembly be consulted (article 119(m)–(p)). As permanent Commander-in-Chief of the Defence Force, the President also directly appoints all chiefs-of-staff, as well as the top commanding officers of the police and state security and intelligence agencies (article 122).

Besides the power to initiate referenda (article 119(m)), the president has his own legislative powers. This goes back to a particular legislative tradition in Portuguese constitutional law which is continued by providing for a distinction between the exclusive and non-exclusive legislative competencies of the National Assembly. In matters not pertaining to the exclusive competency of parliament (listed in article 164), as well as on the basis of delegated legislative authority, both the president and his government can legislate by means of a so-called legislative decree. Additionally, the president can pass provisional presidential legislative decrees on any matters, including

[29] Vital Moreira, '*Presidencialismo superlativo – Espaço público*' (*O Público*, 9 February 2010).

[30] Jorge Miranda, '*A Constituição de Angola de 2010*' (2010) 2 *Revista de Ciências Jurídicas e Económicas—Campo Grande* (Brazil) <http://revistasystemas.com.br/index.php/systemas/article/view/30> accessed 21 August 2015.

[31] José Eduardo Agualusa, '*O Príncipe Perfeito*' (*Jornal I,* 25 January 2010) <http://www.ionline.pt>; Mihaela Webba, 'A Sucessão, a República e o Regime' (11 September 2011), <http://mihaelanetowebba.blogspot.co.za/>; Abel Chivukuvuku, '*Não houve grandes mudanças*' (*A Capital,* 17–24 July 2010); Nelson Pestana,'*Sistema 'Parlamentar-Presidencial'ou Presidencialismo Extremo?*' (2011) 1 Angola Brief (Centro de Estudos e Investigação Cientifica (CEIC) <http://www.ceic-ucan.org>; José Melo Alexandrino, 'O novo constitucionalismo angolano', ICJP (Lisbon, 2013) <http://www.icjp.pt/sites/default/files/publicacoes/files/ebook_constitucionaliosmoangolano_2013.pdf>; all accessed 9 July 2015.

those pertaining to the exclusive competency of parliament, subject only to the subsequent approval of the National Assembly within sixty days, which term is extended for equal periods of sixty days for as long as the National Assembly has neither rejected or converted the presidential legislative decree into an Act of Parliament (article 126).

Other than by impeachment, the president cannot be removed, but unlike under the 1992 constitution, he no longer enjoys an explicit power to dissolve the National Assembly. However, he can resign from office and thereby trigger the provision in article 128 for the automatic or *ipso jure* dissolution of the National Assembly, for the holding of new parliamentary elections within ninety days which election can reappoint the same president, provided his name reappears as the first name listed on the list of candidates for members of parliament.

Besides his 'Council of Ministers', the president's office is supported by a State Council (*Conselho da República*) and a State Security Council. Both are consultative organs assembling a number of officials and *ex officio* members.

It is clear that the office of the president is subject to 'checks and balances' only from the National Assembly (parliament), and the Constitutional Court. The functioning and interaction of both was most recently tested in the judgment by the Constitutional Court of 9 October 2013, case no 319 of 2013.

### 3.2 Presidential absolutism

The Constitutional Court already existed before the 2010 constitution, in terms of Acts 2/08 and 3/08 of 17 June 2008. The original enabling legislation was amended by Acts 24/10 and 25/10 of 3 December 2010.[32] Act 2/08 provides for the establishment of the Constitutional Court and Act 3/08 for the procedure before the Constitutional Court.

In terms of article 180(2)(a) and the corresponding article 16(m) of Act 2/08 (as amended), the Court enjoys a generic jurisdiction to 'examine the constitutionality of any norm or other acts of the State'. This widely cast provision was, and continues to be, interpreted by the Court to grant it the power to hear individual complaints against unconstitutional encroachments of fundamental rights and freedoms.

The legislature, in Amendment Act 25/10, acknowledged this 'inherent' competency of the Court by amending article 49 of Act 3/08 (procedure before the Constitutional Court) so as to provide that individual complaints of an unconstitutional encroachment upon fundamental rights and freedoms can only be heard once all ordinary legal remedies have been exhausted.

As provided in article 16 of Act 2/08 (as amended by Act 24/10), the Constitutional Court decides on requests for a finding of unconstitutionality of any law or legal norm (abstract review); the pre-emptive examination of the constitutionality of any proposed legislation (abstract pre-emptive review); possible infringements of the constitution by omission; appeals against the refusal of an ordinary court to apply a law on the grounds

[32] See texts and further information, including all judgments, on the webpages of the Constitutional Court, Tribunal Constitucional da Republica de Angola <http://www.tribunalconstitucional.ao/> accessed 9 July 2015.

of unconstitutionality; appeals against the application of an unconstitutional law by a court; all appeals relating to national elections and disputes arising from a referendum; mandates of members of the National Assembly; the establishment, legality, and prohibition of political parties; matters of constitutional interpretation submitted to the Court by the president or the National Assembly; and conflicts of competency between organs of the state.

The Court is composed of eleven judges: four—including the Judge President—who are appointed by the State President, four who are appointed by the National Assembly (including the Deputy Judge President), two who are appointed by the National Council of the judiciary, and one judge based on a national and open tender and selection process to be conducted by the Constitutional Court itself. All the judges hold one term of office of seven years, which is not renewable. An original intention to set up chambers has so far not materialized. The procedure is a written one only, and the Court does not conduct any trials or hearings.

In case no 319 of 9 October 2013,[33] the Constitutional Court declared unconstitutional several key provisions of the Procedural Rules of Parliament ('Regimento', Act 113/12 of 2 May 2012), governing the parliamentary right of putting questions to the executive, namely articles 261(1)(c), 261(2), 260, 269, 270, 271, and 268 (partially). To any scholar unfamiliar with the intricate turns of interpretation of Angolan constitutional law the provisions in the Assembly's Rules that a group of deputies of the majority MPLA party had challenged before the Constitutional Court, would appear to be entirely normal and innocent.

Article 261 lists specific powers of the Assembly to 'exercise its controlling and oversight functions', for example, in subsection 1(c) read together with subsection (2) the right to ask questions and put interpellations to any state organs, as well as to conduct hearings and parliamentary inquiries. Article 260 of the Assembly's Rules provides that the oversight by the Assembly shall be directed chiefly at the activities of the executive, of the public administration on central, local, indirect, and municipal levels as well as in relation to any organs applying public funds or utilizing public assets. As far as this oversight will affect the administration of justice, its scope shall be limited to utilization of public funds and public assets. Articles 269, 270, and 271 regulate the exercise of the powers of the Assembly to put questions and to interrogate 'Ministers of State' (that is, ministers appointed in the office of the state president), Cabinet ministers, and provincial governors, on request of any member, but through the leader of that member's parliamentary group. The questions must be submitted with fifteen days' notice and during their debate, members shall each only be allowed five minutes for their interventions. Finally, article 268 defines parliamentary hearings as meetings convened by parliamentary commissions for the purpose of hearing members of the executive, public servants, or any persons with particular knowledge on matters that may be relevant to the workings of the Assembly.

The constitutionality challenge to the above provisions provides an invaluable insight into the evolution of the Angolan form of presidentialism. The challenge was

[33] ibid.

a reaction of the MPLA group of deputies against requests made by the opposition party UNITA to summon the administrators of the national water and electricity utility companies over continuing and worsening service delivery issues.

The first argument to bar the opposition from requesting the appearance in parliament of members of the executive or administrators of state-owned utility companies, invoked a formalistic reading of article 162 of the constitution on the Assembly's 'Oversight and Controlling Competencies'. The opponents of a comprehensive right of oversight and interpellation of the Assembly argued that article 162 of the constitution does not specifically determine how the Assembly may exercise its oversight and controlling powers, and that parliamentary hearings or question sessions are not specifically mentioned in article 162.

The Constitutional Court essentially concurred with the restrictive reading of article 162 of the constitution and added that parliament under the 1992 constitution had wider powers than under the 2010 constitution, because of an allegedly fundamental change in the system of government. The judgment began by recalling that the constitutionally guaranteed principle of separation of powers grants a power of decision within the scope of an organ's competencies, as well as a blocking power, in relation to other state organs. The Court referred verbatim to the French concepts of '*faculté de statuer*' and '*faculté d'empécher*'.[34]

The Court than expanded this approach by stating (author's own translation):

> In a democracy, government systems are based primarily on one of the following models of separation of powers: separation of powers by integration, or separation of powers by coordination.
>
> The separation of powers by integration is characteristic of government systems that have a parliamentary foundation in which the executive branch is the result of a parliamentary majority elected by the citizens. Consequently, there is a relationship of subordination of the Executive branch in relation to Parliament, to whom it is accountable. Furthermore, and in its oversight role, Parliament can put questions to the members of the Executive and even pass motions censuring the Executive branch or rejecting motions of confidence, thus provoking the dismissal of the Government. In systems where the separation of powers is achieved by means of coordination, as in the case of presidential systems of government, the situation is different. Here, the organization of state power, is established through a triangular relation between the Legislative, Executive and Judiciary, by means of checks and balances so that the functions among different organs are divided and balanced in such a manner that none can exceed the limits established by the Constitution, without being prevented and restrained by the other organs, resulting in an interdependence between them.

[34] The concepts '*faculté de statuer*' and '*faculté d'empécher*' have their origin in: Montesquieu, *Esprit des Lois* 1777 Liv XI Ch VI 321: *J'appelle faculté de statuer, le droit d'ordonner par soi-même, ou de corriger ce qui a été ordonné par un autre. J'appelle faculté d'empêcher, le droit de rendre nulle une résolution prise par quelqu'autre* <http://mjp.univ-perp.fr/textes/montesquieu.htm> accessed 7 July 2015. The meaning of this earliest argument in favour of a separation of powers is that the competence to stipulate or instruct must be separated from the competence to veto or void such stipulation or instruction. For a critical review of this original 'separation of powers' see: Laurence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 11 <http://digital.sandiego.edu/lwps_public/art11> accessed 7 July 2015.

…

The current Constitution of the Republic of Angola has introduced substantial changes to the governance system and to the nature of the Executive branch.

The system of governance adopted now has a presidential base and the Executive is a singular body grounded on a system where the President of the Republic is the Head the State, the head of the Executive branch, as well as the Commander in Chief of the Armed Forces (article 108(1) of the Constitution). The Ministers of State and the Cabinet Ministers, whilst retaining the competencies and designations that they already had during the previous system of government, are now auxiliary organs of the office of the President (article 108(2) and 134 of the Constitution).

The new configuration of the constitutional organs of sovereignty has two fundamental characteristics that enhance the independence between the Executive and the Legislative branches: the Executive does not depend politically on the Legislature, who may not vote on any motions of censure and cannot thereby dismiss the government; on the other hand, the Executive cannot dissolve the National Assembly. Under the current Constitution, Ministers of State and Ministers exercise delegated powers, and therefore the tasks carried out by them are attributed to the President (article 137 of the Constitution).

…

Thus, in summary, it is the understanding of this Constitutional Court, that the Constitution does not grant the National Assembly authority to put questions and inquiries to the Executive, or to convene hearings to ask questions or interrogate Ministers, because in Angola the Ministers of State, the Ministers and Governors perform functions delegated to them by the head of the Executive branch, who is the President of the Republic (articles 134 and 139 of the Constitution). In fact, to have the power to summon 'members of the Executive' would be the same as to have the power to summon the President who is the head of the Executive branch, which is constitutionally not acceptable.

However nothing prevents the permanent special committees of National Assembly, if they require clarifications, to request the President of the Republic, through the Speaker of the National Assembly, to authorize a particular Minister or a senior manager of a particular ministerial department to appear before that Commission. The head of the Executive branch, in keeping with the principles of collaborative cooperation between organs of the State, institutional cooperation and institutional solidarity may grant such requisite authorization.

It is in this context and within these limits that parliamentary hearings under article 268(2) of the Procedural Rules of the National Assembly shall be conducted: only upon prior approval of the Head of the Executive branch and on the request of Speaker of the National Assembly can Ministers and senior officials from ministerial departments participate and be heard in parliamentary hearings.

In conclusion: a) Under the Constitution of the Republic of Angola, the Executive is not politically accountable to Parliament, nor is there a relationship of political subordination of it to the Legislature. There is indeed a relationship interdependence by coordination between the branches of Political Power (ie the Executive and the legislative), who share the same democratic legitimacy, whereby it is not acceptable

> that the Procedural Rules of the National Assembly should make provision for the political subordination of the Executive;...

Clearly, the judgment was political in nature and its critics point out that it came about in a suspect manner, as the result of an unusual special sitting of the Court in the distant provincial capital of Uige, with only six of the full complement of eleven judges having participated and passed the judgment, just passing the minimal quorum requirement.

The substantive shortcoming of the Angolan *Parliamentary Oversight* Judgment however is that the Court failed to correctly interpret the nature of democratic legitimacy in the Angolan system of government and made the wrong deductions on the relationship between the legislature (the National Assembly and parliament) and the executive. The Court tried to disguise its conservative bias by invoking explicitly a very select number of interpretation principles, as follows (author's own translation):

> In this regard we will refer not only to princip1es of legal hermeneutics, but also to some principles of constitutional interpretation, namely, the principle of the unity of the constitution, which says that the interpretation of the constitution must take into consideration the connection and systemic unity of the principles that are found throughout the length of this fundamental law and integrated in the framework of the unity of the political and ideological meaning of this law; further, the principle of integration, which provides that in the resolution of legal and constitutional issues, preference must be given to those views or criteria that preserve its political consistency and integrity; and, finally, the principle of functional constitutionality that forbids alterations to the functions attributed by the Constitution to the state organs tasked with the exercise of political power.

The Angolan Court's canon of rules of constitutional interpretation thus contain some peculiar adaptations of Luso- and Francophone constitutionalism. The references to the rules of systematic and contextual interpretation are unproblematic as they merely articulate the commands of consistent and objective legal reasoning and deduction. However, the emphasis placed by the Angolan Court on the 'principle of functional constitutionality that forbids alterations to the functions attributed by the Constitution to the state organs' is less innocent, in particular when considered together with the complete omission of any reference to principles of interpretation consistent with the overall legislative purpose (*telos*), as to be deduced from the overall interdependence and interaction of constitutional provisions. The omission of the principle of teleological interpretation that is undisputed in Portuguese constitutional law, which took place at the same time as the Court emphasized a far less established and accepted general 'principle of functional constitutionality', allowed the Court to interpret the constitution rather manipulatively. The Court assumes that it was the intention of the constitutional legislature to attribute certain unfettered powers to the head of state, and in a next step of reasoning refuses to apply the clear and unequivocal meaning of the wording in certain other constitutional provisions because that might result in an interference with the assumed absolute power of the head of state. Such a reductionist interpretation, camouflaged as 'functional constitutionality' is not supported by the meaning of the wording of the contested constitutional provisions, nor by their

aim and purpose, which is clearly to strengthen the parliamentary accountability of the executive.

Despite its assurances to the contrary, the judgment offends the interpretation principles that it specifically invoked. It reads into the constitution the strictest possible separation of powers between the legislature and the executive, despite the fact that the constitution specifically adopted a cooperative and 'coordinated' separation of powers doctrine, and also ignoring entirely that the Angolan president is not directly and separately elected, but instead automatically chosen from the list of deputies elected to serve as members of parliament. The fact that a particular candidate for a parliamentary seat is placed by a political party executive as the first name appearing on the list of candidates does not establish an own and separate electoral legitimacy, but simply attributes a particular consequence, for a particular candidate, to a purely parliamentary election. There is no relevant distinction that can be made between a presidential appointment by an explicit vote of the majority group of parliamentarians, or simply by considering that choice to have already been made implicitly, by placing a particular candidate for election to parliament as the first name appearing on the list of candidates. Hence, whether the parliament actually elects someone from their midst to become the head of the executive, or whether that same choice is made simply by a choice of ranking on the list of candidates to be elected, cannot make a difference for legal deductions on the nature and authority of the executive organ so established, within the system of 'coordinated' separation of powers.

The positivist reading of the constitution becomes clear in the statement of the Court that 'the Executive cannot dissolve the National Assembly'. The statement does not take into account the functional result of legal provisions. As mentioned earlier, article 128 of constitution provides that the president is free to declare a 'political resignation' that automatically causes the National Assembly to be dissolved and a new Assembly to be elected within ninety days, during which election the president is free to be re-elected, as the first name appearing on the list of candidates for election to parliament.[35] The president thereby has the power to dissolve parliament at will, just like a prime minister in a Westminster constitution. As is also the case in a Westminster constitution, there is only one political legitimacy under the 2010 Angolan constitution, which is the parliamentary legitimacy, parliament being the only elected organ of state. The invoking of the principle of separation of powers cannot convincingly justify the curtailment of the parliamentary powers to oversee the workings of the executive, nor can it attribute a degree of institutional autonomy to a parliamentary-appointed head of the executive. Even a president vested with their own and distinct democratic legitimacy, established by a separate presidential election, could not claim to have an entirely unaccountable authority, totally separate and unfettered by the legislative powers and democratic legitimacy of parliament. The democratic legitimacy of the Angolan president is derived from the democratic legitimacy of parliament, and has no own and independent origin.

[35] Gouveia (n 1) 407.

Together with its earlier rulings on the validity of the national elections held on 31 August 2012,[36] the judgment on parliamentary oversight powers has been criticized as positivist, regressive, and even reactionary.[37] Clearly, the Court was reluctant to make a ruling that could have been perceived as encouraging a challenge to the more than thirty-four years of patriarchal rule by President José Eduardo Dos Santos. An effective forty-year civil war in Angola ended only recently, in 2002, and there is widespread fear that such hard won stability and the relative developmental progress during the first decade of peace could be jeopardized if organs of the state are allowed to challenge and weaken the authority of the president.

The question must be asked whether the invoking of the principle of separation of powers by the Constitutional Court to severely curtail the powers of parliament, was really just a Machiavellian intellectual ploy, to frustrate any possible challenge to the rule of President Dos Santos. In this author's view, a balanced assessment needs to take into consideration the constitutional reality of Angola and cannot simply assume that the Court acted in bad faith. In Angola, all three main political parties have always supported a presidentialist system of government. In the run up to each parliamentary election, hundreds of small, break away and sectarian parties emerged, challenging political stability and confirming a widespread perception that the fate of the nation cannot be entrusted to the reign of political parties.[38]

Judge President Rui Ferreira of the Angolan Constitutional Court is not only one of the principal authors of the 2010 constitutional text, but also of the constitutional text of September 1992 which remained in force until 2010, and further the remarkable draft of 2004.[39] He can rightly claim to have been a principal architect of the transformation of Angola from an aggressively Marxist–Leninist one party state into a constitutional democracy. In particular, he succeeded in securing the support of his president for the successive strengthening and implementation of the principles of the constitutional rule of law and of constitutionalism, and of the relevance and authority of Angola's young Constitutional Court.

Justice Rui Ferreira and the other justices of the Constitutional Court have, in academic discussions with the author of this chapter, shared their concerns about the fragility of African governments and that a pure transplant and enforcement of European constitutional governance models, in the past and elsewhere, has provoked political, social, and economic divisions and cleavages that could not be managed and eventually destroyed the state. The collapse of minimal levels of public administration

[36] Judgments no 226/2012 of 16 September 2012 and 309-D/2013 of 4 June 2013.

[37] Club-K, 'Tribunal Constitucional angolano proíbe Parlamento de fiscalizar Governo' (*Esquerda*, 4 November 2013) <http://www.esquerda.net/artigo/tribunal-constitucional-angolano-pro%C3%ADbe-parlamento-de-fiscalizar-governo/30100>; Abel Chivukuvuku, 'O papel da oposição no actual contexto angolano' (*Club-k.net,* 31 March 2014) <http://www.diarioangolano.com/index.php/opiniao/146-editoriais/9589-o-papel-da-oposicao-no-actual-contexto-angolano> both accessed 9 July 2015.

[38] In a statement on 10 October 2006 the Chairperson of the Angolan National Election Commission alerted to the registration of more than 200 individual political parties, see *Comissão Eleitoral critica elevado número de partidos em Angola*, <http://www.panapress.com/Comissao-Eleitoral-critica-elevado-numero-de-partidos-em-Angola–3-415612-47-lang1-index.html> accessed 21 August 2015. On the evolution of presidentialism in Angola see Raul Carlos Vasques Araúfo, *O Presidente da Republica no Sistema Político de Angola* (Casa das Ideias 2009).

[39] On that draft in particular see Thomashausen (n 13).

in Somalia, Guinea Bissau, Mali, and Central African Republic are the most recent examples. Even Mozambique, widely praised as a transformation and modernization model case, has been unable to effectively control and prevent public violence and the arming of the main opposition party since 2013. These are concerns that never overshadowed the deliberations of the South African Constitutional Court and it would be unfair to measure the Angolan Court's maiden judgment against the abundant and internationally acclaimed case law produced by the South African Constitutional Court.

The Angolan Constitutional Court justices, in contrast to their South African counterparts, have much greater reason to fear that constitutional transplants throughout Africa continue to produce anything but 'virtual democracies'.[40] The equation of multi-party democracy with development, growth, and widely distributed prosperity in the Northern Hemisphere and maybe in South Africa, does not seem to work for the rest of the African continent. As Jeffrey Herbst demonstrated fifteen years ago, the transplants of the Northern Hemisphere models of democracy have remained so very fragile and unsuccessful in Africa because of a fatal combination of geographical and developmental circumstances.[41] Herbst's proposition in 2000 was, essentially, that with a population density of merely approximately fourteen inhabitants per square kilometre in Africa in 1975, as opposed to approximately 100 in Europe, coupled with an absence of infrastructure and generalized economic underdevelopment, African states were inherently handicapped in 'broadcasting their power', throughout their territories.[42] The proposition by Herbst is not simply contradicted by the fact that population density in Africa has increased and now stands at eighty-seven inhabitants per square kilometre,[43] or that population density in North America is a mere fifty-seven inhabitants per square kilometre. With only 5.1 per cent of the world population, North America consumes just under 26 per cent of the world energy production and produces 22 per cent of the world's GDP, whilst Africa, with 15 per cent of the world population and 20 per cent of the world's landmass, has access to a mere 3.1 per cent of the global energy production and produces a mere 2.4 per cent of world GDP.[44] States in Africa continue to be handicapped by persistent economic underdevelopment, with

[40] Adérito Coreia, 'Angola: Nova Constituição deve estabelecer sistema presidencialista—Constitucionalista' 2 de Outubro de 2008 <http://www.expresso.sapo.pt/angola-nova-constituicao-deve-estabelecer-sistema-presidencialista-constitucionalista=f413627> accessed 21 August 2015; Thomashausen (n 2) 56–8, 59; Nelson Custódio, 'A CRA de 2010 na Perspectiva dos Sentidos Clássicos da Constituição; Aspectos Políticos, Económicos, Jurídicos e Sociais' (*Diretios Fundeamentais em Angola*, 13 August 2012) <https://eutenhodireitos.wordpress.com/tag/teoria-da-constituicao/> accessed 9 July 2015.

[41] Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control, Princeton Studies in International History and Politics* (2nd edn, Princeton University Press 2014) 254; the detailed accounts are given with unsurpassed precision and excellence in Martin Meredith, *The State Of Africa: A History Of Fifty Years Of Independence* (Free Press 2006) published for distribution in the United States as *The Fate of Africa; A History of Fifty Years of Independence* (Public Affairs 2006).

[42] Herbst (n 41) 15–28.

[43] See for instance Caitlin Dempsey Morais 'Continents and Population Density' <http://www.geolounge.com/continents-population-density/> accessed 7 July 2015.

[44] As perUnited Nations Development Policy and Analysis Division DESA, 'World Economic Situation and Prospects' <http://www.un.org/en/development/desa/policy/wesp/> accessed 7 July 2015; and Enerdata, 'Total Energy Consumption 2014' (Global Energy Statistical Yearbook 2015) <https://yearbook.enerdata.net/> accessed 7 July 2015.

most of their adult populations trapped in absolute poverty, measured as an income per capita of less than 1 USD per day.[45]

The developmental hindrances to a faster and more successful establishment of modern systems of government in Angola are exacerbated by persistently high levels of illiteracy, slow progress of mass education, as well as the chronic underdevelopment of political party organization and party political programmatic articulation, resulting in candidate-based rather than policy-based alternatives for political affiliation and identity.[46]

As African governments continue to suffer from their relative inability to effectively 'broadcast state authority' throughout their state territories, they reveal themselves as weak, rather than exceedingly powerful governments.[47] Against this background it may be easier to understand why the Constitutional Court in Angola, faced with an immense institutional responsibility, shied away from a ruling that might have weakened the executive power, only to give the starting signal for a race 'to bring down Dos Santos'.

The perceived need for political stability is ever-present in Africa because Africa's governments may appear to have concentrated unmitigated power, but in reality lack the capacity to govern and develop their immense territories. The humanitarian disasters that have all too often been the result of state failures in Africa, have caused the main world powers in their external policy decisions also to give priority to stability rather than perfection and purity of democratic rule and representation. The overriding preoccupation with stability can be found in the Constitutive Act of the African Union (AUCA) of 2000, where 'unconstitutional changes of government' were specifically outlawed (article 4 of AUCA). The principle of non-interference in internal affairs in the days of the OAU of 1963 was replaced by a principle of non-indifference to governments coming to power through unconstitutional means. They are not allowed to participate in the activities of the Union (article 30 of AUCA), and are at risk of 'the right of the Union to impose sanctions on states failing to comply with the policies and decisions of the Union' (article 23 of AUCA).[48]

Under these circumstances, policies attempting to progressively change the nature of presidential power in Angola (and in many other African states as well) may be more likely to succeed than policies attempting to curtail presidential powers in favour of a more parliamentarian governance model. The South African case does not contradict

[45] African Development Bank, 'The Middle of the Pyramid: Dynamics of the Middle Class in Africa' <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/The%20Middle%20of%20the%20Pyramid_The%20Middle%20of%20the%20Pyramid.pdf> accessed 7 July 2015.

[46] Portuguese readers will find an immensely inspiring and authoritative exploration of this all important aspect for the understanding of the systems of government in Africa in Sandra Rodrigues Balão, *A Fórmula do Poder* (ISCSP 2001).

[47] Herbst (n 41) 255. The observation was shown to be true much earlier in the reflections by Oscar Monteiro, *Poder e Democracia* (*Power and Democracy*) (Assembleia Popular 1988).

[48] See for instance J Shola Omotoa, *Unconstitutional Changes of Government in Africa* (Nordiska Afrikainstitute 2011) <http://nai.diva-portal.org/smash/get/diva2:478511/FULLTEXT01.pdf> accessed 7 July 2015; Ulf Engel, 'Unconstitutional Changes of Government—New AU Policies in Defence of Democracy' (2010) Universität Leipzig Working Paper Series No 9 <http://home.uni-leipzig.de/gchuman/fileadmin/media/publikationen/Working_Paper_Series/RAL_WP_9_Engel_web_101207.pdf> accessed 7 July 2015.

this conclusion. The South African constitution of 1993–96, acclaimed for its fundamental rights provisions, chose to establish a typically parliamentary or *Westminster* system of government, but continued nevertheless the peculiar South African tradition, since its 1983 constitution, to attribute the title of 'president' to what is in effect a South African prime minister. In constitutional reality, a politically subservient parliament has helped to move the system of government closer to a presidentialist model, where the president, as in the case of Angola, is not directly elected but relies on his party political domination over parliament.[49] Unlike in Angola however, the South African Constitutional Court has never endorsed or encouraged this development.

It is significant though that Professor Carlos Feijó, as Chairman of the Technical (drafting) Committee of the Constitutional Commission, found the inspiration for the Angolan list-ranking determination for the appointment of the president and deputy president (referred to commonly as the 'obligatory dual vote'), in the South African constitutional model. In his correspondence with the author in 2009, he justified and defended the 'obligatory dual vote' by characterizing the vote in the South African parliament to elect the president as a mere ritual. According to Feijó's Cartesian logic, the real choice of who would become president in South Africa is made with the decision of the majority party on who will lead the list of candidates in the election campaign, as the first name appearing on the list of candidates for member of parliament. Undoubtedly, no South African majority party would ever appoint anyone to the office of state president but their winning leader, who will have appeared on the ballot paper as the first candidate for that party.

The Leninist tradition in the Southern African liberation movements and current majority parties played a role in making this choice in Angola. In the Leninist party tradition, the ranking of candidates for appointment to serve on the party's Central Committees (or National Executive Committee as it is called in the case of the South African ANC), is all-important in determining power and influence. It seemed natural to follow the same tradition in the constitutional procedure for the appointment of the president. The South African practice does not contradict this interpretation of the Angolan 'obligatory dual vote' system. The South African parliament never voted on the appointment and subsequently also not on the removal of South Africa's second president, Thabo Mbeki. The decisions were taken by the ANC's National Executive Committee and both Thabo Mbeki and parliament simply acted and proceeded accordingly.

Rather than advocating in vain the strengthening of parliamentary authority and powers, the next quest in constitutionalism in Angola (and elsewhere in Africa) might be the reflection on how the nature and the organization and budgetary control, and therefore the effectiveness and actual capacity of presidential powers, may be improved. A possible direction could be to reassess the concept of collective presidencies, such as known in Switzerland, where the *Bundesrat*, a seven-person collective acts

[49] André Thomashausen, 'Demokratie und Rechtsstaatlichkeit in Südafrika' in Ulrich Battis and others (eds), *Das Grundgesetz im Prozess Europäischer und Globaler Verfassungsentwicklung* (Nomos Verlagsgesellschaft 2000) 163–88.

as the head of state, or state presidency.[50] In an historic narrative much more familiar to the liberation movements and current majority parties in Southern Africa, the equivalent of the Swiss *Bundesrat* was the former *Staatsrat* of the defunct German Democratic Republic.[51] With the ever closer ties between the states in Africa and the People's Republic of China, the perception is growing in Africa that the twenty-one-member Politburo of the Chinese Communist Party with its seven-person Standing Committee, is an efficient and successful governance model.

Whilst the Angolan *Parliamentary Oversight* Judgment of 9 October 2013 disappointed the opposition and many African constitutionalists, it also contributed to a reflection on the future of presidentialism in Africa. The judgment avoided rekindling conflict about the form and principles of democratic government in Angola.

## 4. Conclusion

It is submitted that Angola has undertaken an extraordinary journey in constitutionalism. It stretches from Angola's independence constitution that is recorded as a 'purist' single-party state and Leninist Charter, to the first compromise and interim constitution of 1992 that remained in force for almost twenty years, until the entry into force in 2010 of the final and current document. The current 2010 constitution is the fruit of many years of arduous drafting and constituent debates which have taken place since 1998. The drafting skills of constitutionalists in Angola are evident in the 2010 text which can easily be characterized as one of the most elegant and well-structured constitutions in the community of Portuguese-speaking nations. A first fundamental conflict between the powers of parliament and the autonomy of the president put the new Constitutional Court of Angola to the test in 2013. The Court decided not to challenge the powers of the president, and not to reinforce and strengthen the general oversight powers of parliament. However, the reasoning of the *Parliamentary Oversight* Judgment of 9 October 2013 shows that this was not generally a decision in favour of an absolutist form of presidentialism, but rather an assertion of the principles of the rule of law of the constitutional state, and of the authority of a constitutional court. The president emerged as the immediate winner in the short term, but the constitutionality of all exercising of state authority was the wider and bigger commitment of the Court. Hence the debate over the future of presidential powers and better and more responsible governance in Africa has been stimulated rather than stifled by the Angolan Constitutional Court. As a result, it may be hoped that the courts in Angola generally will gain in self-confidence, discover the very comprehensive and well-crafted fundamental rights guarantees of the 2010 constitution, and invoke the interpretation of the constitution as the supreme law of the land.

[50] Thomas Fleiner, Alexander Misic, and Nicole Töpperwien, *Swiss Constitutional Law* (Kluwer Law International 2005) 82–7.

[51] Peter Joachim Lapp, *Der Staatsrat im politischen System der DDR (1960–1971)* (Westdeutscher Verlag 1972).

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# 8

# Relationships with Power

## Re-imagining Judicial Roles in Africa

*James Fowkes*

### 1. Introduction

In this chapter, I seek to identify a particular feature of the way in which the separation of powers is understood in the context of African systems, and to challenge it. The feature, in one sentence, is a pervasive tendency to see the exercise of credible judicial power as the solution to separation of powers problems, and thus to seek more of it. This tendency is understandable, given the post-independence history of African states, and I do not doubt its relevance. What I seek to challenge is not its place at the table but the overwhelming dominant focus on it to the neglect of other possibilities that both logic and comparative experience suggest should also be relevant in Africa going forward. One of these possibilities is that judiciaries may come to exercise too much power, a very familiar problem to global scholars but one that is strikingly rare in scholarly discussion in the African context. Another is that the relationship between the entities of the separation of powers can also be more amicable. Judicial relationships are not always confined to power struggles with the politically powerful, and this means, above all, that not all responsible judicial action is about boldly standing up to threats to rights from other branches. We neglect both possibilities if we seek only more judicial action, and this neglect can mislead.

My argument starts from two premises. First, I understand the separation of powers as something to be established, a way in which constitutional structures are supposed to operate, and that, insofar as the task of establishing that way of operating is a matter of having certain provisions in the constitutional text, African countries increasingly tick the box. Texts and their defects receive a good deal of attention, and in some African systems textual reform understandably remains a priority. But many African constitutions now provide for the basic elements of the separation of powers. It is increasingly implausible to think of textual reform as the key to further progress in those systems. As Charles Fombad has noted, problems are now usually to be traced not to ‘the absence of constitutions’ but the ‘absence of constitutionalism’.[1] Accordingly, my second premise is that today’s key questions are usually about whether the real-life institutions manifest the legal relationships required by the text, and about how to

[1] Charles Manga Fombad, ‘Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of The Prospects for Constitutional Governance and Constitutionalism’ in Alfred Nhema and Paul Tiyambe Zeleza (eds), *The Resolution of African Conflict: The Management of Conflict Resolution & Post-conflict Reconstruction* (Unisa Press 2008) 188, 179.

attain or cement this desirable state of affairs. Such enquiries quickly go beyond questions of text and doctrine and implicate broader political relationships, and that is why it potentially matters so much if we have an incomplete understanding of the forms these relationships can take. Identifying and interrogating these understandings is therefore important both to re-imagine internal African debates and to convey to external observers a crucial part of how African constitutional scholarship currently understands itself.

## 2. Approach

For simplicity's sake, this chapter will focus on what is usually the most important relationship for purposes of discussion of the separation of powers in the African context: the relationship between the executive and the judiciary. This is the most important simply because African executives tend to hold the most power and because legal scholars tend to view courts of constitutional jurisdiction as the guardian who might be able to check this power and the abuse of it by unscrupulous leaders. However, other institutions are of course important too, and my arguments will have some relevance to judicial relationships with other bodies as well. I do not aim to rehash theoretical debates about the separation of powers; questions of the concept and its different forms in African systems are taken up elsewhere in this volume. Instead, my approach is heavily case-based, and in this I have a secondary aim. Global comparative scholarship tends to neglect African examples, with the prominent exception of South Africa. There is no good reason for this, especially in a post-Cold War world in which both the richness and the credibility of African constitutionalism has increased significantly. In response, with the aim of enriching the dialogue in both directions, this chapter connects examples that are familiar in global discussions with the analysis of selected relevant and instructive African cases.

The models that currently dominate African discussion see an executive that is too strong and a judiciary that should be stronger. At worst, the executive subordinates the judiciary, whether by fear and intimidation, or by packing it with puppets and pawns. The result is that the judiciary does what the executive wishes and offers no check on executive activities. In relatively better cases, the judiciary preserves a meaningful sphere of action for itself by confining itself to actions that ruling powers desire or at least can accept. What separates the worst case of judicial *subordination* from the cases of judicial *survival* is that subordinated courts do not act independently while surviving courts do, albeit within strong political limits.

In fairness, these categories are the most useful for understanding judiciaries in Africa historically and are probably the most apt categories, in general, today. But even if only to avoid being blinded by conceptual habit, we should recognize the two other possibilities I have already noted. Courts might exercise much greater amounts of meaningful independent power. Taken to its logical extreme, this can result in a case of *judicial supremacy*, in which it is the other branches of government that start to lose meaningful ability to check the court, instead of the other way round. And finally, while relationships of subordination, survival, and supremacy all envisage a zero-sum, competitive relationship between the judiciary and the executive, it is also possible

that this relationship can be more harmonious. The tendency to think of executives as threats is hardly far-fetched, but executive actors can also sometimes have admirable, constitutional goals. In such a context, there can be a *virtuous alignment*, in which both branches have meaningful independence in relation to the other but pursue similar, legally valid, goals.

These four variables are, of course, ideal types, with real practice displaying various patterns and degrees of each. The keys are the degree to which the judiciary is independent in relation to the executive, and the degree to which the two branches pursue different aims. A court that pursues the same goals as the executive may be subordinated, but if it is meaningfully independent it may instead enjoy a virtuous alignment. A court that seeks to pursue different goals to the executive will struggle in survival mode if the executive is dominant, but will enjoy judicial supremacy if the executive is largely unable to constrain the court's actions.

## 3. From Subordination to Survival

The case of judicial subordination requires little elaboration. At its logical extreme, it describes the case where courts have been bent entirely to the executive will and offer no meaningful or principled resistance to executive attempts to circumvent the rule of law. Africa is unfortunately a well-known source of examples of this case, either because executive power has destroyed courts; or because it ignores them (much the same thing); or as George Ocich puts it in the East African context, because '[f]rom the colonial times, the . . . courts have, by and large, been deliberate allies of the ruling elite'.[2] In such a case, a court is just a building with paper in it.

To the extent that something that can be taken seriously as independent judicial authority exists, we move towards a situation of judicial survival. Here, the exercise of judicial power may encounter non-compliance or provoke more direct attacks on the judicial institution, and the court may risk slipping back into a position of subordination as a result. But in a condition of survival, at least some credibly independent judicial authority succeeds in preserving itself over time. The state becomes characterized by something of a tacit bargain, in terms of which the powerful executive comes to tolerate or even welcome certain exercises of judicial authority. Such bargains may contain a strong element of subordination. There are likely to be large areas where courts know they must toe the executive line or face reprisals. But if the tacit bargain also contemplates areas in which courts will exercise meaningfully independent authority, the situation goes beyond subordination.

A standard reference point here is Latin America during its recent dictatorial rule. In several Latin American states, courts exercised meaningfully independent power over areas like private law, but were much less likely to challenge the regime itself. The details varied. In Chile, the Supreme Court declined to challenge the executive on matters of public law. Observers describe independent judges under Pinochet as

[2] George O Otieno Ochich, 'The Changing Paradigm of Human Rights Litigation in East Africa' in Kithure Kindiki (ed), *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (vol 5, Judiciary Watch Series, Kenyan Section of the International Commission of Jurists 2007) 73.

'accomplices' and 'faithful agents of the authoritarian regime'.[3] The Chilean case thus blurred into one of subordination, at least on public law questions. By contrast, the judiciary showed somewhat more resistance in a case like Argentina and more still in one like Brazil. But the basic pattern is one in which a meaningful degree of independent judicial power is tolerated in some areas, where judging may operate almost normally, while being much more sharply constrained in other respects.[4]

In Africa, Egypt was until recently an important example of this pattern. Egyptian judges exercised significantly independent authority for years under dictatorial regimes. Egyptian leaders tolerated this, and indeed both Presidents Sadat and Mubarak actively supported it to a degree. Both needed to offer credible legal services to foreign businesses and also sought responsible oversight of the lower levels of the bureaucracy where corruption was rampant.[5] Such situations are naturally fraught with moral ambiguity for judges. The courts are used instrumentally by the regime, and the law ekes out an existence for itself partly by self-censoring its own reach. Egypt long exemplified this pattern. Another especially notorious example is the South African judiciary for much of the apartheid period. That judiciary prided itself on its expertise in private law matters and indeed also in a number of public law contexts, and it regularly exercised meaningfully independent authority in these areas. At the same time, however, most apartheid-era judges were very deferent on matters sensitive to the regime, such as detention without trial in the name of national security, and forced removals.[6]

From the perspective of those seeking more judicial power relative to the executive, such cases represent situations from which judicial power could be grown, with the right strategy. South African judges were not interested in doing this for the greater part of the apartheid period, but if judges do have the will, the features of a position of judicial survival offer a way. To be credible, judicial power must be seen as reasonably independent, and it can be difficult for an executive to get away with trying to confine

[3] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345, 356; Lisa Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 129.

[4] See, for example, Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press 2007); Anthony W Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile and Argentina* (University of Pittsburgh Press 2005); Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford University Press 2013); for convenient short summaries, see Hilbink (n 3); Anthony W Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil and Chile' in Ginsburg and Moustafa (n 3); Robert Barros, 'Courts out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)' in Ginsburg and Moustafa (n 3).

[5] Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egpyt' in Ginsburg and Moustafa (n 3); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press 2009).

[6] See, for example, John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press 1978); Christopher F Forsyth, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950–1980* (Juta Legal and Academic Publishers 1985); Stephen Ellmann, *In Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford University Press 1992); David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (updated edn, Oxford University Press 2010). For further discussion of these and other sources, see James Fowkes, 'Apartheid Judging and Dugard's Question: Re-examining the Legend' (forthcoming).

credibly independent power to the contexts in which it was originally granted without undermining the whole edifice. If even dictatorial regimes have incentives to accept independent power in some places—incentives like reliably policing the lower reaches of their own governments or offering trustworthy contract enforcement to foreign investors—then judges might be able to expand their sphere of meaningfully independent power from that starting point.

The success of this strategy is of course by no means assured. The executive may choose not to tolerate attempts to expand judicial power, or even seek in response to reduce the level that already exists. The executive may decide to roll back judicial power independently of anything judges do, but a judiciary that expands power incautiously or challenges the government too strongly certainly increases the risks of provoking this reaction. Tom Ginsburg, for example, has compared the cases of Taiwan and Mongolia. In Taiwan, the Council of Grand Justices began in the 1980s to very cautiously extend its authority and thus both preserved and grew that authority. By contrast, the new Mongolian Tsets, a court created in 1992 roughly after the model of the Conseil Constitutionnel, over-extended itself and suffered backlash.[7] The Russian and Hungarian Constitutional Courts are two other prominent cases where judges are understood to have exercised power very expansively and to have experienced backlash.[8]

In Africa, the case of Zimbabwe exemplifies this negative dynamic. The Mugabe government (1987–) was initially seriously committed to the rule of law. In time, however, it began to exert more unilateral power in disregard of existing legal constraints. From the year 2000 the Mugabe regime politicized the judiciary.[9] Judges who sought to hold the old legal lines found themselves the subject of various kinds of executive reprisals: non-compliance with orders, pressure to resign, and in some cases actual physical violence and imprisonment. In February 2001, the government forced Chief Justice Anthony Gubbay to resign, claiming 'that it could not guarantee his safety if he stayed in office'.[10] His replacement was Godfrey Chidyasiku, a former ZANU-PF deputy minister and Attorney-General under the Mugabe government who was widely perceived as a government supporter. The same year, President Mugabe packed the Supreme Court, adding three new judges. By 2002 five more of the original Supreme Court bench had resigned, the last of them, Justice Ebrahim, in response to Mugabe's decision simply to ignore the Justice's invalidation of an electoral law. During that year, former High Court Judge Fergus Blackie was arrested and briefly imprisoned, and two

[7] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Review in Asian Cases* (Cambridge University Press 2003). For the details of the Mongolian Tsets, see at 165–8.

[8] Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (Cambridge University Press 2008); Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 *University of Pennsylvania Law Review* 1757; and on recent developments in Hungary, see, for example, Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Disabling the Constitution' (2012) 23 *Journal of Democracy* 137; Vincze Attila, 'The New Hungarian Constitution: Redrafting, Rebranding or Revolution' (2012) 6 *Vienna Journal on International Constitutional Law* 88.

[9] Simbarashe Moyo, 'Regime Survival Strategies in Zimbabwe in the 21st Century' (2013) 7 *African Journal of Political Science and International Relations* 67, 73.

[10] Jennifer Widener and Daniel Scher, 'Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe' in Ginsburg and Moustafa (n 3) 250.

magistrates were physically assaulted in separate instances. 'By April 2003', concludes a survey by Jennifer Widener and Daniel Scher recording these events, 'the state had built up an impressive record of noncompliance with court orders'.[11] Another incidental judicial victim was the SADC Tribunal, which had ruled that aspects of the Zimbabwean land reform programme were illegal. The Mugabe regime refused to comply with its rulings and pushed successfully for SADC member governments to suspend the Tribunal.[12]

Until recently, Egypt itself illustrated a less dramatic version of the same unsuccessful trajectory, one that effectively led to a stalemate until Mubarak's overthrow. The Supreme Constitutional Court asserted powers in some important contexts and sometimes offered a meaningful forum to resist the executive. However, judicial assertions of power met continued executive responses. In 2000, for example, the Court claimed a role in overseeing elections, something the regime opposed and that the original text of the 1971 Constitution had sought to constrain. The government responded with a constitutional amendment that substantially restrained the power the judges had asserted. In this and other areas the government 'constantly spun out fresh, illiberal legislation' and 'undermined the independence of the [Court]' in response to attempts to open up the legal system.[13] Instead of either a vicious backlash or a gradual growth of judicial power in the face of executive acquiescence, in other words, the result was something of a continuous standoff. The judiciary retained significant independence and authority, but it also did not succeed in expanding that authority very much in relation to the executive.[14]

However, under different conditions the power equation can be more promising for the court. A regime may weaken and its ability to resist judicial assertions of power may weaken with it. Public support may grow and support court rulings. A regime may wish to liberalize and open up to the international community, and therefore either support expanded judicial activity or find it too embarrassing to oppose it.

The Ugandan case is a modest example of this sort, although the situation remains unsettled and the outcome accordingly uncertain. Under President Museveni, the judiciary has encountered significant challenges to judicial authority. Armed commandoes invaded courtrooms on two occasions, one of them a hearing in a particularly politicized criminal case against Museveni's main political rival, Kizza Besigye. The same case saw attempts to oust the jurisdiction of the ordinary courts in favour of military tribunals, including the disregard of court orders by the army officers holding

[11] ibid 252; see also, for example, Lorna Davidson and Raj Purohit, 'The Zimbabwe Human Rights Crisis: A Collaborative Approach to International Advocacy' (2004) 7 *Yale Human Rights and Development Journal* (2004) 108, 118–19; Charles Goredema, 'Wither Judicial Independence in Zimbabwe?' in Brian Raftopoulos and Tyrone Savage (eds), *Zimbabwe: Injustice and Political Reconciliation* (Weaver Press 2004) esp 102–3.

[12] See, for example, Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* 870; Erika de Wet, 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45.

[13] Tamir Moustafa, 'Law in the Egyptian Revolt' (2011) 3 *Middle East Law and Governance* 181, 184.

[14] Moustafa, *Struggle for Constitutional Power* (n 5); for summaries and updates, see Moustafa (n 13) 182–5; Moustafa, 'Law and Resistance' (n 5).

Besigye and a number of his co-defendants. The government also made deliberate attempts to weaken the judiciary, publicly criticizing senior judges, leaving senior judicial positions vacant and under-funding the courts as a whole. At least some of the time, the courts have displayed political caution in response. Strategic decisions seem to have loomed especially large in the electoral context. In the wake of both the 2001 and 2006 elections, the Supreme Court rejected challenges by Besigye to Museveni's presidential election victories despite finding that significant irregularities had occurred. Observers, while noting some of the weaknesses of Ugandan election law, attribute these results to executive pressure, judicial fear of reprisals, and 'the Supreme Court's reluctance to rule against the president on issues directly related to his remaining in power'.[15] That said, however, other aspects of the Ugandan case show the court exerting significant power against the government. The courts have enjoyed considerable support from the Ugandan Law Society, the domestic legal community more generally, and the press. They have also benefitted from international pressure in response to the events accompanying Besigye's prosecution. The International Bar Association and the International Commission of Jurists came out in support of the judiciary, the United States applied diplomatic pressure, and several European countries cut aid. The judiciary's decisions against the government caused resistance but not decisive backlash, and the government has usually ended up respecting judicial authority, albeit grudgingly and slowly, and sometimes only after it had probably achieved its political purpose.[16] In a case like the Ugandan one, the rule of law is battered, but courts can still—ultimately—prevail even in very politicized cases.

Judging during the last years of apartheid in South Africa is also susceptible to analysis in these terms. While much of the apartheid period was characterized by deference, signs of a systematic shift in this attitude began to appear in the mid-1980s, against the backdrop of a broader protest movement and the increasing weakness and reformist inclinations of the government.[17] (The point should not be over-stated; other key judgments at this time, conversely, reinforced the pro-security line.) The success of the judiciary in *post*-apartheid South Africa can also be understood in terms of strategic decisions about when to assert judicial power and when to retreat in order to avoid a destructive clash with the powerful ANC government. Theunis Roux's recent book offers the most sophisticated analysis in these terms of the South African Constitutional Court, established in 1995. Roux argues that the new Court was useful to the ANC during the transition, but thereafter increasingly posed an obstacle to the ANC as

[15] Jude Murison, 'Judicial Politics: Election Petitions and Electoral Fraud in Uganda' (2013) 7 *Journal of Eastern African Studies* 492, 495–7, 503 (the quoted text appears at 495); Ben Kiromba Twinomugisha, 'The Role of the Judiciary in the Promotion of Democracy in Uganda' (2009) *African Human Rights Law Journal* 1, 13–18.

[16] Widener (n 10) 239–48; Dean E McHenry, Jr, 'The Role of the Ugandan Courts in the 2006 Elections: The Significance of Local and International Support for Judicial Independence' (paper delivered at the Annual Meeting of the African Studies Association, San Francisco, 16–19 November 2006) available at <http://cgu.edu/PDFFiles/SPE/workingpapers/politics/ASA2006%20Paper%208%20111206.pdf> accessed 27 October 2014.

[17] See, for example, Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994* (Routledge 1995); Dennis Davis and Michelle le Roux, *Precedent and Possibility: The (Ab)use of Law in South Africa* (Double Storey 2009) ch 2.

an institution with meaningful independence and very extensive textual authority. In these difficult conditions, the Court succeeded in protecting its fragile authority by 'compromising on principle' in a few cases to avoid challenging the ANC's interests too directly, and (more often) by adopting interpretations other than the best reading of the text if they would better serve its relationship with the ruling party or preserve its political room to manoeuvre. At the same time, it maintained its reputation as an independent forum of legal principle and bolstered its credibility by keeping the straightforwardly strategic 'compromises on principle' to a minimum and deciding in legally defensible ways most of the time. On Roux's analysis, the South African case is one of a court successfully building authority by cautious strategy, as in Ginsburg's Taiwanese case, with crucial support from civil society and the advantage of a government that Roux recognizes has displayed important (although in his view, declining) support for judicial authority.[18]

## 4. From Survival to Supremacy

To this point, we have been considering the logic of quite a blunt equation. The executive is a threat, at least a potential abuser of power, and needs checking. The judiciary, constitution in hand, is the guardian that could provide that constraint. A judiciary that tries to do so must confront a difficult strategic choice about how far to push in expanding its often fragile power, and a difficult legal or moral choice about how far to be strategic. This is a common paradigm in contemporary political science literature, and as noted, it is a dominant way of thinking in the African context where the abuse of power by executives continues to be the chief cause for concern and much hope is placed in constitutions and courts as a means to curb that abuse. And it is, as we have just seen, a useful logic with genuine purchase in real cases. But it must be borne in mind that there are also significant complications to this logic.

Underlying this way of thinking is an assumption that increasing the level of independent judicial power is a good thing. That assumption might be justified by a very rosy view of courts. It might also be justified on the basis that the African power equation is so heavily tilted in favour of the executive that any increase in judicial power is to be welcomed. Arguments of both sorts seem to be of significant (albeit often implicit) weight in African discussions, as in many other systems worldwide. Courts are not always subject to much critical scrutiny, and even scholars who are well aware of the potential list of concerns with judicial power usually have bigger worries. H Kwasi Prempeh is illustrative here. He is more careful than most to note that 'judicial review . . . is a double-edged sword' and to recognize that '[t]he challenge is to ensure that judges in newly democratizing states exercise their new power so as to

[18] Theunis Roux, *Politics of Principle: The First South African Constitutional Court 1995–2005* (Cambridge University Press 2013). The book significantly deepens the argument of his first statement, Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *I.Con* 106. Both are discussed in James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, forthcoming 2016).

advance and deepen the transition to constitutional democracy'.[19] But his chief concern remains the constraint of executive power. In fact, the chief respect in which Prempeh thinks judicial review is 'a double-edged sword' is not that judges might hold too much power and come to make too many decisions. It is that if judges are assigned extensive powers they will be subordinated by the executive and so turn into a 'formidable instrument for legitimating authoritarianism'.[20] African history certainly justifies Prempeh's concerns. But perspectives from further afield suggest that judicial power is not so unambiguously sound and unthreatening that one can just push uncritically for increases in independent judicial power. Extensive judicial power may seem a far-off dream in Africa today, but comparative examples suggest that could change quickly.

Latin America is again a useful counterpoint. Courts that (until quite recently) occupied rather precarious positions under dominant, dictatorial executives, as we saw, now sometimes exercise vast powers. And this rise in power has not been free of standard concerns about judicial power, that judges are making decisions they lack the democratic legitimacy, technical expertise, or institutional support to make in an optimal fashion. The same can be said about the rise to power of courts in other emerging systems, with India perhaps the most prominent example.[21] Apparently, neither a history of colonialism nor recent authoritarian government precludes the possibility of a rapid rise in judicial power in a state.

How likely is it that the same pattern will play out in Africa? Naturally, the analogy with Latin America is inexact, perhaps most importantly because Latin American countries are generally richer and have more established judicial systems and much longer constitutional histories.[22] Much also depends, of course, on the particular politics of individual African states. But these inevitable caveats aside, it is certainly not far-fetched to think that the sorts of factors that have been important in the rise of Latin American and South Asian courts might also operate in Africa.

One factor is an expansive constitutional text, underwriting correspondingly expansive judicial authority. As noted, African systems are increasingly adopting such texts. Another is political fragmentation. If political authority is divided, this may create political space for courts to act where the political branches cannot, or make it harder for political actors to form the necessary majorities to thwart judicial assertions of power, or make political actors more reliant on judicial authority as an arbiter for their institutional disputes. These have been important factors in the rise of very powerful

[19] Henry Kwasi Prempeh, 'A New Jurisprudence for Africa' (1999) 10 *Journal of Democracy* 135, 135–6; see also Henry Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2007–08) 35 *Hastings Constitutional Law Quarterly* 761.

[20] Prempeh, 'A New Jurisprudence' (n 19) 136.

[21] Aspects of these developments and relevant sources are discussed in James Fowkes, 'How to Open the Doors of the Court—Lessons on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434; James Fowkes, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1 *Cambridge Journal of International and Comparative Law* 235.

[22] On this history see Gargarella (n 4).

courts such as the Indian and Israeli Supreme Courts.[23] A third point is pressure for social justice. If governments are not responding to public demands for change and courts step in, courts can attract significant public support. Political actors themselves may favour this activity if they are frustrated with dysfunctional bureaucracies and see the courts as the only way to get something done, but they will at least find it politically difficult to oppose successful or popular efforts by courts to pursue social justice. Dynamics of this sort will be all the more significant in systems like India that also show significant degrees of political fragmentation, because it will be harder there for political institutions to get things done. Such dynamics are at least a realistic possibility in many African systems.

If factors conducive to an expansion of judicial power could be present, what about factors constraining it? Questions of access to justice will arise here. Since courts need cases to act expansively, it might be thought that factors like poverty, illiteracy and legal illiteracy, and weak civil society activity will conspire to make large-scale judicial power unlikely in many African contexts. There is also some history of courts themselves adopting restrictive approaches to standing and jurisdiction and thus stunting litigation, as was true for example in Kenya until the liberalization of the 1990s.[24] This is a perfectly real obstacle, but comparative examples suggest it is not an insuperable one. Systems in Latin America and South Asia also experienced these conditions and judicial power expanded nonetheless, and a key reason is that there is a good deal that can be done to respond to these obstacles. Innovative access to justice mechanisms, like India's Public Interest Litigation (PIL) mechanism and Colombia's *tutela*, work in various ways to expand access by making cases easier and cheaper to bring.[25]

Benin is a particularly instructive African example here. Citizens may bring rights violations to the attention of the Benin Constitutional Court simply by writing a letter. The costs of making the complaint do not exceed the price of the letter and the stamp; no lawyer is required; and the Court itself takes charge of gathering evidence, usually by appointing a commissioner or rapporteur to investigate and report back to the judges.[26] The parallels to Indian PIL in particular are striking, though Indian PIL has evolved considerably since its inception around 1980, and Benin's system remains new and limited by comparison. Armed with such techniques, a court can generate a significant case load and respond to complex problems even if the population it serves generally has a difficult time accessing formal legal mechanisms—as the emerging human rights docket of the widely admired Benin Court shows.

African scholars should therefore take more seriously the possibility of *judicial supremacy*, in which courts exercise extensive independent authority that other

[23] See, for example, SP Sathe, *Judicial Activism in India* (2nd edn, Oxford University Press 2002); Pratap Bhanu Mehta, 'India's Unlikely Democracy: The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 70; Eli Salzberger, 'Judicial Activism in Israel' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007).

[24] Joel M Ngugi, 'Stalling Juristocracy while Deepening Judicial Independence in Kenya: Towards a Political Question Doctrine' in Kindiki (n 2) 4–5, 10–12; see also Ochich (n 2) 73, 76–82.

[25] See Fowkes, 'How to Open the Doors of the Court' (n 21); Fowkes, 'Civil Procedure in Public Interest Litigation' (n 21) and sources cited therein.

[26] Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' (2004) 17 *Harvard Human Rights Journal* 281, 294, 300, 308–10.

branches find difficult to check. As we saw, even a discussion like Prempeh's is not concerned with this: it sees only judicial subordination as the 'bad' side of judicial authority and is content to treat genuinely independent judging as the 'good'.

Africans are hardly unaware of the dangers of excessive judicial power, which are very familiar: as with a powerful executive, there is no guarantee that courts will exercise their powers for the best, even if they have good intentions. Furthermore, again as with powerful executives, even the benevolent exercise of power is not an unqualified good if the effect is to damage or stunt other institutions. Extensive judicial authority may come at the expense of legislatures and democratic processes more generally, for example. The point, instead, is that African discussion seems to treat these concerns as rather remote and does not currently feel the need to take them into account—whereas if the arguments of this chapter are right, judicial supremacy may be a more imminent concern in at least some African states than is commonly thought. Even though executive dominance is indeed the most important problem today, an overweening focus on constraining executive power may lead reformers to establish systems poorly placed to respond to the future possibility of judicial supremacy.

The issue of judicial appointment procedures offers an important illustration. From an executive-phobic perspective, the chief concern is that executives will use their appointment power to undermine the independence of the courts. Scholars thus favour reducing executive influence in appointments. If we have one eye on the dangers of judicial supremacy, however, we might wish to balance this concern against the worry that too little political control over the appointment power removes an important check on judicial supremacy. The fact that the very powerful Indian judiciary controls its own appointment process is telling, and has prompted concerns of cronyism. It is of course very difficult to decide how much of a concession to make to future concerns, at the risk of inadequately checking a looming executive, when designing a mechanism for judicial appointments. But the point is that it is a real choice, with countervailing considerations on both sides.

There are some emerging signs of African scholarly concern with the prospect of excessive judicial power. In the Nigerian context, for example, it is a theme of discussions of the political question doctrine, whose status there has become uncertain. Enyinna Nwauche has argued that 'writ large in the demise of the political question doctrine in Nigeria is the direction of judicial review in Nigeria' and it should prompt recognition of 'the need to examine the nature of judicial incursion into the affairs of co-ordinate branches'.[27] Nwauche notes the 'supremacist tendencies of the Nigerian judiciary' in the fourth republic, borne in part of the judges' significant public popularity—in line with the comparative arguments made earlier.[28] That such questions are beginning to be raised in African discussions gives weight to the claim that judicial supremacy may be becoming a real concern. But this remains uncommon. The focus instead is usually on arguments like Joel Ngugi's, who supports a political

[27] Enyinna Nwanche, 'Is the End Near for the Political Question Doctrine in Nigeria?' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Press 2010) 32.

[28] ibid 60.

question doctrine in Kenya to respond to the threat of 'judicialization' and to help courts avoid policy questions, but does so in order to avoid the awkward scenario in which courts make orders in these domains and the executive declines to enforce them, damaging their authority—the much more common concern for judicial survival.[29]

## 5. The Possibility of Virtuous Alignment

If judicial power is not always an unqualified 'good', it is also true that executive power is not always 'bad'. The point may seem too obvious to be worth making, and too much a matter of chance to place much reliance on, but it should not be too quickly dismissed. The preceding arguments have assumed that the judiciary and the executive are significantly opposing forces or—as in those cases of judicial subordination where the judiciary is the executive's puppet—that an alignment between the judiciary and the executive is something that sounds suspiciously like coordination and should be avoided. In other words, these arguments see a healthy opposition between the different branches of government as desirable. They are therefore suspicious of alignments, which smack of subordination and weaken the vital checking powers of opposing forces that is central to the separation of powers. In rounding out this chapter's argument, however, it is important to see that this conclusion is too quick. Not all 'alignments' between the executive and the judiciary are created equal.

A classic piece of analysis of courts in the US context offers a helpful starting point in examining African examples here. The argument, usually traced back to Robert Dahl's canonical 1957 paper on the US Supreme Court, holds that courts seldom adopt positions that are significantly and persistently out of step with the dominant political forces of the moment.[30] It may, of course, be that there is no dominant political force, as in the examples of politically fragmented systems such as Israel and India over much of the last forty years already considered, and in those cases a different logic can prevail. But to the extent that it exists, the idea that a highest court is 'inevitably a part of the dominant national alliance', at least when there is one, is amongst the oldest insights about courts offered by political scientists.[31] We should not, therefore, be very surprised if courts in Africa also follow this pattern, and either stay quite close to the positions of the powerful executive or at least refrain from significant conflict with it. In doing so, these courts are not necessarily being especially craven or strategic. They might just be being normal courts.

[29] Ngugi (n 24) 3–4, 17–19.

[30] Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279. Dahl made his point only in relation to the US Supreme Court, but it has been generalized since. See, for example, Mark Tushnet, 'Political Power and Judicial Power: Some Observations on Their Relation' (2006–07) 75 *Fordham Law Review* 755. For a survey of some of the important sources supporting this proposition in relation to a guardianship role for courts, see James Fowkes and Michaela Hailbronner, 'Courts as the Nation's Conscience: Empirically Testing the Intuitions Behind Ethicalization' in Silja Vöneky, Britta Beylage-Haarmann, Anja Hofelmeier, and Anna-Katharina Hubler (eds), *Ethics and Law: The Ethicalization of Law/Ethik und Recht: Ethisierung des Rechts* (Springer 2013).

[31] The quoted phrase is Dahl's; see Dahl (n 30) 293.

In a continent where executive power is often abused, the immediate reaction to this may be concern and regret: if courts do not check executives, who will? Optimistic views of courts and rights encourage that reaction, as does the vision of courts as national moral guardians. But what if the executive adopts good stances? What if the dominant political forces have a significantly positive agenda? In such a scenario, we would not necessarily regret a situation in which the judiciary tended to stay close to the dominant political line. If both branches were committed to approximately the same welcome direction, we might not regret that they were both pulling together instead of opposing one another. This is the possibility of a *virtuous alignment*. Unlike judicial subordination, the judiciary is meaningfully independent, but unlike the various stages of judicial survival or judicial supremacy, the judiciary's relationship with the executive is not, at bottom, a hostile, zero-sum game of rivals, because both institutions wish to head in roughly the same direction.

Relying on this sort of virtuous alignment might seem at first glance to be like relying on benevolent dictatorships, what Kwasi Prempeh has aptly referred to as 'hoping for a Lee Kuan Yew'.[32] But there are key differences. A scenario of alignment implies an independent judiciary, and so the possibility of meaningful institutional checks on power is still present in the system, if needed. That is the possibility notably absent from the benevolent dictator scenario. Furthermore, if it is true that courts usually hew quite close to the dominant political alliance, and if it is also true that courts that take on powerful executives squarely often suffer significant backlash, then court-built success without an important degree of virtuous alignment might be an unlikely thing. After all, there are many schools of thought which depend on the possibility of trusting institutions other than courts to do valuable constitutional work: dialogue theory and its predecessors in accounts like Bickel's democracy-forcing interpretations; constitutional experimentalism; collaborative and deliberative approaches to litigation; accounts placing constitutional emphasis on popular mobilization, or on legislation and other instruments besides judicial decisions; and so on.[33] The possibilities presented by this body of work are under-explored in the African context, and this reflects not only the historical implausibility of trust but also that prevailing concepts are closed to the possibility of it. In other words, it might be that alignment is an *ordinary* route to

[32] Henry Kwasi Prempeh, 'Presidents Untamed' (2008) 19 *Journal of Democracy* 109, 122.

[33] On dialogue theory, see seminally Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75; for a recent discussion discussing developments see Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11 *I.Con* 870. For Bickel, see Alexander Bickel, *The Least Dangerous Branch* (2nd edn, Bobbs-Merrill 1986); Alexander M Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row 1970), for example, 91. Important sources from the copious writing on experimentalist and deliberative approaches are discussed in a recent (South) African-based discussion, Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013); additional South African reliance on these sources is discussed in Fowkes (n 18), and ideas of collaborative litigation are examined in Fowkes, 'How to Open the Doors of the Court' (n 21) and Fowkes, 'Civil Procedure in Public Interest Litigation (n 21). On popular mobilization and legislative process see esp Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991); Bruce Ackerman 'The Living Constitution' (2007) 120 *Harvard Law Review* 1727; William N Eskridge, Jnr and John Ferejohn, A Republic of Statutes: The New American Constitution (Yale University Press 2010).

successful constitutional functioning, something that importantly accounts for historical and contemporary examples of it—in contrast to dictatorship, which is ordinarily, on the basis of *its* historical examples, a route to something else and only very extraordinarily has some meaningfully benevolent consequences. An examination of three of Africa's most admired constitutional states to date offers support for the alignment argument. Botswana, Benin, and South Africa are all classed amongst Africa's success stories, albeit with caveats in each case.

Botswana has long been recognized as a virtuous exception of good governance on the African continent. It is, however, a case in which the role of the constitution and the judiciary in producing this result is debatable. Analyses of Botswana's success tend to highlight its political leadership, and its historical luck in having extensive diamond deposits discovered just *after* the departure of a British colonial power that had interfered relatively little in its governing arrangements compared to other colonies.[34] The judiciary is not usually prominently cited in these explanations, and by contemporary standards the High Court and the Court of Appeal are not expansive institutions. Judged by the same standards, the Botswana constitution is not especially expansive either. It does not include socio-economic or cultural rights, and contains quite extensive immunities for the president against civil claims brought against him in his private capacity, which the courts have upheld.[35]

This is not to argue that Botswana's courts are unimportant. There is general recognition that they are substantially independent.[36] Charles Fombad observes that 'what sets Botswana apart from most other African governments' is the degree to which 'the courts regularly review and invalidate irregular and illegal executive and legislative acts'.[37] The very fact that President Khama has recently moved to claim a greater role in judicial appointments implies that the executive sees the courts as an important source of power.[38] But Botswana seems an example in which executive attitudes, rather than independent judicial authority, have been the decisive factor in the state's stability and compliance with the rule of law. The fact that Botswana's rights record has been called into question in areas where the executive's stance is also questionable—such as minority cultural rights—may speak to the limits of the constitutional text, but it also speaks to the limits of power outside the executive more generally, including in

[34] See, for example, Amelia Cook and Jeremy Sarkin, 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development' (2010–11) 19 *Transnational Law and Contemporary Problems* 453.

[35] Botswana constitution (1996). On presidential immunities, see Charles Manga Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007, 1026–7; Thapelo Ndlovu, 'Political Freedoms and Democracy' in Karin Alexander and Gape Kaboyakgosi (eds), *A Fine Balance: Assessing the Quality of Governance in Botswana* (IDASA 2012) 70 <http://www.bidpa.bw/img_upload/pubdoc_59.pdf> accessed 30 July 2015.

[36] See, for example, Charles Manga Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301, 328–30, 340; Segametsi Oreeditse Moatlhaping and Ketlhomilwe Moletsane, 'Participation and Democracy' in Alexander and Kaboyakgosi (n 34) 31; Emmanuel Botlhale, 'Accountability and Democracy' in Alexander and Kaboyakgosi (n 34) 61.

[37] Fombad (n 35) 341.

[38] Botlhale (n 35) 61.

the courts.[39] Botswana's judiciary appears to have stayed close to the stance of the dominant political grouping, in line with Dahl's argument.

Botswana's neighbour, South Africa, has been admired for a much shorter period, but its Constitutional Court enjoys a considerably higher global profile. The 1996 constitution is expansive by any measure, and the Constitutional Court is widely applauded for a number of high-profile decisions on the death penalty, Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed (LGBTI) equality, socio-economic rights, and democracy. As such, it is often seen as an example of the power of independent judicial authority—tempered, to the extent that one follows Roux's argument, by the recognition that pragmatic strategy has been a necessary accompaniment to the principled boldness of its famous decisions.

However, what is seldom acknowledged is that the Court's most celebrated progressive decisions have been largely in line with the policy positions of the ruling ANC government. The judgments often build on pre-existing legislative activity or on ideas with pre-existing public support from the ANC and others. The Court has indeed made high-profile decisions against the government, but the fact that this has not come at the cost of constitutional stability or led to backlash is above all a result of the fact that, come the crunch, South Africa's presidents have chosen to accept judicial rulings.[40] It is true that the Court has shown political awareness and diplomacy, is usually scrupulous about the limits of its institutional authority, and has written some ground-breaking judgments, so it should receive its share of the credit. But it also illustrates the mistake of treating the executive only as a threat. Instead, rather like Botswana, South Africa is a state with a dominant political force that has regularly taken admirable positions (while also, of course, being the subject of a number of justified criticisms and concerns as well). That South Africa's constitutionalism is the more expansive of the two does not affect this basic claim.

As with Botswana, the conclusion is hardly that the South African courts have been unimportant. A case of virtuous alignment implies independent judicial power and the possibility of the courts acting as checks on the executive, and my arguments do not at all preclude the idea of courts serving as everyday checks on executive activity or deny that this has been an important factor in both Botswana and South Africa. However, the larger-scale dynamic of the South African state is of the judiciary building on the work of the executive (and political power more generally) at least as much as constraining it. It also means that the stance adopted by powerful executives in the South African case is once again much more important in explaining the success of South Africa's constitutional democracy to date than any fact about its courts. In both Botswana and South Africa, there is a great and unanswered question about what would happen if the courts and the executive really were to clash squarely in a protracted manner, and what is most significant for present purposes is the simple fact that this question is still largely unanswered.

[39] For these concerns, see Cook and Sarkin (n 33) 455–6, 461, 481, 489.

[40] Fowkes (n 18); see also James Fowkes, 'The People, the Court, and Langa Constitutionalism' in Michael Bishop and Alistair Price (eds), *A Transformative Justice: Essays in Honour of Chief Justice Pius Langa* (Juta 2015).

Finally, consider Benin, the constitutional success story of West Africa since its National Conference in 1990. The Benin Constitutional Court has built some of its reputation by responding promptly to rights violations, no matter how small. Observers tend to agree, however, that its role in deciding electoral disputes and arbitrating disagreements between the branches of government have been the real keys to its status.[41] In both respects, the stance taken by political leaders has been very important. In the electoral context, the most threatening situation arose in the wake of the 2001 elections. The Court appears to have fulfilled its role of election monitor less than adroitly, first excluding the results of an entire province and then reversing course. The final result, however, was not a wave of post-election violence or a coup or even a long-standing dispute hampering governance. After the second- and third-placed candidates declined to participate in the run-off, the fourth-placed candidate, Adrien Houngbédju, agreed to do so in order to preserve the form of election procedures. Even more importantly, all sides accepted the ultimate win for former President Kérékou.[42] As a result, the 2001 elections look somewhat like their US counterpart the previous year: though the story is troubling and the role of the judiciary in the story is a source of concern, the matter was resolved without serious repercussions because political leaders accepted the result relatively quickly rather than provoke a deeper crisis. Executive respect for the basic rules of the game was also on display in 2006 when both Kérékou and former President Soglo respected constitutional restrictions that precluded each from running for the presidency again. Such concerns have now arisen again in response to President Yayi Boni's moves to revise the constitution to permit him to serve a third term. But in Benin's case we can be much more confident than is generally the case that these attempts will wilt in the face of precedent or, if acted upon, that the voters will resist the attempt just as Senegalese voters thwarted President Wade's bid for a third term in 2012. A similar 'enough is enough' movement has already emerged in Benin.[43]

These features are arguably to be traced to features of Benin's politics more broadly. At times, the political system has been relatively fragmented, with many fluid coalitions that make radical agendas hard to pursue. Civilian political activity has also played out against the backdrop of the threat of a military coup, of which Benin has a history, although that threat has been receding as the distance from 1990 grows. The possibility that irresponsible politics might provide the military with a pretext seems to have encouraged responsible politics among civilian leaders. That behaviour now serves as its own precedent, as does the legacy of the founding National Convention.[44] Benin too, therefore, offers no grounds to denigrate the contribution of courts, but once again

[41] Rotman (n 26) 293–4, 313.

[42] Christopher Fomunyoh, 'Democratization in Fits and Starts' (2001) 12 *Journal of Democracy* 37, 38–9; Rotman (n 26) 290–1; Matthias Basedau and Alexander Stroh, 'Do Party Systems Make Democracy Work? A Comparative Test of Party-System Characteristics and Democratization in Francophone Africa' in Gero Erdmann and Marianne Kneuer (eds), *Regression of Democracy?* (VS Verlag 2011) 185–6.

[43] Richard Banégas, 'Brief—Benin: Challenges for Democracy' (2014) 113 *African Affairs* 449, 450–1. See further the comment on recent developments in Benin in this context in Ch 17 of this volume.

[44] Bruce A Magnusson, 'Democratization and Domestic Insecurity: Navigating the transition in Benin' (2001) 33 *Comparative Politics* 211, 219–0, 225–6; Basedau and Stroh (n 42) 184–6, 193; Banégas (n 32) 454.

seems to confirm the paramount importance of executive attitudes and political trends more generally in underwriting constitutional success. As one study puts it, Benin over-performs relative to its history and socio-economic status due, in large part, to a 'different "spirit" of constitutionality'.[45]

Just as the argument about judicial supremacy did not imply that it was wrong to worry about executive supremacy, so the argument about virtuous alignment does not imply that we are wrong to worry about establishing judicial checks on the executive or trying to establish judicial power in executive-dominated systems. It only asks us not to treat this suspicion as a default reflex that blots out the possibility of more admirable executive action. It also does not change the fact that if the conditions for a virtuous alignment are not present reformers and judges will simply have to do the best they can. The lesson here is more subtle. As argued earlier, concerns about *judicial* supremacy give us a reason not to act in response to *executive* supremacy in ways that would prevent a system from reacting to the excessive exercise of power by the judiciary—for example, when it came to thinking about appointment procedures. In a similar fashion, the present argument tells us that a virtuous alignment might well be a route to ordinary constitutional success that reformers should be trying to reach—and if so, they similarly have a reason not to act inconsistently with *that* goal. In particular, this would suggest that, no matter how strong the calls for bold rights decisions and the need to pressure executives, it might be a mistake for a judiciary to depart from a general default premise of distrust in relation to the executive—even if they could get away with it from the perspective of judicial survival. The value of the more dialogic, multi-institutional approaches to constitutionalism is considerable, and so too, therefore, must be the argument for courts and their supporters to work to establish them when they can.[46] To repeat, no one in Africa is wrong to worry about the abuse of executive power. But if constitutional success is often a matter of establishing constitutional partnerships, then always treating every executive as a power-abuser may be a mistake, and a missed opportunity to build trust. Sometimes, the reality of executive behaviour may give us no choice but to be distrustful, but when it does offer other possibilities, we should be alert to them.

## 6. Conclusion

This chapter has worked with ideal types, and moreover has conducted its analysis with a broad brush. In reality, systems combine different aspects of subordination, survival, supremacy, and alignment over time and across issues, and the details matter. In this context, the argument of this chapter has been a limited one. Executive power is the threat of the moment, and so there is an understandable emphasis on independent judicial power to stand up to that power. That emphasis is hardly misplaced and analysis conducted on this basis remains very important for Africa today (and for understanding the Africa of yesterday). Few courts can ignore the imperatives of

[45] Mariana Llanos, Cordula Tibi Weber, Charlotte Heyl, and Alexander Stroh, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases' (2014) Global Institute for Global and Area Studies (GIGA) Working Papers no 245.

[46] For more on this argument, see Fowkes (n 18).

judicial survival, and African courts certainly cannot. This holds true even for the most stable systems, like Botswana, and the most celebrated ones, like South Africa, given the presence of dominant parties in both countries.[47] The study of courts in Africa therefore must indeed remain alive to concerns of judicial subordination and must be informed by a pragmatic awareness of the strategies and realities of judicial survival. An increase in meaningfully independent judicial authority will be welcome in most if not all African systems, and we might well, therefore, treat any increase as a piece of welcome progress in an uphill task. But there are other possibilities, represented in this chapter by the ideas of judicial supremacy and virtuous alignment, which might be less imminent or dominant in Africa today but which comparative analysis suggests are not far-fetched possibilities either. We should be careful not to lose sight of them when we think about constitutional design or seek to understand African constitutionalism. Although it may nowhere be more tempting to be generally suspicious of all political limits on judicial power and all alignments between the judiciary and the executive, critical observers should keep a healthy distance from the image of the executive as, at best, the villain in waiting and the judiciary as the looked-for guardian at the gate who we hope will be strong enough to prevail. Constitutional reformers cannot hope to be fortune-tellers. But the fact that these other possibilities are real is a reason to be cautious about sacrificing on the altar of the strongest concerns of the moment the ideas and institutions that might be needed to build healthy constitutional systems in the future.

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[47] See Fombad (n 1) 1024–5, 1036.

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# 9

# Defying Assumptions about the Nature of Power Relations Between the Executive and Judiciary

## An Overview of Approaches to Judicial and Executive Relations in Ghana

*Kofi Quashigah*

## 1. Introduction

The assumption has gained ground that of the three main organs of government the judiciary is the weakest. This perception may possibly be due to the inherent and actual powers exercised by these various organs and the immediate impact of their functions on the individual. The legislature exercises legislative authority to formulate policies and make laws that direct and compel our behaviour. The executive controls and manages the resources of the state and applies the laws. The judiciary on the other hand is left with the seemingly docile function of just explaining what the laws are and whether they are being applied as expected.

It is the thesis of this chapter that experience has shown that the nature of the 'protection' accorded the judiciary under the various constitutions and the degree of commitment of the executive to respect of constitutionalism, particularly the principles of separation of powers, affect the strength of the judiciary. It is equally the case that the attitude of the judges at a particular period very much influences the relationship between the judiciary and the executive.

In Ghana, the relationship between the executive and the judiciary since independence may be classified according to the exhibited attitudes towards each other as follows:

i) Period of outright emasculation of the judiciary by the executive;
ii) Period of suspicion and minimal trust;
iii) Period of mutual toleration; and
iv) Period of self-assertion by the judiciary.

An examination of these will show a correlation between the nature of constitutional protection accorded to the judiciary, the executive's acceptance of democratic values, and the judiciary's own demonstration of commitment to protecting its independence.

## 2. Brief Constitutional History of Ghana

Ghana attained independence from Britain in 1957. The 1957 Independence Constitution established a parliamentary system of government with Dr Kwame Nkrumah of

the Convention Peoples' Party (CPP) as prime minister. The constitution did not contain specific provisions defining the powers of judicial review. On 1 July 1960 the constitution was changed from a constitutional monarchical system into a republican one. President Nkrumah was overthrown in a military coup d'état on 24 February 1966 and replaced with a military government christened the National Liberation Council (NLC). The NLC returned the country to civilian administration under the 1969 constitution which was also undermined by another military coup d'état in 1972. The military stayed in power until 1979 when a new constitution was promulgated and a civilian administration elected into office headed by Dr Hilla Limann as president. Dr Limann's administration was overthrown in another military coup d'état led by Flight Lt Rawlings in 1981. In 1993 the country was returned to civilian rule under the 1992 constitution following an election that was won by Flight Lt Rawlings who then became president. The 1992 constitution has remained in force to this day.

## 3. Nature of the Relationships

### 3.1 Period of outright emasculation of the judiciary by the executive

The first Republican period was one of total emasculation of the judiciary. The 1960 constitution vested the power to appoint judges of the Superior Courts in the president by instrument under the public seal.[1] The president could remove a judge in pursuance of a resolution of the National Assembly supported by the votes of not less than two-thirds of the members of parliament.[2] The strong control that the president had over parliament meant that he could effectively do as he wished. The executive indeed exercised overwhelming control over the judiciary particularly subsequent to the 1964 amendment of the 1960 constitution.

The immediate post-independence period was one of a rush to modernize and to elevate the country into the class of industrialized nations. President Nkrumah's government declared a preference for the socialist principles of development that came with the consequence of emphasis on economic rather than on civil and political rights.That period was remarkable in the attitude adopted by the judiciary in matters relating to conflicts between the state and individuals in that there appeared to have developed a judicial attitude of deference to the state authority. The courts seemed to have formed the opinion that the system of democratic governance bequeathed at independence in the Ghana (Constitution) Order-in-Council, 1957 was one based on the principle that parliament had unlimited power to make laws. This attitude was clearly informed by the British historic principle of the supremacy of parliament according to which no court could declare an Act of Parliament unconstitutional.

It was in respect of the cases involving the Preventive Detention Act of 1957 (PDA) that this attitude was most apparent. The Act made it possible for the executive to arrest and detain any individual for up to five years without trial. In the case of *Re*

[1] See art 44(3) of the 1960 constitution.

[2] See art 45(3) of the 1960 constitution.

*Dumoga*[3] for example, counsel for the detainees urged the Court not to apply the decision in the English case of *Liversidge v Anderson*[4] since it dealt with a special situation relating to war-time regulations for the arrest and detention of persons suspected of being sympathizers with the enemy. Adumua-Bossman J took the contrary view, explaining that:

> We are not at war; it is true but a fully sovereign parliament composed of representatives of the people duly elected by universal adult suffrage, of which learned counsel for the applicants in his political activities was one of the staunchest sponsors, had after due deliberation decided that conditions exist as to make it necessary for this rather drastic power to be conferred on the chief executive officer of the state to be by him exercised in his discretion and has accordingly made provision for it.
>
> In these circumstances there can surely be little or no point in resorting to the court; and surely the course open to men of realistic outlook is to adopt and pursue a policy of constant approach and appeal to influential humanitarian parliamentarians to use their influence and good offices to procure possibly a reduction in the period of detention in some cases, or perhaps reconsideration from time to time of the question of the termination of the operation of the enabling Act.[5]

The Court did not see itself as a formidable bastion for the protection of the liberties of individuals; it was prepared instead to rely on the goodwill and humanitarian instincts of politicians to use their influence and good offices.

This attitude of deferring to parliamentary and executive superiority was manifested in a series of other cases that came before the courts; these include *Balogun v Edusei*,[6] *InRe Okine*,[7] *Amponsah v Minister of Defence*,[8] *Tsiboe v Kumasi Municipal Council*,[9] and subsequently *Re Akoto*.[10] Amua-Sekyi JSC reflected the prevailing attitude of the judges, saying, 'During this period of our history, the courts said that they were prevented by British constitutional conventions from making a stand for the observance of human rights norms'.[11] Obviously during that period the courts relinquished their inherent authority which was to provide protection to the individual against invasion by the state.The events that subsequently followed this judicial attitude of subservience came to serve as an example for a judiciary that kowtows unduly to the whim of the executive. In the case of *State v Otchere*[12] the High Court (Special Criminal Division) acquitted a number of individuals charged with an attempted assassination of the then President Kwame Nkrumah. Infuriated by the decision, President Nkrumah, by executive order—Special Criminal Division Instrument, 1963 (EI 161)—declared the decision null and void. A new bench was constituted which re-tried the accused persons, found them guilty, and condemned them to death. The sentences were however not carried out. Chief Justice Korsah, one of the judges who sat on the first hearing, was removed from office and with the amendment of the constitution in 1964,

[3] [1961] 1 GLR 44. [4] [1942] AC 206 (HL). [5] *Re Dumoga* [1961] 1 GLR 44, 56.
[6] (1957) 3 WALR 574. [7] (1959) GLR 1. [8] [1960] GLR 140. [9] (1959) GLR 253.
[10] [1961] GLR (Pt II) 523.
[11] *New Patriotic v Inspector General of Police* 2 G & G (2d) 2097, 2099. [12] [1963] 2 GLR 463.

the other justices whose loyalty to the government was not seen to be absolute were also removed from office.

Without a doubt, the Supreme Court itself contributed to the evolution of the Nkrumah regime into a dictatorship. In the case of *Re Akoto*[13] the judiciary failed to assert its authority to deepen the democratic attitude and the respect for the rule of law when it held that a number of basic human rights referred to in the 1960 constitution were non-justiciable and therefore not binding on the executive. With this decision the stage was set for the Nkrumah government to further annihilate the judiciary. The PDA facilitated a systematic persecution of opposition party members; anybody could be arrested and detained without trial at the whim of the executive. It became very dangerous to belong to an opposition party; the ruling CCP became the *de facto* political party. The 1960 constitution was amended in 1964 to inter alia transform the country into a one-party state with the CCP as the only legitimate political party for the country and also to confer powers on the president to appoint and remove judges at his pleasure.

More evidence of palpable executive disregard for the judiciary occurred in the case of *Balogun v Edusei*,[14] where the applicants and three others were placed under detention pending their deportation. Their motion *ex parte* for *habeas corpus* was heard in court on the 20 October, the same date on which it was filed. The court ordered service of the motion on the Minister of the Interior and on the Acting Commissioner of Police and the date of hearing was fixed for 30 October. The first respondent, with full knowledge of the proceedings, but before the Court order could be drawn up and served upon him, removed the four applicants by plane to Nigeria on 21 October. The consequence was that when the writ of *habeas corpus* came before the Court on 30 October, the judge had no alternative but to simply dismiss the application. The respondents were therefore cited for contempt in respect of which Smith J said:

> In the case before me, it is not a question of disobedience to a Court order, but it seems to me clear that with the knowledge which the first respondent possessed—that a Court order had been made, and was virtually on the way—there was an interference with the administration of the law, and interference with (or prejudice to) the parties litigant, who else could have given evidence during the litigation. I am of opinion that, for these reasons, the application in respect of the contempt must succeed.[15]

The case was subsequently adjourned in the hope that the respondents would purge the contempt. However, early in the morning of the next day when the hearing was due to take place, an Indemnity Act was quickly passed which sought to indemnify the two respondents from all penalties for contempt of court and exonerated them from all other liabilities in respect of any action taken by them in carrying out the deportation orders. Smith J, obviously not enthused with the turn of events castigated the executive as follows:

> By the passing of this Act I take it that the Court's finding that the respondents are in contempt is not challenged by Parliament, but that the intention is to neutralize any

[13] 2 G & G 183. [14] 2 G & G 396 (2d). [15] ibid 400–1.

> consequential order that I might make. It is plain that Parliament prefers that the respondents should not apologise, and it has passed this Act in other to nullify any order which I might make in the absence of the apology. The courts of justice exist to fulfill, not to destroy the law, and it would not make sense for me to record an order which is incapable of being carried out.[16]

Smith J subsequently resigned his appointment and took up another appointment in East Africa.

During this period of outright emasculation, the judiciary operated under the shadows of the executive. That period ended with overthrow of President Nkrumah in a coup d'état on 24 February 1966.

## 3.2 Period of suspicion and minimal trust

The military government that replaced Nkrumah handed over power to a civilian administration under the 1969 constitution. This new constitution was formulated to prevent a recurrence of the dictatorship experienced under the Nkrumah regime. One of the main features of the 1969 constitution was the institutionalization of an independent judiciary that should be able to stand its ground in the face of executive intimidation.

The Constitutional Commission which drafted the 1969 constitution saw much wisdom in the words of Lord Hewart which it quoted *in extenso* that:

> Every student of history knows that many of the most significant victories for freedom and justice have been won in the English Law Courts, and that the liberties of Englishmen are closely bound up with the complete independence of Judges. When for any reason or combination of reasons, it has happened that there has been lack of courage on the judicial bench, the enemies of equality before the law have succeeded, and the administration of the law has been brought into disrepute. In particular there have been, in the long course of English history, periods and occasions when the executive has endeavoured not entirely without success to control and prevent the course of judicial decisions.[17]

The Commission therefore reached the conclusion that:

> [T]he law courts of Ghana shall be the custodian and bastion of the liberty and dignity of Ghanaians, the guardian of the Constitution; in short, the citadel of justice. The independence of the judges is an essential prerequisite to the attainment of this objective and it can be achieved only under certain accepted conditions.[18]

The accepted conditions identified include the elimination of executive interference in matters relating to the actual adjudication of disputes before the courts and also the

[16] ibid 402.
[17] Quoted at 137–8 of *Memorandum on the Proposals for a Constitution for Ghana* from Lord Heward, *The New Despotism* (London, Ernest Benn Ltd 1926).
[18] *Memorandum* 138.

avoidance of situations that place the executive in a position as would make it or 'offer' it the temptation to exert any pressures, however subtly, on the judiciary.[19]

The Commission accepted the general proposition that separation of powers as between executive and legislative arms of government cannot be rigid; however it rejected any such assertion in respect of the relationship between the executive and the legislature on one hand and the judiciary on the other hand. The Commission was of the opinion that by the nature of its functions, the judiciary is more 'amenable to a separate existence'.[20] It was therefore the considered opinion of the Commission that the appointment and removal of judges and their conditions of appointment and removal shall be such as to guarantee their security of tenure. It shall also be such as to ensure that 'the executive and its agencies including the Civil Service shall have no vestige of control over the administrative process of the judiciary'.[21]

The subsequent 1969 constitution therefore firmly guaranteed the separation of the executive from the judiciary but with some connection in terms of appointment without necessarily compromising the functional independence of the judges. Article 102 of the 1969 constitution provided, for example, that:

> The judicial power of Ghana shall be vested in the Judiciary of which the Chief Justice shall be the Head; and accordingly no organ or agency of the executive shall be given any final judicial power.

For the first time, the power of judicial review was expressly entrenched in the constitution together with elaborate provisions on the independence of the judiciary.[22] It was on the basis of this background that the Court of Appeal, in the case of *Sallah v Attorney-General*[23] declared unlawful the action of the executive to terminate the appointment of a number of civil servants. The then prime minister was not very happy with the decision but unfortunately for the government there was no option of an appeal because the Court of Appeal was at the time sitting as the Supreme Court and therefore its decision was final. Out of frustration the prime minister went on radio to rant that 'no court can enforce any decision that seeks to compel the government to employ or re-employ anyone. That would be a futile exercise. I wish to make that perfectly clear.'[24]

This approach was in sharp contrast to the position under Nkrumah where any dissatisfaction with the judiciary could have led to outright dismissal of the judges as was the case in *State v Otchere*.[25] The protection afforded the judiciary by the 1969 constitution could not have permitted the executive to behave as former President Nkrumah did. This nevertheless generated an atmosphere of suspicion between the executive and the judiciary, and for the prime minister who had sworn to protect the constitution to come out openly to denounce and refuse to be bound by the decision of the Court was worrying.

[19] *Memorandum* 138. [20] *Memorandum* 139. [21] *Memorandum* 138.
[22] See ch 9 of the 1969 constitution. [23] 2 G & G 1319 (2d).
[24] Prime Minister Dr Busia's Radio Broadcast (20 April 1970) on the *Sallah* Decision—see 2 G & G 1374 (2d).
[25] See n 12.

It was therefore precisely for the purpose of protecting the integrity of the judiciary from threats such as that of Prime Minister Busia that the 1992 constitution now contains article 2 granting to any person who alleges that an enactment or anything done thereunder or an omission of any person is inconsistent with or in contravention of the provisions of the constitution, the right to bring an action in the Supreme Court for a declaration to that effect.[26] Article 2 further declares that failure to obey or carry out the terms of an order or direction made by the Supreme Court pursuant to the said action will constitute a high crime which, in the case of the president or vice-president, constitutes a ground for removal from office.[27] This provides a bulwark against executive lawlessness which may result in disrespect for the authority of the judiciary.

## 3.3 Mutual toleration

Ghana experienced a number of military regimes since the first coup d'état of 1966. Almost invariably the military governments suspended the existing constitution and governed according to decrees that they enacted from time to time and which they changed at will. Under military administrations whatever protection that the previous constitutions conferred were brushed aside with the abrogation of the particular constitution. Judges could be dismissed at will as happened under the rule of the Provisional National Defence Council (PNDC).

Rather interestingly however, the courts developed a protectionist attitude in favour of the citizenry even under the military regimes, perhaps out of their appreciation of the fact of the dearth of democratic institutions and being the only permitted institution existing after the military take over. The courts consistently showed their tenacity to deliver judgments that often questioned the assumed absolute authority of the military administrations.The cases of *Ex parte Bannerman, Ex parte Salifa*, and *Shallabi and another v Attorney-General and others*[28] provide ample examples of the ability of the courts to challenge the authority of the military.

In *Ex parte Bannerman*[29] for example, the High Court by *certiorari* quashed the purported dismissal of Mr Bannerman for the reason that the NLC (a military government) failed to take the proper steps to comply with the procedure specified in its own decree.

Again in *Ex parte Salifa*[30] the High Court refused to recognize a purported decree of the NLC for its failure to satisfy the specified conditions for the promulgation of a decree as prescribed by the NLC's own proclamation. The High Court therefore refused to uphold the detention of Mr Salifa. In the subsequent case of *Ex parte Salifa (2)*[31] the Court upheld the detention after the state followed the proper procedure to promulgate the decree justifying his detention.

In the *Shallabi* case, the NLC (the military government which replaced the Nkrumah regime) promulgated a decree, NLCD 191 in 1967, according to which citizenship was conferred on the plaintiffs. In 1969 the same NLC by NLCD 333 amended Decree No 191 to divest the plaintiffs of the citizenship already conferred by NLCD 191. The

[26] See art 2(1) of the 1992 constitution.
[27] Art 2(4) of the 1992 constitution.
[28] 2 G & G 739 (2d) 1489.
[29] 2 G&G 293.
[30] 2 G & G 374.
[31] 2 G & G 378.

NLCD 333 was deemed to have come into force on 25 July 1967 which was the same date as the coming into force of NLCD 191. NLCD 333 was actually made on 15 February 1969 and gazetted on 21 February 1969. Justice Hayfron-Benjamin, while acknowledging the superior authority of the NLC military government to legislate to cover any circumstance, was however clear in his holding that:

> It is naturally impossible for the National Liberation Council to have amended NLCD 191 by NLCD 333 unless NLCD 191 was in existence before NLCD 333. No one, however mighty and omnipotent, can substitute one thing for a thing that has never existed. It is clear therefore that whatever interpretation is placed on these decrees, the inescapable result is that NLCD 191 was in existence and came into force before NLCD 333 and that the plaintiff acquired citizenship rights under NLCD 191. The latter decree not having specifically diverted those who acquired citizenship of their rights, it is clear that they continue to enjoy these rights, unless the same has been specifically removed by subsequent legislation.[32]

The Court therefore upheld the right to citizenship of the plaintiffs.

In these and other such cases there was a clear determination on the part of the judiciary to hold the executive to its own terms and thereby provided some protection to the individual even under military regimes that were noted for their arbitrariness.

## 3.4 Self-assertion of the judiciary

The 1992 constitution protects the judiciary from executive and legislative interference. The constitution creates the judiciary as 'independent and subject only to this Constitution'.[33] More particularly the judicial power of Ghana vests in the judiciary and 'neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power'.[34] The experiences of the judiciary under the PNDC military administration created a sense of self-assertion when the political climate changed under the 1992 constitution with the same crop of PNDC operatives now wearing the garb of democratic leaders. The judiciary was now able to take umbrage under the constitutional provisions that guaranteed its independence. Under the 1992 constitution the judiciary, like a bird out of a cage, was ready to fly to assert its freedom. This was manifested in two politically charged decisions, namely *New Patriotic Party v Attorney-General*[35] and *National Patriotic Party v Inspector General of Police*.[36]

In the case of *New Patriotic Party v Attorney-General*[37] (31 December case) the Supreme Court was presented with the opportunity to establish its relationship with the executive. The facts of the case were that on 31 December 1981 Flight Lieutenant Jerry John Rawlings led a military revolt that overthrew the constitutionally elected government of Dr Hilla Limann. The Limann administration was replaced by a military government headed by Rawlings. In 1989 the Public Holidays Law, 1989

[32] 2 G & G 739 (2d) 1489, 1497–8.
[33] See art 125(1) of the 1992 constitution.
[34] See art 125(3) of the 1992 constitution.
[35] (1993–94) 2 GLR 35.
[36] 2 G & G 2097 (2d).
[37] (1993–94) 2 GLR 35.

(PNDCL 220) was promulgated making the events of 31 December 1981 an annual anniversary. The Rawlings military administration remained in power until 1993 when an election conducted under the new 1992 constitution was won by Rawlings who then became president under that constitution. During the course of the year and pursuant to the Holidays Law, 1989 (PNDCL 220) the government notified the public of its programme to celebrate the anniversary of the 31 December 1981 revolution. The plaintiff, a registered political party issued a writ invoking the original jurisdiction of the Supreme Court seeking the following redress:

> (1) A declaration that the public celebration of the overthrow of the legally constituted Government of Ghana on 31 December 1981, and the financing of such celebration from public funds is inconsistent with or in contravention of the letter and spirit of the Constitution, 1992 and more particularly articles 3(3), (4), (5), (6) and (7) and 35(1) and 41(b) thereof.

An important aspect of the defendant's argument was that the case was a political one and ought not to be entertained by the Supreme Court. The majority decision however rejected that assertion. In the view of Adade JSC:

> It would seem that even in the United States the doctrine of political question does not apply to the United States Supreme Court, the ultimate interpreter of our Constitution, 1992. In any case, by Articles 1 and 2 of the Constitution, 1992, that doctrine cannot have any application to us here in Ghana. With us, issues of constitutional interpretation are justiciable only by the Supreme Court and not by any other court . . . [38]

Taking this position, the Supreme Court could be seen as asserting to the fullest its authority under the constitution and thereby serving the executive the clear notice that its actions would be subjected to the highest degree of scrutiny.

It is instructive to note that the Supreme Court still considered the previous overthrow of the constitution as illegal and this was why the 1992 constitution's transitional provisions sought to grant indemnities to all those who had participated in the overthrow of previous constitutions. The constitution sought to exorcise the spectre of the military coup d'état from the Ghanaian political landscape and therefore provided in article 3(3), (4) that:

> (3) Any person who—
> (a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or
> (b) aids and abets in any manner any person referred to in paragraph (a) of this clause; commits the offence of high treason and shall, upon conviction, be sentenced to suffer death.
>
> (4) All citizens of Ghana shall have the right and duty at all times—

[38] ibid 64.

(a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3) of this article; and
(b) to do all in their power to restore this Constitution after it has been suspended, overthrown, or abrogated as referred to in clause (3) of this article.

This provision was in response to the people's exasperation with the frequency of military interventions in the administration of the country and their abhorrence of military coups d'état. Having rejected the defence argument which was based on the doctrine of political question, the issue of declaration of a public holiday became a constitutional matter that the Court felt able to examine in terms of the provisions of the 1992 constitution. Chief Justice Archer produced a minority decision in which he took the stance that the declaration of public holidays has always been within the exclusive domain of either the legislature or the executive and therefore that: 'This court should not behave like an octopus stretching its eight tentacles here and there to grasp such jurisdiction not constitutionally meant for it'.[39] In his view, to hold otherwise would run counter to the concept of separation of powers as embedded in the constitution. However, in the view of the majority of the Court the celebration of an event which is in principle prohibited by the constitution would run contrary to the spirit of the constitution. In the words of Adade JSC:

> Article 3(4) (a) of the Constitution, 1992 confers a right, and both articles 3(3)(a) and 41(b) of the Constitution, 1992 impose a duty on all Ghanaians to defend the Constitution, 1992. The celebration of 31 December with carnivals, route marches, etc having a tendency to glorify the coup d'état of 31 December will weaken the people's resolve to enforce this right, or perform this duty, ie their resolve to frown upon, and or reject coups, a result which will have the effect of undermining and subverting the Constitution, 1992. It is an insidious and surreptitious way of undermining the Constitution, 1992. The celebration may not be a violent means of subverting the Constitution, 1992; but surely it is an unlawful means under article 3(3) (a) of the Constitution, 1992, if only because its result is a subversion of the Constitution, 1992.[40]

Francoise JSC put it more poignantly thus:

> An event that has earned its architects an indemnity under section 34 of the Transitional Provisions of the Constitution, 1992, must, as observed before, be consigned to the grave with the solemn quietus intoned by the said section. The Constitution, 1992 reminds us that three such events in the past are to be buried with the indemnity of a pardon. Their ghosts should not linger around like phantom wraiths dispensing mischief with reckless abandon.[41]

That was an epitome of the degree of boldness with which the judiciary proceeded to deal with the attempt to glorify the incidence of military interventions in the governance of the country.

[39] ibid 49. [40] ibid 72. [41] ibid 87.

Abban JSC, dissenting, thought that it was within the province of the executive and legislature to declare public holidays of any kind and that it was improper for the judiciary to determine the legality or illegality of such declarations. In his words:

> [F]rom the history of public holidays as I have tried to set out supra, it must be clear to any unbiased mind that the choosing or selecting of a day to be designated as a public holiday has always been a political decision for the executive and the legislature. The Sovereignty of Ghana resides in the people as provided in article 1(1) of the Constitution, 1992. So it is for the people of Ghana acting through their elected representatives in Parliament who in conjunction with the executive, ought to decide which days out of the 365 days in a year should be designated public holidays and not for the judiciary to undertake that exercise.[42]

The significance of this decision was that the judiciary felt able to confront the Rawlings administration. This was an administration that used to hold absolute sway under the PNDC government but which was now constrained by the principles of constitutionalism embedded in the 1992 constitution, according to which the civilian administration headed by President Rawlings was now obliged to operate. The majority of the Bench felt able to assert itself based on the strength of the constitutional provisions of the 1992 constitution and of course, reading between the lines, its own determination and a recognition of its position as the protector of the democratic principles inherent in the constitution.

The government had no choice but to respect that decision, for failure to do so could fall foul of article 3 of the 1992 constitution which created an offence of high treason for the failure of the president or vice-president to respect decisions of the Supreme Court.

In the other classic case of *National Patriotic Party v Inspector General of Police*[43] (*NPP v IGP*) otherwise known as the Public Order Case the Supreme Court felt bold enough to declare as unconstitutional the Public Order Decree that had served the previous PNDC military government by requiring the permission of the police before any public assembly or procession could be organized. The facts of *NPP v IGP* were that prior to the change to democratic governance under the 1992 constitution, the Public Order Decree, 1972 (NRCD 68), passed by the PNDC military government, required a permit from the police as a precondition for the organization and conduct of public processions and peaceful demonstrations. Section 8 of the Public Order Decree, 1972 (NRCD 68) provides as follows:

> (1) Any person who intends
>
> a. To hold or form any meeting or procession; or
> b. To celebrate any traditional custom in any public place shall first apply to a superior police officer for permission to do so.
>
> (4) Where an officer refuses to grant a permit under this section he shall inform the applicant in writing of the reasons for his refusal.

[42] ibid 115. [43] 2 G & G 2097 (2d).

The NPP, an opposition political party, applied for a permit on two occasions to organize public rallies; in terms of the plaintiffs' complaint, on each occasion the permit was granted but in the first case, it was withdrawn and the rally prohibited just the day before it was due to take place, while in the second case the police withdrew the permit on the very day that the rally was scheduled to be held. The plaintiffs argued before the Supreme Court that the Public Order Decree 1972 (NRCD 68) was inconsistent with the 1992 constitution which provides in article 21(1)(d) as follows:

> 21(1) All persons shall have the right to
> (d) Freedom of assembly including freedom to take part in processions and demonstrations . . .

The Supreme Court came to the unanimous conclusion that the requirement of a permit or licence as a prerequisite for the enjoyment of the right to freedom of assembly was unconstitutional and therefore that sections 7, 8, 12(a), and 13 of NRCD 68 were inconsistent with article 21(1)(d) of the 1992 constitution.

In these cases the impact of the judiciary was very much felt and respected. In the 1993 case of *National Patriotic Party v Inspector General of Police*[44] Amua-Sekyi JSC set out the new attitude as follows:

> It was to rescue us from such an abyss of despair that on three successive occasions, in 1969, 1979 and 1992, elaborate provisions on fundamental human rights have been set out in our constitutions and the courts given clear and unequivocal power to enforce them. The constitution, 1992 is now the supreme law of the land, and any enactment or executive order inconsistent with it is null and void.[45]

This represents the new attitude which can be seen in decisions such as the 31 December case and *NPP v IGP*. These cases were decided by a judiciary that is confident enough to pronounce on the unconstitutionality of actions of a government whose personnel had operated in a completely unchecked manner only a year previously under the PNDC military administration. Now under the threat of impeachment, the Rawlings administration had no choice but to respect the decision of the Supreme Court.

## 4. Conclusion

Since independence the relationship between the judiciary and the executive has not been a straightforward one. There was the period when the judiciary was rendered virtually irrelevant; that was the time of the Nkrumah regime when the judiciary was suppressed and became merely an appendage of the executive. There was also the period of suspicion and tolerance between the executive and the judiciary when the judiciary endeavoured to keep the executive in line and the executive equally flexed its muscles whenever it felt uncomfortable. There followed the period of mutual tolerance and then that of judicial self-restraint.

[44] ibid. [45] ibid 2101.

Clearly therefore the assertion that the judiciary is the weakest of the three organs of government cannot be simply assumed in the case of Ghana. Three main factors influence the nature of the relationship between the executive and the judiciary—the constitutional provisions protecting the independence of the judiciary, the political environment, and the commitment of the members of the judiciary itself to stay above obvious partisan politics and to do justice without undue deference to the executive. Over the years Ghana has experienced periods when one or two of these elements were compromised leading to the obvious consequence of a derogation from the authority of the judiciary. Under the 1992 constitution period however, we have a situation in which all the three elements are present at fairly high levels. The 1992 constitution provides adequate constitutional protection to the judiciary making it constitutionally and politically unwise for any ill-intentioned executive to exhibit dictatorial tendencies in relation to the judiciary.

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# 10

# Judicial–Executive Relations in Nigeria's Constitutional Development

## Clear Patterns or Confusing Signals?

*Ameze Guobadia*

## 1. Introduction

From independence in 1960 to date, Nigeria has at different times, operated under parliamentary and presidential systems of government separated by interludes of military rule. Each of these experiences has resulted in peculiar variants of the relationship between the different arms of government. These relationships have not always been founded on a clear theory of separation of powers and its attendant principle of checks and balances, although lip service has often been paid to both. While the relationship between the executive and legislature (the political and more visible branches) has been the subject of much debate and discussion, judicial–executive relations in this setting has generated far less discussion with the role of the judiciary being simply passed off as the interpretative function that comes with the power of judicial review. This readily connotes action by the judiciary on legislative activity. There is usually too little attention paid to the judicial reaction to executive activity and the implications for constitutional development.

In what is more than a mere historical narrative, this chapter examines judicial–executive relations in Nigeria's constitutional development with a view to identifying discernible trends. The chapter is divided into six sections that situate the discussion within the context of Nigeria's constitutional history and its engagement with separation of powers. The nature and scope of the powers of both branches of government and their relations *inter se* are examined in subsequent sections under such themes as the appointment, discipline, and removal of judges; judicial independence; financing the judiciary; the support system generally available for the judiciary; judicial response to executive action; and relevant case law. The chapter concludes with an evaluation of discernible trends.

## 2. Nigeria's Constitutional History: A Brief Overview

Nigeria's British colonial antecedents paved the way for the adoption of a parliamentary system of government at independence in 1960. The country's constitutional history has been well documented[1] and bears no repeating here. This brief overview

[1] See, for example, Benjamin Obi Nwabueze, *A Constitutional History of Nigeria* (Longman Inc in association with C Hurst and Co 1982); Taslim Olawale Elias, *Nigeria: The Development of its Laws & Constitution* (Stevens & Sons 1967).

is designed to situate the operation of the doctrine of separation of powers in Nigeria in a historical context. The Independence Constitution of 1960 was given effect to by an Order in Council of the British monarch. It was the culmination of developments in the governance of the colonial territory, including but by no means limited to, earlier constitutions enacted from 1922[2] (after the amalgamation of the Northern and Southern parts of the country in 1914). These all preceded the struggle for and final preparations for independence. Adopting a republican constitution, Nigeria became a republic in 1963. Both the 1960 and 1963 constitutions, established a cabinet system of government under which ministers had seats in the legislature[3] and were collectively responsible to it.[4] Therefore, only the judicial branch could be said to be separate although there was a 'lack of a clear, explicit separation of judicial power from the legislative and executive powers'.[5] Apart from the fusion of the executive and legislature, there was a direct conferment of legislative power on parliament under the 1963 constitution.[6] That constitution did not expressly vest judicial powers in the judiciary although it created specific courts and provided for the appointment of judges, their tenure, jurisdiction, practice, and procedure.

Civilian rule under the 1963 constitution was cut short by military incursion in 1966. This was to last in the first instance, for thirteen years (1966–79) and subsequently, for another sixteen years from 1983 to 1999. Between 1979 and 1983, there was another spell of civilian rule that established a presidential system of government[7] premised on a clear division of the powers of government between three separate and distinct branches viz, the executive, the legislature, and the judiciary under a supreme constitution which has continued to the present. Under the 1999 constitution (the constitution), there is a clear separation of the functions, personnel, and institutions of the three arms of government. The procedures for carrying out each of these functions are similarly separated. According to Nwabueze, 'the exercise of presidential power within these limits is restrained and moderated by various checks and balances'.[8] These include the power of the judicial branch to pronounce on the constitutionality and validity of the acts of both the legislative and executive branches. This notwithstanding, some overlapping of functions between the branches of government is inevitable for the smooth running of the system and does not detract from the principle of separation of powers. For:

> while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It

[2] The Clifford Constitution of 1922; the Richards Constitution of 1946; the Macpherson Constitution of 1951; the Federal Constitution of 1954. Also relevant here are the series of Constitutional Conferences (1957, 1958) that preceded independence in 1960.

[3] As in 1960, in addition to the federal one, the existing three regions, Northern, Eastern, and Western, each had a constitution enacted by the regional legislatures with the approval of a two-thirds majority of both Houses of the federal parliament under the 1963 constitution. The constitution of the fourth region, the Midwest (created in 1963), was passed by the federal parliament.

[4] Constitution of the Federation 1963, s 90.

[5] Nwabueze (n 1) 91.

[6] Section 69.

[7] Under the constitution of the Federal Republic of Nigeria, 1979.

[8] See Benjamin Obi Nwabueze, *The Presidential Constitution of Nigeria* (C Hurst & Company in association with Nwamife Publishers Ltd 1982) 30–1.

> enjoins upon its branches separateness but interdependence, autonomy but reciprocity . . .[9]

## 3. Executive Power: Nature and Scope

Section 5(1)(a) and (b) of the 1999 constitution vests the executive powers of the Federation in the president to be exercised by him or through the vice-president and ministers or officers in the public service. A cardinal feature of the executive under the constitution is the institutionalization of the Cabinet which is mandated to hold regular meetings and advise the chief executive.[10] In Nigeria's second Republic, the inability of the governor of Kaduna State to form a cabinet was declared unconstitutional by the Court of Appeal. It did not matter that the State House of Assembly had repeatedly refused to confirm the governor's lists of nominees for the Cabinet. The governor and the majority in the legislature belonged to different political parties and for what to all intents appeared to be purely partisan reasons, the legislators refused to confirm the governor's nominees for the Cabinet. Consequently, the governor could not form a Cabinet. This was one of the wrongdoings the governor was charged with in a series of allegations that led to his impeachment and removal from office by the legislature. These and related issues were considered in different court actions[11] that arose as a consequence.

An understanding of the powers of the executive and judicial arms is an appropriate premise upon which their relationship can be examined. Section 5(1)(b) of the constitution states that the executive powers of the Federation,

> shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

There are similar provisions relating to the executive powers of the states.[12] Under this supreme constitution, the executive operates under a specific grant of power which extends to the execution of the constitution itself and the laws passed by the legislature.[13] This involves the running of the administration which also includes the

[9] Per Justice Jackson in *Youngstown Sheet and Tube Co v Sawyer* (the Steel Seizure Case) 343 US 579, 72 S Ct 863, 96 LEd 1153 (1952) 234 US 597, taken from William Lockhart, Yale Kamisar and Jesse Choper, *Constitutional Law—Cases—Comments* (5th edn, West Publishing Co 1980) 198.

[10] Constitution, s 148(2).

[11] See *Musa v Speaker, Kaduna State House of Assembly & Anor* (1982) 3 NCLR 450; *Musa v Kaduna State House of Assembly* (1982) 3 NCLR 463; *Governor Kaduna State v Kaduns State House of Assembly* (1981) 2 NCLR 444; *Musa v Hamza & others* (1982) 3 NCLR 439.

[12] Sub-section 5(2)(b).

[13] There are questions as to whether executive power admits of 'inherent' and 'residual' powers. These raise further arguments about what can be considered an executive power properly so called and what may be termed the means that may be employed in carrying it into effect. A consideration of these issues is outside the scope of this chapter. See however in relation to the United States where these issues have been seriously canvassed, *Myers v United States*, 272 US 52, 47 SCt 21, 71 LEd 160 (1926); *Humphrey's Executor v United States*, 295 US 602, 55 S Ct 869, 79 LEd 1611 (1935). See also the detailed discussion of these cases and the issues in Lockhart, Kamisar, and Choper (n 9) ch 4, s 4. See also Benjamin Obi Nwabueze, *Presidentialism in Commonwealth Africa* (C Hurst & Company in association with Nwamife Publishers 1977) 1–15.

initiation and implementation of policy.[14] In implementing laws, the executive can initiate policies to give effect to the law. In like manner, the executive may also introduce policies which do not proceed directly from a particular law. Such policies can propel the making of new laws by the legislature. Section 5(1)(b) of the constitution envisages this where it extends the executive powers 'to all matters with respect to which the National Assembly has for the time being, power to make law'. The apparent contradiction in this provision introduces the notion of discretion that lies at the heart of how the executive may proceed with its functions. This includes when or how it would exercise a particular power. Where these are not specified in enabling legislation as they often are not, or where the law itself does not prescribe a time frame within which to act, the field is left open for the exercise of discretion by the chief executive and his delegates.

It is settled law that a public authority has a responsibility to exercise this discretion with reason and justice and a lack of malice and arbitrariness. The old English authorities[15] on this were cited with approval in the High Court of the Northern Region in the case of *The Chairman of the Board of Inland Revenue v Joseph Rezcallah and Sons Ltd*.[16] Sometimes the activities of the executive may be quasi-judicial.[17] In such cases, the enabling law would usually provide guidelines for the exercise of such powers. These guidelines are usually in line with basic principles of natural justice. To avoid being impugned as *ultra vires*, the exercise of power by the executive in these instances must be within the confines of the enabling law.

The constitution is premised on the limitation of power. As one commentator points out:

> It was the establishment of judicial restraint upon the executive Agencies of government that marked the beginning of the era of constitutionalism and its extension to the legislature, its consummation.[18]

This fundamental element of constitutionalism finds expression in the principle of checks and balances that proceeds from the doctrine of separation of powers as the different branches of government operate as checks on one another. The constitution itself provides restraints on the executive's exercise of its powers. These restraints do not only operate to check the executive within the framework of limitation of powers

[14] Section 148 of the 1999 constitution empowers the president along with the vice-president and ministers who together form the Cabinet, to determine the general direction of domestic and foreign policy. There was no specific grant of power in respect of policy to the executive in the 1963 constitution. The fusion of the executive and legislative branches under that constitution left no room for such a specific grant of power.

[15] See, for example, *Sharp v Wakefield* [1891] AC 173. The cases of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 104; *Wheeler v Leicester City Council* [1985] 1AC 1054 are also instructive.

[16] [1961] NRNLR 32. See also *The Federal Board of Inland Revenue v Azigbo Bros Ltd* [1963] NNLR 121.

[17] Such as where they affect the fundamental or property rights of the individual.

[18] Benjamin Obi Nwabueze, *Ideas and Facts in Constitution Making (The Moroundiya Lectures)* (Spectrum Books Ltd 1993) 192.

but more importantly, demonstrate the nature and extent of its relationship with the other branches.

Before proceeding with a discussion of judicial–executive relations within this milieu, something must be said about the nature and scope of judicial power.

### 3.1 Judicial power: nature and scope

Section 6(1) of the 1999 constitution vests the judicial power of the Federation in the judiciary, effectively separating it from the other branches by delineating its powers thus: 'The judicial powers of the Federation shall be vested in the courts to which this section relates being courts established for the Federation.' Section 6(2) makes an equivalent provision for the states. Section 6(6)(a) states that the judicial powers vested in the courts 'shall extend, notwithstanding anything to the contrary in this Constitution, to all the inherent powers and sanctions of a court of law'. The constitution is supreme[19] and the actions of the branches and organs of government have to be in conformity with its provisions. Given that fact, the importance of a separate organ (the judiciary) empowered to pronounce authoritatively on the constitutionality of the actions of the executive and legislature by striking them down or validating them as the case may be, cannot be overemphasized. This is the power of judicial review envisaged in the constitution. It is an aspect of the wider concept of judicial power espoused by the United States Supreme Court in *Marbury v Madison*[20] in the following words: 'It is emphatically the province of the judicial branch to say what the law is.' This power of judicial review premised on a written, supreme constitution is captured in section 1(1) and (3) of the constitution, thus:

> 1 (1) This Constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
>
> (3) If any other Law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other Law shall to the extent of the inconsistency be void.

On the strength of similar provisions in the 1979 constitution,[21] the Supreme Court in *Attorney General Bendel State v Attorney General of the Federation and 22 others*,[22] struck down the Allocation of Revenue (Federal Account etc.) Act No 1 of 1981 as unconstitutional and void for not having been passed in accordance with the procedure set out in the constitution for the passing of money bills. The fundamental lesson of the judgment lies in the fact that with regard to law-making, procedural irregularity is as unconstitutional as substantive irregularity. The former cannot be justified by any suggestion that in law-making, the end justifies the means.

In *National Assembly v President Federal Republic of Nigeria*,[23] the Independent National Electoral Commission (INEC) brought an action against the National Assembly and joined the president and the Attorney-General of the Federation as co-defendants challenging the constitutionality of the 2002 Electoral Act as not having

[19] Constitution, s 1(1). [20] 1 Cranch 137, 2 LEd 60 1803.
[21] 1979 constitution, s 1(1) and (3). [22] (1981) 3 NCLR 1. [23] [2003] 41 WRN 94 (CA).

been passed in accordance with the procedure prescribed in the 1999 constitution. The Electoral Bill 2002 had been passed by both chambers of the National Assembly but the president failed to assent to it. The legislature then proceeded to override the president's veto by a motion passed by a two-thirds majority of members present. In the Federal High Court, the Act was declared unconstitutional, null and void. On appeal to the Court of Appeal, the Court found that the Act had indeed not been properly passed as merely passing a motion to override the president's veto was not the procedure laid down in the constitution. It declined, however,to grant the declaratory relief sought by INEC on the ground, according to Oguntade JCA (who delivered the lead judgment) that since the Electoral Act 2002 was at the time being used for the conduct of the 2003 elections, striking it down would lead to mayhem. In his view,

> it was sufficient that INEC had obtained a vindication for its rights and in the process enabled this court to express its view as to the procedure to be followed when overriding a presidential veto in the law-making process.[24]

The opportunity to further expound the jurisprudence of judicial review in the case on appeal to the Supreme Court was frustrated by the withdrawal of the appeal.[25] This point underscores the notion of judicial guardianship of the constitution which in the view of Nwabueze, is the fundamental task of the judiciary under a written constitution based on the doctrine of separation of powers.[26] The dimensions of judicial–executive relations in Nigeria's constitutional development should be examined against a background of the foregoing preliminary issues.

### 3.2 Separation of powers: meaning and scope

In line with the doctrine of separation of powers, the constitution vests the powers of governance in three different branches at both the federal and state levels.[27] Much of the literature on separation of powers takes for granted a concomitant operation of checks and balances between the three branches which prevents incursions by one branch into the 'territory' of another. The separation envisaged accommodates, in varying degrees, both a separation of the functions/powers of governance and the institutions that exercise these powers. The extent to which this separation exists in any state is a direct reflection of its system of government.[28] The presidential system with its separation of personnel and functions as well as the independence of each arm is

[24] ibid 110.

[25] Benjamin Obi Nwabueze, who was one of the counsel in the case, gives a critical analysis of the case and a perspective on the some of the underlying currents that influenced the ultimate withdrawal of the appeal from the Supreme Court in his book, *The Judiciary As The Third Estate of The Realm (the Second Justice Kayode Eso Lecture*) (Gold Press Limited 2007) 249–64.

[26] See Benjamin Obi Nwabueze, *Constitutional Democracy in Africa* (vol 3, Spectrum Books Ltd 2004) 33–83.

[27] Sections 4, 5, and 6 of the constitution vest these powers in the National Assembly and state Houses of Assembly (legislative); the president and governors (executive); the courts (judicial) respectively.

[28] Some overlapping of functions is inevitable as the literature shows. For example, the prerogative of mercy vested in the president and state governors is considered by some to be an incursion into the judiciary's sphere of authority. It can however be argued that this power which he exercises as head of state, lies in the president as an embodiment of the state.

predicated on the principle of separation of powers. How it works out, the factors necessary for its operation, and the extent to which it has succeeded in Nigeria raise other issues of constitutional law. These are some of the questions that any examination of the relationship between the branches of government will invariably attempt to answer.

Ironically, it was a landmark judgment of the Supreme Court delivered under a military government that made one of the boldest assertions of separation of powers in Nigeria, taking as its basis, the pre-existing legal order under the 1963 constitution before the military government came into power in 1966. The case was *Lakanmi & Kikelomo v Attorney-General (Western State) & others*[29] in which the legislative authority of both the federal military government and a state military governor was challenged on several grounds including an allegation that the laws in question were a usurpation of judicial power.[30] According to Ademola CJN:

> Those who took over the Government of this country in 1966 never for a moment intended to rule but by the Constitution. They did, in fact, recognize, the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of the Decree No 1 of 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military government should in its power to enact Decrees, exceed the requirements or demands of the necessity of the case.[31]

On the power of judicial review, the Court observed that:

> [I]f the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgement or . . . eroded to [sic]the jurisdiction of the courts, the courts must intervene.[32]

The court declared the laws in question null and void. The Supreme Court was far short of the mark when it failed to appreciate the fact that a coup d état had actually overthrown the former legal order.[33] In the context of a *de facto* military regime which left no doubt as to its character, it was unrealistic for the Court to suggest that the government was bound by the rule of law. The source of its power was not the constitution and no matter how benevolent, such principles as separation of powers that are deliberate limitations on power are antithetical to the nature of a military government.[34] The federal military government reacted by passing its Supremacy and Enforcement of Powers Decree[35] which effectively overruled the judgment and re-emphasized the supremacy of the military government over any judicial pronouncement.

[29] [1971] 1 UILR 201.

[30] Although this case arose under a military regime, it is discussed here to illustrate the view of the Supreme Court of the system of government under the civilian dispensation immediately preceding it.

[31] *Lakanmi & Kikelomo v Attorney-General (Western State) & others* [1971] 1 UILR 201, 221.

[32] ibid 222.

[33] For a more detailed discussion of this issue, see Kayode Eso, 'Is There a Nigerian Grundnorm?' (The first Justice Idigbe Memorial Lecture, University of Benin, Benin, 31 January 1985); Ameze Guobadia, 'Is the Grundnorm Elusive in Nigerian Jurisprudence?' (1987) *Obafemi Awolowo University Law Journal* 60.

[34] As the change was unacceptable to the judiciary, the judges could have resigned.

[35] No 28 of 1970.

The Court's assertion of separation of powers as a principle of Nigeria's system of government under the erstwhile civilian dispensation is however instructive for the purpose of this discussion. In line with the point already made about the application of separation of powers by states in varying degrees however, it must be observed that the fusion of the legislature and the executive under the 1963 constitution limited the scope for the application of the doctrine.

## 4. The Judicial and Executive Branches: Relations *Inter Se*

The functions and powers of these two arms of government (the judiciary and the executive) have been broadly defined in a historical context. The ramifications of their relationship need to be considered for a proper discussion of their relations *inter se*.[36] A useful starting point is the formal process for the appointment, discipline, and removal of members of the judiciary.

### 4.1 Appointment, discipline, and removal of judges

Under the constitution, the executive plays a fundamental role in these matters. Sections 231(1) and (2), 238(1) and (2), 250(1) and (2), as well as 256(1) and (2) of the constitution vest the power of appointment of all justices and judges of the federal courts in the president acting on the recommendation of the National Judicial Council (NJC). In the case of the Chief Justice of Nigeria, other justices of the Supreme Court, the President and justices of the Court of Appeal, the Chief Judge of the Federal High Court as well as the Chief Judge of the Federal Capital Territory, their appointments are subject to confirmation by the Senate. There are similar provisions governing the appointment of judges at state level.[37] The power to appoint is vested in the state governor acting on the recommendation of the NJC. In like manner, some of the appointments are subject to confirmation by the state House of Assembly. The power to remove these judicial officers from office is also vested in the executive. It is to be exercised acting on an address supported by two-thirds majority of the Senate or the House of Assembly of the state as the case may be, on grounds of inability (arising from infirmity) or for misconduct.[38]

A key element of judicial–executive relations plays out in the power and procedure for the removal of other judges (apart from the heads of various courts set out in s 292

[36] For a fuller discussion, see Ameze Guobadia, 'The Relationship between the Executive, Legislature and the Judiciary in a Democracy: Nigeria's Third Republic in View' (1994) 1 *Lawyer's Bi-Annual* 27.

[37] Constitution, ss 271, 276, and 281.

[38] Constitution, s 292; see also the 3rd schedule to the constitution, pt 1, para I, 21(b) and (d) for the power of the NJC to recommend to the president or governor, the removal of judicial officers. Under the 1963 constitution, the Chief Justice of Nigeria and other justices of the Supreme Court were appointed by the president on the advice of the prime minister (s 112(1)). The regional premiers' advice was required in relation to the appointment of four of the justices. Under that constitution, the power to remove justices of the Supreme Court following an address by both Houses of Parliament was vested in the president (s 113 (2)). Apart from physical or mental infirmity, reasons for such removal included 'misbehaviour'. Commenting on this provision, Nwabueze makes the point that 'an allegation of misbehaviour may be no more than an expression of political prejudice in disguise'. See Nwabueze (n 1) 114.

(1)(a) of the constitution) from office. The constitution vests this power of removal in the president or the governor as the case may be, acting on the recommendation of the NJC.[39] What can cause the removal or suspension of a judge from office or indeed the application of any other disciplinary measures against a judge? Guidance may be found in the Code of Conduct for Public Officers.[40] There is also a Judicial Code of Ethics formulated by the judiciary itself with which all judicial officers are expected to comply. A breach of these Codes can set in motion the disciplinary or removal process.

There are international benchmarks for protecting judicial independence against which these processes can be measured. The Commonwealth (Latimer House) Principles[41] for example, include the following key elements as guidelines: (a) disciplinary proceedings that would lead to removal of judges should include appropriate safeguards to guarantee fairness; and (b) disciplinary procedures should be fairly and objectively administered. The efficacy of any disciplinary process would depend on a proper balance of the requirement of accountability to the people and the system without endangering the judges' security of tenure. The hallmarks of accountability in this context include: (a) the existence of some authority that the populace can take complaints against judges to; and (b) the assurance that the complaints will be investigated (and a credible procedure put in place for rejecting and dismissing frivolous petitions). Finally, it should guarantee that consequential action will be taken following the outcome of an investigation. These suggestions lend themselves to consideration in Nigeria, in light of some of the actions taken against some judicial officers in recent years. They will be better appreciated against a background of the powers, composition, and some actual activities of the NJC.

## 4.2 The National Judicial Council

The National Judicial Council (NJC) comprises twenty-three members, seventeen of whom are appointed directly or ultimately[42] by the Chief Justice of Nigeria (CJN) who chairs the body. Membership consists of retired justices of the Supreme Court or Court of Appeal; Chief Judges of the states who serve in rotation; one Grand Khadi of the Sharia Court of Appeal and one President of the Customary Court of Appeal who serve in rotation; members of the Nigerian Bar Association (who only sit on the Council to consider the names of persons to be appointed to superior courts of record); and two other persons of unquestionable integrity. There are in addition, occupants of named offices who are permanent members of the Council. These are the next most senior justice of the Supreme Court after the CJN, who is the Deputy Chairman; the President

[39] Constitution, 3rd sch, pt 1, para 21(b) and (d).

[40] See the 5th schedule to the constitution where public officers are defined to include judicial.

[41] Commonwealth Parliamentary Association, *The Commonwealth (Latimer House) Principles on the Three Branches of Government* (2009) <http://www.cmja.org/downloads/latimer house/commprinthreearm> accessed 1 July 2015. They were endorsed by the Commonwealth Heads of Government to serve as a guide to member nations on democratic governance, the accountability of the arms of government, their relations *inter se* and, in the present context, the independence of the judiciary.

[42] 'Ultimately' in the sense that some other institution or interest group such as the Nigerian Bar Association (NBA) may recommend some members but the final choice rests with the CJN.

of the Court of Appeal; the Chief Judge of the Federal High Court, and the President of the National Industrial Court.[43]

### *4.2.1 The NJC and the suspension of the President of the Court of Appeal*

The suspension of Justice Salami, President of the Court of Appeal (PCA) from office in 2011 illustrates the extreme consequences that can follow the exercise of unbridled power by the NJC as well as the lapses in the constitutional provisions relating to that body. The issues in contention arose from election petition appeals pending before or decided by the Court of Appeal in respect of the 2007 governorship elections in Sokoto, Ekiti, and Osun states respectively. The Sokoto state governorship tussle was however the immediate cause of the controversy. The following facts are relevant for a better understanding of the issues. First, the Sokoto state governorship election, the subject of the petition that was in issue was held in 2007 and by 2010, the matter had not been resolved. Second, the Court of Appeal was the final court in gubernatorial election petitions at the time[44] and different partisan political interests (not necessarily confined to Sokoto state) were likely to be interested in and possibly affected by the Court's decisions. Third, the immediate facts that led to the suspension of the PCA arose in 2010 when the 2011 general elections were clearly within sight.[45]

The relevant facts are distilled here from the writ of summons and other processes, including affidavits, letters, and other attachments as well as responses and other documents from some of the defendants in a suit filed by Justice Salami against the NJC, the Deputy Chairman of the NJC, Katsina-Alu CJN, and eight other defendants,[46] challenging different actions by some or all the defendants relating to the matters in issue. Some of the defendants had served as members/chairpersons of the special investigative panels of the NJC that looked into complaints/petitions levelled against the President and some other justices of the Court of Appeal.

The plaintiff alleged that the CJN sought to influence the outcome of the Sokoto state governorship election appeal by asking the PCA to direct the justices of the Court of Appeal to (a) dismiss the appeal and or (b) put on hold delivering judgment in the matter for which a date had already been set. At some point in the course of these events and only after the PCA refused to accede to the suggestion or directive of the CJN regarding the judgment, it was alleged that the pending judgment in the election petition had been leaked. It is fair to surmise that this allegation was intended to justify the action of the CJN.

Amongst other averments, the PCA was emphatic that when the CJN called him to his office to make these suggestions/give his directives on the 8 February 2010, no allegation that the pending judgment had been leaked was made to him by the CJN and that there was no petition alleging leakage of the judgment either. As the court

[43] See the constitution, 3rd sch, pt 1, para I.

[44] The law has been changed to make the Supreme Court the final court in governorship election petitions. See the constitution, s 233(2)(b) as amended.

[45] In anticipation of potential disputes from the 2011 elections, the quest for soft landing in the Court of Appeal was not far-fetched.

[46] Suit no FHC/ABJ/CS/723/11 (still pending in court).

processes showed, petitions only appeared later. Interestingly, these petitions were dated 15 February 2010, one week after the events that transpired between the CJN and the PCA on 8 February 2010. They did not allege that the judgment[47] had been leaked. In his reply to the letter written to him by the CJN attaching petitions allegedly received in respect of the Sokoto state governorship election appeal, the PCA gave the following insight into the matter:

> I am unable to see the urgency in the matter to warrant your lordship's intervening in a court proceeding which interference respectfully is contemptuous of the Court sitting in Sokoto. Yours appears to be a deliberate attempt to frustrate the hearing. It is the practice of the National Judicial Council on whose behalf your lordship is purportedly acting, not to interfere in matters that are subjudice . . . I rejected your Lordship's entreaties. Thereafter, petitions emerged in Your Lordship's Chambers on the 15th of February, 2010.[48]

Soon after, the PCA found himself suddenly nominated for appointment to the Supreme Court. He declined the nomination describing it as an 'unholy move to push me out of the Court of Appeal'. He preferred to remain President of the Court of Appeal until retirement.[49] These events culminated in Justice Salami's suspension from office by the NJC. Some time elapsed and Justice Salami was not recalled until he attained the mandatory retirement age in spite of his being cleared of all wrongdoing by a differently headed NJC. It has been alleged that the reason for the failure to recall him was the fact the NJC did not receive the President's assent as chief executive to recall the PCA. It would seem that there was a misconstruction of the effect of section 238(4) of the constitution which states:

> If the office of President of the Court of Appeal is vacant, or if the person holding the office is for any reason unable to perform the functions of that office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed those functions, the President shall appoint the most senior justice of the Court of Appeal to perform those functions.

The provision does not suggest that the President must assent to the recall of a suspended PCA who has been cleared of any wrongdoing. There is no constitutional basis for a different interpretation. It is also trite that the President was similarly not to be consulted before the PCA could be suspended from office by the NJC acting under its constitutional power to 'exercise disciplinary control over' judicial officers.[50] Indeed,

[47] Interestingly, the NBA also set up a committee to investigate the face-off between the CJN and PCA. The committee found as a fact that the petitions did not allege any leakage of the judgment and did not exist on 8 February 2010. The committee concluded that 'there does not appear to be any fact and law upon which the CJN predicated his directive that the PCA disband the Sokoto Gubernatorial Appeal Panel either on the two petitions or any purported allegation of judgement leak'. The report of the NBA committee was also filed as part of the appendices in the suit.

[48] This is an excerpt from a letter dated 22 February 2010 from Justice Salami (PCA) to Justice Katsina-Alu (CJN) filed as annex 7 in suit no FHC/ABJ/CS/723/11 (n 46).

[49] It is certainly more attractive to be the Head of the Court of Appeal. At that level, it is more materially rewarding to head that federal court than to be just another member of the Supreme Court.

[50] Constitution, 3rd sch, pt 1, para 21(b).

as section 158(1) of the constitution provides: 'in exercising its power to exercise disciplinary control over persons, the National Judicial Council shall not be subject to the direction or control of any other authority or person'. Accordingly, the President only needed to be informed of the action so that he could appoint an acting PCA in the exercise of his constitutional power to appoint another justice of the court to perform the functions of that office in the interim.

Although the foregoing account raises several issues, it is those that have a bearing on executive–judicial relations and the broader notion of limitation of powers that are relevant to this discussion. They underscore the need for balance in the composition of the NJC. This can ensure that no one individual or organ of government wields excessive power over such a powerful institution. Membership by the Attorneys-General, key members of the executive in such related bodies of the NJC as the Federal and State Judicial Service Commissions (JSC) respectively,[51] not only creates room for some diversity, it also enables them to act as bridges between both arms of government. This is not enough however because as presently constituted, the CJN can in fact 'pack' the NJC—an inference that can be drawn from Sagay's criticism of 'the complete domination of the Council by the Chief Justice of Nigeria'.[52] The extent, if any, to which that may have played out in the Salami affair is yet to be determined.

The Salami affair gives an insight into the possibility of collusion between the executive and judiciary to achieve goals that are not in line with the spirit and letter of the constitution. Whether this occurred in that case is yet to be firmly established. The circumstances surrounding the suspension of the PCA and the failure to recall him in spite of having been cleared of wrongdoing continue to evoke controversy however. The outcome of the case filed by Justice Salami should throw more light on the underlying currents. It should reveal and explain the role played by both branches of government in the affair. Will the Salami case yet become a metaphor for judicial–executive collusion? That remains to be seen.

Ironically, in his criticism of the procedure for removal of a judge under the 1963 constitution, Nwabueze emphasized the need for the input of 'a tribunal composed of a chairman and at least two other members being past or present Superior Court judges'[53] to ensure fairness. Fast forward to three decades after this suggestion was made and extend the suggestion to all matters of discipline of judges. The existence of a body (the NJC), similar in composition to what he suggested, albeit larger, was not able to help an embattled PCA. The statement by the same commentator to the effect that an allegation of wrongdoing against a judge may be no more than an expression of political prejudice in disguise (mentioned earlier),[54] taken together with the suggestion that in anticipation of the 2011 general elections, there was keen political interest in the headship of the Court of Appeal makes such a conclusion plausible.

[51] These bodies are chaired by the Chief Justice of Nigeria and the Chief Judges of the States respectively. The Attorney-General is not a member of the NJC.

[52] IE Sagay, 'The Judiciary in a Modern Democracy' in Ignatius Ayua et al (eds), *Nigeria: Issues in the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies 2000) 76–112, 109. The CJN is chairman and also appoints almost all the other members.

[53] Nwabueze (n 1) 114.

[54] ibid 114.

### *4.2.2 The NJC and the appointment of a State Chief Judge*

The role of the NJC in the appointment of State Chief Judges has raised a lot of controversy as demonstrated in Rivers State where the NJC was in a tussle with the state governor.[55] The controversy arose from the choice of a successor to the retiring Chief Judge of the state in 2014. The constitution empowers the NJC to 'recommend to the Governors from among the list of persons submitted to it by the State Judicial Service Commissions persons for appointment to the offices of the Chief Judges of the States'.[56] Section 271(1) of the constitution provides that:

> The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State.

The governor of Rivers state did not appoint the candidate recommended by the NJC who was the most senior judge in the State High Court, from the two names sent to the NJC by the State JSC. Instead, he sent the name of Justice Agumagu, President of the State's Customary Court of Appeal to the House of Assembly for confirmation. On being confirmed by the state legislature, Justice Agumagu was sworn into office. The newly appointed Chief Judge was subsequently queried by the NJC and asked to explain in writing why he should not be removed from office as a judicial officer for what it described as 'failure to abide by your Oath of Office to uphold the Constitution and Laws of the Federal Republic of Nigeria'. In addition, he was suspended from judicial office. This action of the NJC was predicated on the fact that it did not recommend Justice Agumagu to the governor for appointment as provided in section 271(1) of the constitution. In the ensuing crisis, the Rivers state judiciary and its courts did not function for several months.[57]

The governor had earlier gone to court in *Governor of Rivers State and another v National Judicial Council and another*,[58] seeking a resolution of certain questions concerning the role of a state governor and the NJC in the appointment of the Chief Judge of a state. Amongst them was whether the NJC was constitutionally bound to recommend only the most senior judge in the state judiciary to the governor for appointment as Chief Judge. Justice Lambo Akanbi sitting in the Federal High Court in Port Harcourt, answered this in the negative. The Court also pronounced on whether there are any other factors to be considered by the NJC in making a recommendation to a state governor. Under the constitution, the qualification for appointment as Chief Judge of a state is a minimum post-qualification experience of ten years as a legal practitioner.[59] There is no restriction as to where the appointee can be chosen from. This was confirmed by the Federal High Court in that case. It was lawful for the governor to appoint a Chief Judge without considering extraneous factors such as

[55] It also demonstrates the anomaly in having the NJC as a federal body, play so fundamental a role in the affairs of a state judiciary.

[56] Constitution, sch 1, pt 1, para 21(c).

[57] The new governor sworn in on 28 May 2015 has since sworn in the nominee of the NJC as acting Chief Judge. The nomination is yet to be confirmed by the legislature.

[58] Suit no FHC/PH/CS/421/2013 (unreported).

[59] Constitution, s 271(3).

whether his appointee came from the State Customary Court of Appeal rather than the High Court. The governor was not bound to accept the nominee of the NJC. The constitution provides that the governor appoints 'on the recommendation of the NJC'. To recommend 'mainly suggests … trying to be helpful',[60] it does not imply that the appointing authority, in this case, the governor, is bound to accept the recommendation. Having recommended, the NJC has no further role in the matter. The governor cannot appoint without the recommendation of the NJC either. This is where procedurally, the governor was wrong. He could have continued to reject the recommendations until the NJC came up with a name acceptable to him. That could also have led to a stalemate that would have required better management of judicial–executive relations to resolve. A practical solution is to consider placing a limit on the number of times a state governor may reject the nominees of the NJC for Chief Judge. The NJC should also be made to send more than one name at any time for a governor to choose from.

Some lessons can be drawn from the procedure for appointment of other judges (other than the Chief Justice of South Africa) to South Africa's Constitutional Court. There the Judicial Service Commission (JSC) recommends to the president a number of names equivalent to the vacancies to be filled, plus three additional names. The president then appoints after consulting the Chief Justice and leaders of parties represented in the National Assembly. The president may choose any of the names recommended and must advise the JSC, with reasons if any of the nominees are unacceptable. The JSC then has to send more names and the president is compelled to make the appointments from this second list.[61] This procedure, while allowing for the required checks and balances, ensures that a stalemate is not reached.

The failure of an earlier attempt[62] to make the appointment of Supreme Court Justices the responsibility of the president acting only on the advice of the NJC without confirmation by Senate underscores the salutary element in the Rivers state controversy which upholds the concept of checks and balances in the appointment process.[63] The question also arises as to whether the facts support the argument for more political involvement in the process of appointment and removal of judicial officers. Justice Agumagu has gone to court to challenge the different actions of the NJC as they pertain to him. While it is true that the aggrieved parties in the two instances discussed have a right to judicial determination of their grievances, the ultimate utility of that right may be doubtful. First, it is significant that a few years down the line, the Salami case is yet to be concluded. Second, one must question how comfortable a serving judge will be in deciding against the NJC if justice so demands? The words of Lambo Akanbi J in the *Governor of Rivers State* case[64] sum up the issues well. He opined that he was holding that the reasons given by the NJC for recommending one judge over another as Chief Judge were wrong, 'with great trepidation

[60] See Albert Sydney Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press 2010).

[61] Constitution of the Republic of South Africa, 1996, s 174(4).

[62] See the Report of the Constitutional Conference 1995, vol 1, Draft Constitution s 231.

[63] With the effective participation of all three branches of government.

[64] *Governor Rivers State* (n 58) unreported.

bearing in mind that the Defendant, (i.e. the NJC) are [sic] my employer'.[65] Need more be said?

In the light of both the Salami affair and the stalemate that occurred in the Rivers state judiciary, perhaps the time has come to consider the establishment of a higher body for the judiciary to which the NJC will be accountable, particularly in the discipline of judges. This institution should comprise in the main, retired judges of superior courts known to be of unquestionable integrity. Along with the recommended changes to the composition of the NJC and a whittling down of the overwhelming power of the Chief Justice in its composition, such a move may indeed make the much needed difference.

### *4.2.3 Funding and other support for the judiciary*

Section 81(3) of the constitution provides that:

> Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the States under Section 6 of the Constitution.[66]

The NJC is constitutionally empowered to 'collect, control and disburse all monies, capital and recurrent; for the judiciary'.[67] Were the judiciary simply to prepare and defend its budget estimates before the legislature, the budgetary process for the judiciary should, going by the provisions of the constitution, be conducive to its independence. At federal level, what actually happens in practice is that a mid-term budgeting exercise is embarked upon by the executive at which all ministries, departments and agencies (MDAs) of the executive branch as well as the judiciary submit their budget proposals for the coming year to the Budget Office of the federation (an office under the executive). A ceiling is then placed by the executive on the amount that may ultimately be proposed by each MDA and the judiciary. It is instructive that the budget of the legislature is not subjected to this process. In practice, it is the estimates that are produced from this exercise that are in fact defended by the judiciary before the legislature. There is nothing in the constitution that authorizes the executive to take these steps in relation to the judiciary's budget estimates! This practice of placing a ceiling on the estimates of the judiciary or even reviewing its estimates is a serious interference by the executive with judicial independence.

At the level of the states, the situation is worse. Apart from the salaries of judges which are paid directly to the judiciary from the Consolidated Revenue Fund, in practice, other monies (capital and recurrent) as well as salaries of other staff budgeted for the judiciary are held by the executive and released to the judiciary at the pleasure

[65] It is taking the argument too far to say that the NJC is the employer of judges. While the NJC may wield rather enormous powers over members of the judiciary, the real employers of judges are the state and federal judiciary as the case may be and ultimately, the state or federal government.

[66] Specifically s 6(4).This covers all superior courts of record at federal and state level.

[67] Constitution, 3rd sch, para 21(e).

of the state governor. Contrary to the tenor of the constitution, the state judiciary is placed in the awkward position of having to apply to the executive for the release of budgeted funds. Section 121(3) of the constitution is clear. It provides that 'any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned'. Sections 81 and 84 of the constitution (to which further reference will be made later) are also clear. It is stating the obvious to say that the current practice seriously undermines the independence of the judiciary.[68]

The successful challenge of the whole process of budgeting and appropriations for the judiciary in the case of *Olisa Agbakoba v The Attorney General of the Federation and two others*,[69] laid bare the different ramifications of the problem. It demonstrated the implications of some vital but often overlooked issues that are fundamental to the independence of the judiciary with regard to its funding and its relations with the executive at both federal and state levels. The plaintiff sought the following, amongst other, reliefs: (a) a declaration that by sections 81(2) and 84(1), (2), (3), (4), and (7) of the constitution, the remuneration, salaries, allowances, and recurrent expenditure of the judiciary, being constitutionally charged on the Consolidated Revenue Fund of the Federation, do not form part of the estimates to be included by the president in the appropriation bill as proposed; (b) a declaration that the NJC ought not to send its annual budget to the Budget Office of the executive branch and that by virtue of sections 81(1), (2), (3)(c) and 84(2), (3), (4), and (7) of the constitution, its estimates should go directly to the National Assembly for appropriation; (c) a declaration that funds standing to the credit of the judiciary in the Consolidated Revenue Fund ought not to be released to the judiciary in warrants or through any agency of the executive but should be paid directly in whole to the NJC for disbursement.

Reiterating the supremacy of the constitution and its principle of separation of powers, the Court held that the current practice of the judiciary submitting its budget estimates to the executive arm for inclusion in the appropriation bill to be submitted to the National Assembly, undermined the independence of the judiciary and was unconstitutional. The Court further queried 'if the National Assembly does not submit its Budget Estimates to the executive arm, why should the judiciary be made to do so?' All the reliefs sought by the plaintiff were consequently granted.

Some of these issues were also successfully canvassed before Justice Adeniyi Ademola in *Judicial Staff Union of Nigeria v National Judicial Council and seventy three others*[70] where the emphasis was on the states. The court declared unconstitutional, the failure to pay amounts standing to the credit of the states' judiciaries in the Federation

[68] For a discussion of these and related issues from the perspective of a judge, see Nasir Ajanah (Chief Judge of Kogi State of Nigeria), 'Maintaining a Strong Judiciary' (8th Justice J. M Adesiyun Biennial Memorial Lecture, Lokoja, Kogi State, May 2014).

[69] Suit no FH/LABJ/CS/63/2013 *In the Matter of Interpretation of Sections 81(1) (2) and 84(1), (2), (3) of the Constitution of the Federal Republic of Nigeria 1999* decided by AR Mohammed J on 26 May 2014. The judgment is as yet unreported.

[70] Suit no FHC/ABJ/CS/667/13. The other defendants were the Attorneys-General and governors of all the thirty-six states. The judgment was delivered on 13 January 2014.

Account and the Consolidated Revenue Fund directly to the Heads of Courts in the states. It also declared unconstitutional, the piecemeal payments and allocation of funds to the states' judiciary through the states' Ministries of Finance. The Court went further to make (a) orders compelling the defendants to comply with sections 81(3) and 121(3) of the constitution; and (b) further Ancilliary Orders to serve the judgment on the Accountants-General of the Federation and the states as well as the presiding officers of the legislature (federal and state) to compel their compliance therewith.

There are practical difficulties in the way of giving effect to the declaration that the funds standing to the credit of the judiciary should be wholly paid directly to the NJC for disbursement. The revenue that funds the Consolidated Revenue Fund is not received at once. Funding depends on different variables including sometimes unpredictable accruals from crude oil sales and other sources of government revenue. That notwithstanding, fidelity to the principle of proper funding of the judiciary cannot be overemphasized. As has been so well articulated in the Commonwealth (Latimer House) Principles:

> Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.[71]

The other aspect of funding which goes to the heart of this discussion relates to judges' salaries. In most countries and much of the literature, emphasis is placed on having a constitutional guarantee that the salaries are charged to the Consolidated Revenue Fund.[72] As the salaries of serving judges cannot therefore be withheld or reduced, judicial independence is said to be guaranteed. The adequacy of judges' remuneration which is vital for their independence is not similarly emphasized. The NJC is empowered to: 'advise the President and Governors on any matter pertaining to the judiciary as may be referred to the Council by the President or Governors'.[73] It is similarly empowered to 'deal with all other matters relating to broad issues of policy and administration'.[74] Under these provisions, the judiciary may be able to make an input into the determination of its salaries and related issues. Would this be enough to guarantee its independence? It is significant that the judiciary's input in this may have to be at the initiative of the executive (the president or governor as the case may be).[75] It is also important to note that the Revenue Mobilization Allocation and Fiscal Commission, an executive body established under the constitution, determines the levels and ranges of these salaries.[76] While these facts may have an effect on the independence of the judiciary under a system of separation of powers, creating a special body to determine judicial salaries may not necessarily make a difference either, as the salaries still have to be fixed within the context of the whole economy. It is the independence of the body that undertakes the function that is vital. In this regard, the

[71] See the Commonwealth Parliamentary Association (n 41). More will be said about these principles later.

[72] See, for example, Constitution, s 84(2).

[73] Constitution, 3rd sch, para 21(f).

[74] Constitution, para 21(i).

[75] Constitution, sch 3, pt 1, para 21(f).

[76] Constitution, s 84(1).

security of tenure of members of the Revenue Mobilization and Fiscal Commission guaranteed by the constitution is designed to make them independent.[77]

With regard to the provision of adequate physical infrastructure and other facilities like books, vehicles, etc which is directly linked to funding, it is salutary that at the federal level, the judiciary itself undertakes the provision of the facilities once the funds have been released. The point already made about the impropriety of interference by the executive in the funding of the judiciary is fully applicable here. This is where the NJC and JSC are particularly important and do make a difference. It was not always so.[78] Although the JSC existed at both federal and state levels under the 1979 constitution, their powers did not include the establishment and management of a bureaucracy for the judiciary except for the Chief Registrars and their Deputies in the Supreme Court, the Court of Appeal and the Federal High Court. Under the 1999 constitution, the powers of the JSC at both federal and state levels extend to 'all other members of staff of the judicial service of the federation (State) not otherwise specified in this Constitution and of the Federal Judicial Service Commission'.[79]

Other key issues in judicial–executive relations are reflected in the support system available for the judiciary. Amongst them are those pertaining to trial matters such as the timely production of accused persons in court as well as the protection, and remuneration of witnesses. Others include the provision of staff including secretaries and registrars, the execution of judgments and court orders, as well as the provision of protection for judges at all times. These issues largely point to significant reliance on bureaucracy (the police, the prisons service, etc) and show that the effectiveness of the judiciary often rests on the executive branch. These fundamental support services can be hampered by the various challenges faced by some of the institutions and departments in the executive branch. For example, complaints about the inadequacy of facilities and logistics (such as vehicles, manpower, and housing) for the performance of its functions are recurring themes in the annual reports of the Nigeria police force.[80]

## 5. Judicial Response to Executive Action

A random sampling of some landmark cases decided under different dispensations will shed some light on the subject and give a foundation for a consideration of key issues in judicial–executive relations. In the old case of *Awolowo v Federal Minister of Internal Affairs*,[81] the plaintiff challenged an alleged infringement of his fundamental right to counsel of his choice guaranteed by the Independence Constitution of 1960. The first plaintiff was leader of the opposition in parliament. The first defendant was the Minister of Internal Affairs who was in charge of immigration. The plaintiff was

[77] They can only be removed from office by the president acting on an address supported by a two-thirds majority of the Senate on grounds of infirmity or misconduct.

[78] Before the establishment of the NJC under the constitution, the judiciary had no such control over its funds.

[79] Constitution, 3rd sch, pts 1 and 11.

[80] See the Police Service Commission, 'Annual Reports of the Nigeria Police Force' ('F' Department of the Nigeria Police) 2008, 2010, 2012, and 2013.

[81] [1962] LLR 177.

charged along with several others with the offence of treasonable felony and conspiracy. They retained the services of one EFN Gratiaen QC, a British subject who was enrolled to practise law in Nigeria. Although his papers were in order, on arrival at Lagos airport for the purpose of defending his clients, Mr Gratiaen was refused entry into Nigeria by the immigration officer who was acting on the instructions of the first defendant. Consequently, the first plaintiff had to defend himself at the trial while the other plaintiffs settled for counsel that was not their choice. The plaintiffs then brought this action claiming that the refusal of entry to Mr Gratiaen was a breach of their fundamental right to counsel of their choice and *ultra vires*. They further claimed that it was instigated by malice.

The defendant contended that the Immigration Act vested authority in the first defendant at his discretion to determine who (being a non-Nigerian), could be allowed entry into Nigeria and that this was not inconsistent with the guaranteed right to counsel. The particular provision of the Immigration Act in contention was section 13 which stated thus: 'Notwithstanding anything in this ordinance contained, the Governor-General may, in his absolute discretion, prohibit the entry into Nigeria of any person, not being a native of Nigeria.' Upholding the arguments of the defendants and validating their action, the Court held that the denial of entry to Mr Gratiaen was lawful. According to the Court, the constitutional right to counsel of one's choice

> is subject to certain limitations. It is clear that any legal representative chosen must not be under a disability of any kind. He must be someone who, if outside Nigeria, can enter the country as of right; and he must be someone enrolled to practice in Nigeria.[82]

The Court opined that malice was not the only plausible conclusion that could be drawn from the defendant's action and that in any case, the motive for acting as he did was irrelevant as the power he exercised was absolute. Should the Court have delved more into the possibility of *malafides* or improper motives on the part of the executive, particularly as this was the era in which foreign counsel from the Commonwealth were known to have been given a right to appear in Nigerian courts? Should it have considered whether indeed the executive's interpretation of its statutory power was rational or reasonable in the circumstances? It could not have been the intention of the law-maker to place obstacles in the way of the citizen's enjoyment of constitutionally guaranteed rights. Could the Court not in this light have scrutinized the Immigration Officer's exercise of his discretion however sweeping the words of the Immigration Act? Within the context of the political nuances of the case, perhaps the Court could have done more, particularly as the power exercised by the executive in the circumstances could be described as quasi-judicial.[83] A distinction can be drawn between the executive's exercise of quasi-judicial powers on one hand and discretionary powers on the other. Where, as in the *Awolowo* case the power though discretionary, was also

[82] ibid 185.

[83] The English authorities discuss these issues extensively. See, for example, *R v Electricity Commissioners ex p London Electricity Joint Committee Co* [1924] 1 KB 171; *Wheeler v Leicester City Council* [1985] 1 AC 1054; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 104.

quasi-judicial, the Court could have found against the defendant if the discretion was not exercised reasonably.

In *Federal Minister of Internal Affairs and Others v Shugaba Darman*,[84] the deportation of a Nigerian citizen (then majority leader of the Borno State House of Assembly) to Chad by the federal executive for what appeared to be purely political reasons,[85] was severely criticized and nullified by the courts as being in violation of the fundamental rights guaranteed by the 1979 constitution.

In the case of *Archbishop Okojie and others v Attorney General of Lagos State*,[86] the attempt by the government of Lagos state to abolish private schools as a matter of deliberate executive policy was struck down by the courts as being in breach of the fundamental right to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference under the 1979 constitution. The right to own, establish, and operate any medium for the dissemination of information, ideas, and opinions in section 36(2) of that constitution was held by the Court to be capable of accommodating such vehicles as schools or other educational institutions as it does the mass media, for the dissemination of information, opinions, and ideas.

The case of *Attorney General of Lagos State v Attorney General of the Federation*[87] arose following a circular letter written by the president to the Minister of Finance directing, amongst other things, that no allocation of funds from the Federation Account should be released to the local government councils of some states including Lagos state. The president's directive was sequel to the creation by the affected states of new local government areas in addition to those named in the constitution. The president's circular acknowledged the right of state Houses of Assembly to create local government areas under the constitution. It also pointed out that for the process to be complete however, the National Assembly still had to make consequential provisions with respect to the names and headquarters of such local government areas by means of an Act which it had not done. Lagos state challenged as unconstitutional, the suspension or withholding by the president of the statutory allocations due and payable to local government councils from the Federation Account under section 162(5) of the constitution.

The Supreme Court held that Lagos state had the power to create new local government areas over the existing twenty as it had done under sections 7(1) and 8(3) of the constitution. It also held that the new local government areas so created would not become functional until the National Assembly passed an Act to amend[88]

[84] [1982] 3 NCLR 915.

[85] The federal government claimed that Shugaba (who was not a member of the ruling political party) was a Chad national as his father migrated from Chad. It was found that Shugaba was born in Borno State of Nigeria, of a mother who was Kanuri (a Nigerian ethnic group) and had lived there all his life.

[86] [1981] 1 NCLR 218; [1981] 2 NCLR 337 (FCA).

[87] (2004) 18 NWLR (Part 904) 1.

[88] The use of the term 'amend' to describe the consequential action of the National Assembly, ie, passing an Act to reflect the names and headquarters of the new Local Government areas pursuant to a change duly effected by the state, has been criticized as incorrect as this provision does not envisage an amendment to the constitution as such. That is taken care of by s 9. According to Nwabueze, 'The power conferred by section 8(5) is limited to changing "the names and headquarters . . . of local government areas" consequent upon a change (ie an increase) in their number brought about by the creation of new local government areas

section 3(6) and Part 1 of the First Schedule to the constitution. On the withholding by the president of funds meant for the states named in his circular, the Supreme Court observed per Uwais CJN thus:

> In addition, the 'executive powers of the Federation,' [are] vested in the President by section 5 subsection (1) (a) of the Constitution and such powers extend to the execution and maintenance of the Constitution. This is certainly so, but the question is does such power extend to the President committing an illegality? Certainly the Constitution does not and could not have intended that.[89]

Although the Supreme Court impugned the action of the executive, it stopped short of holding that the real power to create additional local government areas was vested in the states, the role of the National Assembly in the exercise being purely consequential. The Court could have compelled the National Assembly to undertake this function having established that Lagos state had completed its own part of the exercise.

In defiance of the Supreme Court judgment and in breach of the rule of law, the president continued to withhold the funds due to even the twenty local government areas already existing under the constitution before the controversial creation of the additional thirty-seven that led to the case.[90] This was not an isolated incident. The executive also used the administration to make the enforcement of some other court judgments difficult or impossible. Following the nullification of the purported removal of the governors of Oyo and Anambra states between 2003 and 2007 for example, the newspapers were awash with stories that the governors' security details were not restored to them by the federal executive and its agencies like the police.

## 5.1 Judicial response to the executive power of adaptive legislation

Section 315(2) of the constitution provides that:

> The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of the Constitution.

The appropriate authority is defined to include the president and the state governor depending on whether the law is a federal or state law.[91] The executive is only empowered to make merely textual changes to such law which do not affect the substance of the law or make law as the power of law-making remains that of the legislature under the system of separation of powers. In exercise of the power of adaptive legislation, the president made the Allocation of Revenue Modification Order 2002. The Order altered, retrospectively, the extant revenue-sharing formula among the governments in the Federation, set out in the Allocation of Revenue

by a law enacted by a State Government'. See Benjamin Obi Nwabueze, *How President Obasanjo Subverted Nigeria's Federal System* (Gold Press in association with Givani Books (Export) Inc 2007) 40.

[89] (2004) 18 NWLR (Part 904)1 [91].

[90] President Yar'Adua who came into office in 2007 subsequently released the funds.

[91] Section 315(4)(a)(i) and (ii).

(Federation Account, etc) Act.[92] By this modification order, the share of the federal government was increased from 48.5 to 56 percent to take effect from 29 May 1999.

The thirty-six states of the Federation challenged the Order in the Supreme Court in the case of *Attorney General of Abia State and others v Attorney General of the Federation*.[93] In a unanimous judgment that did not recognize the limited scope of the power of adaptive legislation, the Supreme Court held that the Order was valid. The fact that the modifications went to the substance of the existing law and eroded the law-making power of the legislature set out in section 4 of the constitution[94] did not seem to count for anything.[95]

### *5.1.2 Judicial review of political questions?*

A major check on the executive is the power of removal by the legislature consequent upon the sustenance of an impeachment for gross misconduct in the performance of the functions of his office. Sections 143 and 188 of the constitution provide for the removal of the president, vice-president, and the governor and deputy-governor respectively, from office by the legislature for gross misconduct. Highlights of the procedure include the empanelling of seven persons by the CJN to investigate the allegation at the request of the Senate President.[96] Sections 143(10) and 188(10) of the constitution respectively, bar the courts from questioning any matter relating to the impeachment of the chief executive and his deputy. The governor of Adamawa state was removed from office in July 2014 following his impeachment. The legislature in Nassarawa state also commenced the process of impeaching the state governor the same year. In an interesting development, the first of its kind in Nigeria, the investigative panel set up by the State Chief Judge to look into the allegations of misconduct levelled against the governor of Nassarawa state dismissed the allegations.

There have been suggestions that there ought to be room for the courts to pronounce on the conformity of the procedure employed in impeachment proceedings with the constitution. Where the procedural hurdle has been cleared however, sustaining the allegation of wrongdoing and the circumstances that justify removal of a governor or president remain political issues to be decided upon by the legislators. The constitution leaves it to their 'opinion'. The approach of the judiciary to the determination of

[92] CAP 16 Laws of the Federation. [93] (2003) 1 SC (Pt 11) 1.

[94] Section 4 provides that 'the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly . . . '

[95] See Nwabueze (n 26) 219–35 for a discussion of these issues. A slightly differently worded power of adaptive legislation under s 274(2) of the 1979 constitution was the subject of *Attorney General of Ogun State v Attorney General of the Federation, Bendel and Borno States* (1982) 1–2 SC 13 in which the plaintiffs challenged the Constitution of the Federal Republic of Nigeria (Adaptation of Public Order Act) Order 1981 made by the president.

[96] Constitution, s 145(5). See s 188(5) for similar provisions in respect of the states. The procedure for the removal of the members of the executive under the 1979 constitution did not include participation by the judiciary in any way. The Committee to investigate allegations of misconduct was appointed by the President of Senate or the Speaker of the State House of Assembly as the case may be. See the 1979 constitution, ss 132(7) and 170(5). In the second Republic (1979–83), this power was successfully used against Governor Balarabe Musa of Kaduna state under the 1979 constitution.

political questions under the constitution is demonstrated in the cases that have arisen from the impeachment/removal of state governors from office. The fundamental question is whether the judiciary can or will interfere.

An allusion may be made to the attempt by the governor of Nigeria's Western Region under the parliamentary system in the immediate post-independence years to remove the premier from office on the ground that he no longer commanded the support of the majority in the legislature in the celebrated case of *Akintola v Aderemi*.[97] Although it was decided under a different constitution (the Constitution of the Western Region 1960)[98] and a different system of government, the case provides some insights into the determination of political questions. It turned on whether the governor could exercise the power of removal without a vote having been taken on the floor of the House showing that the premier no longer commanded the support of the majority in the legislature. The Supreme Court held that he could not. In his dissenting opinion, Brett FJ said that he could, as the constitution did 'not prescribe as it might have done, the matters to which the Governor is to have regard in deciding whether the condition is fulfilled'. The matter was clearly left to the governor's 'deliberate judgement'. The reaction of the government of the day to the Privy Council decision which upheld the dissenting opinion of Brett FJ was to pass a retrospective law, the Western Nigeria Constitution (Amendment) Law, 1963 the effect of which was to nullify the Privy Council decision.[99] The executive and legislature (fused under the parliamentary system) demonstrated that they could go to any length to undermine the judiciary.

The constitutional provisions for the removal of the chief executive give rather wide powers to the legislature. It is a fair argument[100] to say that by removing it from the purview of the courts, the constitution makes it a matter for the political branches to deal with. There is, of course, the corresponding question as to whether the judiciary should, in such circumstances, foreclose all inquiry into the actions of a coordinate arm. In matters of political questions as has been discussed by Nwauche,[101] the Supreme Court in particular has, in recent times, devised ploys to enable it to pronounce on issues that could otherwise be termed political questions. Amongst these are the Court's insistence on its power to determine whether there has been compliance by the political branches with a procedure laid down by the constitution for

[97] (1962) WNLR 185. The case went on appeal to the Privy Council as *Adegbenro v Akintola* (1963) 3 All ER 544.

[98] Specifically s 33(10) thereof which, as the Privy Council held, was an attempt to read the unwritten conventions of British parliamentary practice into a written constitution.

[99] There are other constitutional issues raised by these facts, including the legality of the government of the Western Region after the Privy Council decision and, by implication, the amendment of the Western Region constitution. These are outside the scope of this chapter. For some discussion of the issues, see DO Aihe and Peter A Oluyede, *Cases and Materials on Constitutional Law in Nigeria* (Oxford University Press 1979) 18–19.

[100] The constitution's definition of 'gross misconduct' that will found the basis of impeachment lends credence to this view. Section 143(11) defines it as 'a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct'.

[101] Enyinna Nwauche, 'Is the End Near for the Political Questions Doctrine in Nigeria?' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Press 2010) 31–60.

the exercise of a particular power[102] considered political, thus paving the way for judicial review.

#### 5.1.3 *Sensitive constitutional matters: a policy of avoidance?*

Self-imposed restraint demonstrated by the reluctance of the judiciary to pronounce on sensitive constitutional matters involving the executive has sometimes resulted in either striking out or dismissing cases, or failing to make consequential orders. This has had the effect of stifling the growth of the law. The withdrawal of the appeal filed in the Supreme Court against the refusal of the Court of Appeal to strike down the Electoral Act 2002 in *National Assembly v President* discussed earlier, was one such example. As has already been observed, that action was actually initiated by INEC and the executive branch acquiesced in it. Had the appeal gone on and succeeded, the Electoral Act 2002 would have been struck down and along with it, the elections that had been conducted under it including those into executive offices.

In like manner, the action filed by Plateau state challenging the constitutionality of the suspension of the governor and House of Assembly of Plateau state and the declaration of a state of emergency in the state in 2006, was struck out by the Supreme Court. This was on the ground that an action in the name of Plateau state could only be brought, at that time, on the authorization of the person appointed administrator for Plateau state during the emergency. The court missed the opportunity to pronounce on the real issues at stake, namely the legality of the state of emergency, the suspension of the democratically elected organs of government, and the appointment of the administrator himself.

There is a sense in which these issues point to some element of a democratic deficit on the part of the judiciary regarding accountability. Judges in Nigeria are not elected and unlike persons elected to legislative and executive offices, do not have to undergo periodic validation by the populace. Therefore they can afford to fail or refuse to act in a cause or matter in which the public is interested. As a result, there is the ever present danger that the executive branch can take advantage of this reluctance on the part of the judiciary to pronounce on sensitive constitutional issues to commit infractions of the constitution at will.

## 6. Clear Patterns or Confusing Signals?

The foregoing discussion of judicial–executive relations in Nigeria's constitutional development has shown that the character of the relationship has not only been determined by the kind of government in force but has also been influenced by the personality of the principal actors in government. The principle of separation of powers as well as the formal separation of both the institutions and personnel that operate the three branches of government under the presidential system premised on a

[102] See, for example, *Ugwu v Ararume* (2007) 12 NWLR (Pt 1048) 367; the Supreme Court per Niki Tobi JSC, went further in *Inakoju v Adeleke* (2007) All FWLR Pt (353) 3, to set down parameters for determining what amounts to gross misconduct that can found the basis for removing a governor or his deputy from office.

supreme constitution show that the ensuing power of judicial review can create tension between the judiciary and the executive. The judiciary can assume the responsibility of managing such tension however because of its non-political character and its role as guardian of the constitution.

The chapter has established the fact that in its response to the actions of the executive, Nigeria's judiciary has played both a scrutinizing and a validating role. There has also been some tendency to avoid sensitive constitutional issues altogether or to stop short of making the decisive pronouncements that can make the difference as in the *Lagos state local government areas* case. While the distinction between the discretionary and non-discretionary powers of the executive has been reflected in the response of the judiciary to different situations, it has been suggested that the judiciary should be more willing to review the exercise of even the so-called discretionary powers in order to ensure their conformity with the spirit and underlying purpose of the constitution. A clear philosophy underpinning the pronouncements of the judiciary is however yet to be clearly identified.

Executive resistance to judicial pronouncements in Nigeria's constitutional history has not been limited to any particular dispensation. Under the parliamentary system in the first Republic, it was easy for a law to be passed to render a judgment ineffective as was done in the aftermath of *Akintola v Aderemi*. The military regime did the same to counter the judgment in the *Lakanmi* case. Under the 1999 constitution, the executive has, on occasion shown a tendency to be more brazen by simply flouting court judgments.

The chapter has discussed some of the practical effects of the constitutional provisions relating to the NJC and their inherent weaknesses while making suggestions for improvement. The discussion has shown what the ramifications of judicial–executive relations could be in this context. A number of questions then arise. Do the facts and issues the discussion raises reflect the dominant political culture in the state? The facts in the Salami affair are indicative of flaws in extant constitutional arrangements. That incident being novel, it cannot be regarded as a pattern. It does however send out alarming signals. In the examples discussed, the two branches of government are depicted as antagonists in some while leaving room for the opposite view in others. Should alignment between the two branches always give room for suspicion? There could be something salutary about the judiciary and the executive being on the same side.

The thorny issue of funding the judiciary and the current practices associated with it provide further insights into the disturbing trends and issues that still need to be addressed in promoting the independence of the judiciary from executive interference. In all, the ramifications of the relationship between these two branches illustrate the dynamic nature of governance and lend credence to the view that ultimately, today's solutions may be premonitory of tomorrow's problems.

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# 11

# Relations Between the Legislature and the Judiciary in Ethiopia

*Assefa Fiseha*

## 1. Introduction

The 1995 federal constitution of Ethiopia establishes federal and regional state courts distinct from the political branches. A dual court structure was introduced during the transition (1991–94) but was further elaborated in the new constitution and subsequent laws that established a more detailed hierarchy of court structures and defined their respective powers.

A thorny relationship seems to be emerging between the judiciary and the legislature in Ethiopia. One indicator is the ever increasing tendency by the legislature to issue ouster clauses that take away power from courts, placing them instead in quasi-judicial bodies within the executive and at times making their decisions not reviewable by courts.[1] On occasions the legislature is also engaged in enacting or amending laws in response to final court decisions. Based on the assessment of existing laws and decisions of federal courts, this chapter investigates whether these developments are in line with the notion of separation of powers as outlined in the federal constitution. By virtue of the constitution, the judiciary is established as an independent body and is vested with broadly stated judicial mandates that give rise to the question of whether the legislature can issue the ouster clauses without limits and whether the courts, particularly those at the highest level, can review decisions of quasi-judicial bodies established by the legislature at least on the basis of errors of law. In providing answers to this question, the relationship between the judiciary and the legislature is explored both as envisaged in the constitution and as it manifests itself in practice. Laws enacted by the federal parliament and decisions of the Federal Supreme Court are the main materials used in analysing the relations between the legislature and the judiciary. The practice of ouster clauses being enacted by the legislature that take away the courts' mandate and placing it instead in quasi-judicial bodies within the executive that are neither impartial nor tenured, together with the self-imposed positivist conception of the rule of law adopted by the highest court, has given rise to a unique conception of separation of powers in Ethiopia. The judiciary is evolving as a handmaiden of the legislature, the latter having little constraint on its mandate.

[1] For more detail, see Section 4.4.

## 2. Historical Background

Except for some efforts since the second half of the twentieth century, Ethiopia's judicial system is characterized by a fusion, not separation, of administrative and judicial functions in one organ. Historically, adjudication in Ethiopia of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice, and the executive proper. Indeed, adjudication of cases was considered to be the principal function of the executive. For example, in Emperor Menlik's (1889–1913) era, the Minister of Justice was also the Chief Justice.[2] The attempt to separate the judiciary from the executive was not easy. A long and tiring process of negotiation in 1942 led to a partial victory as far as the judiciary was concerned: only the highest benches, that is, the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administrators. In all other respects, the court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. At the apex of the court structure, until 1974, was the Emperor, who dispensed justice in the *Zufan Chilot* (Crown Court). Under the *Derg* regime (1974–91), the Ethiopian judicial system was unitary and the country was divided into fourteen provinces that merely served as agents of the centre in which the High Courts would sit and only one Supreme Court in the capital, Addis Ababa. It remained a unitary system until 1992.

The blend of judicial and executive functions in the latter is not without implications. The crisis of the state and its institutions also had its effects on the judiciary. In fact, it is difficult to see the judiciary in isolation from the whole political system under which it operated. Primarily, the judiciary never had a separate existence of its own as an institution. Rather, it sat within the political branches and predominantly within the executive. Second, the judiciary never survived the regime that established it. It was no surprise to see every new regime setting up its own version of the judiciary that suited its purpose. It was never designed to operate as the third branch of the government in the real sense. This left the impression on ordinary citizens that changes in government necessarily entailed another round of appointments and dismissals of judges. Thus, when the Ethiopian People's Revolutionary Democratic Front (EPRDF) came to power and introduced the new federal system after overthrowing the military junta (1974–91) in 1991, the prestige and reputation of the judiciary was at its lowest ebb. It was associated with all forms of nepotism, corruption, and worst of all, an arm of the most despotic regime, notorious for execution of people without any semblance of due process of law.[3] As indicated later in this chapter, although an independent judiciary

[2] Aberra Jembere, *An Introduction to the Legal History of Ethiopia 1434–1974* (LIT Verlag Munster 2000) 219, 227, 240.

[3] See Pietro Toggia, 'The State of Emergency: Police and Carceral Regimes in Modern Ethiopia' (2008) 24 *Journal of Developing Societies* 116; for a detailed account of the arguments behind the dismissal of judges in the transition period both from the side of the judges and the government see Frode Elgesem, *The Derg Trials in Context: A Study of Some Aspects on the Ethiopian Judiciary* (Human Rights Report No 1, Norwegian Institute of Human Rights, University of Oslo 1998).

is proclaimed in the constitution, it continues to face challenges from the political branches and its reputation is still far from improved.[4]

The 1995 federal constitution establishes federal and regional state courts distinct from the political branches. Article 78(1) states that: 'An independent judiciary is established by this constitution.' The constitution further stipulates that 'Judicial powers . . . are vested in the courts'.[5] A dual court structure was introduced during the transition (1991–94) and further elaborated upon in the new constitution.[6] Supreme federal judicial authority is vested in the federal Supreme Court and reserves for the House of Peoples' Representatives (HoPR) to decide by a two-thirds majority vote to establish such lower level federal courts as it deems necessary, either nationwide or in some parts of the country. There is only one Federal Supreme Court with nationwide jurisdiction and until 2003, the Federal High Court and first instance courts were limited to Addis Ababa and Dire Dawa. As far as the organization of the lower level federal courts in the states is concerned the constitution stipulates that the jurisdictions of the Federal High Court and of the first instance courts are delegated to state courts. By virtue of this delegation, the state Supreme Court exercises, in addition to its state jurisdiction, the jurisdiction of the Federal High Court. In order to guarantee the right of appeal of the parties, decisions rendered by a state High Court exercising the jurisdiction of the federal first instance court may be appealed to the state Supreme Court. In addition, decisions rendered by a state Supreme Court on federal matters may be appealed to the Federal Supreme Court.[7]

As far as the state courts are concerned, from the provisions of the federal constitution (state constitutions also provide the same) one finds that the judicial structure consists of the state first instance courts at the lowest level, also called *wereda* courts, above which we have the intermediate zone/High Court and at the highest level we have the State Supreme Court.[8] As a result the Ethiopian judicial system is organized formally on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations.

As for the power of the respective level of courts, the constitution states that the Federal Supreme Court shall have the highest and final judicial power over federal matters while the State Supreme Court shall have the highest and final judicial power over state matters. What constitutes a federal or state matter is often contested[9] but this

[4] For example, *The Reporter* newspaper (Amharic), in its 19 February 2012 issue citing a study made by the Federal Anti-Corruption Commission, stated 'Courts and Municipalities continue to suffer a poor reputation in the eyes of the public'.

[5] See art 79(1) of the constitution.

[6] Art 50(2) of the constitution and see also Proclamation No 322/2003, Federal High Court Establishment Proclamation, A Proclamation to Provide for the Establishment of Federal High Court in Some Regions, *Federal Negarit Gazeta*, 9th Year No 42, Addis Ababa, 8 April 2003.

[7] See arts 78(2), 80(2), (4), (5), and (6) of the constitution.

[8] See arts 80 and 81 and 50(7) of the constitution. Also see arts 67–9 of the constitution of Amhara state, arts 72–7 of the constitution of Southern state, arts 62–7 of the constitution of Tigray state, and arts 61–6 of the constitution of Oromia State.

[9] Arts 79(1) and 80(1) of the constitution. This is rather vaguely defined in art 3 of Proclamation No 25/1996, Federal Courts Proclamation, *Federal Negarit Gazeta*, 2nd Year No 13, Addis Ababa, 15 February 1996. The proclamation allocates subject matter jurisdiction to federal courts on the basis of three grounds: laws, parties, and places. Under the first paragraph federal courts assume judicial power over cases arising

remains the key concept for the allocation of jurisdiction between federal and state courts. The Federal Supreme Court has also a very controversial power of Cassation over state matters when it establishes that state courts have committed a 'basic error of law'. In a federal context, the jurisdiction of the Federal Supreme Court covers matters that fall within the mandates of the federal government. State Supreme Courts assume final and authoritative mandate with respect to matters allocated to the states. Yet in Ethiopia, the Federal Supreme Court also reviews decisions of State Supreme Courts even though issues such as divorce, which is an exclusively state power, have little to do with the mandates of the federal government.[10] This appears to be rather at odds with the federal principle and division of powers between the two levels of governments.

## 3. Separation of Powers in the Context of a Parliamentary System

Ethiopia has adopted a parliamentary system of government, so the relationship between the judiciary and the legislature is analysed in the context of a parliamentary system. Modern parliamentary systems first evolved in Europe,[11] notably so in Great Britain where the cardinal principle is that of parliamentary sovereignty.[12] This principle refers to parliament's absolute right to make and unmake any law whatsoever,[13] that a law enacted by parliament is sovereign, and that, conversely, no individual or institution is allowed to set aside such an act of parliament. However, the notion of parliamentary sovereignty is given a particular context when it is fused with a supreme constitution such as is the case in Germany. The Basic Law governs as supreme law and the parliamentary system operates within the context of the supreme constitution. Likewise, the parliamentary system in Ethiopia operates within a supreme constitution. Parliamentary supremacy is limited as by virtue of article 9 which declares the constitution as supreme. No law, custom, or decision of government body can contravene the supreme law of the land.

Examining the separation of powers in the context of a constitutionally defined parliament leads to a second core feature of parliamentary democracies. Inasmuch as there is a fusion of power between a legislature and executive, the executive derives

under the constitution, federal laws, and international treaties; cases to which the federal government is a party; suits between persons residing in different regions; cases involving employees of the federal government in relation to their official duties and cases to which a foreign national is party. The dividing line between federal and state matters is, however, far from clear in practice. See, for example, Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Eclipse Printers 2010) 357–68.

[10] For details see Muradu Abdo, 'Review of Decisions of State Courts over State Matters by the Federal Supreme Court' (2007) 1 *Mizan Law Review* 61; *Regassa Chali v Werke Kimosa*, Federal Supreme Court 1998 Civil Petition No 29/1998 (unpublished).

[11] See P Hoogwoods and G Roberts, *European Politics Today* (Manchester University Press 2003) 155.

[12] G Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (2nd edn, New York University Press 1997) 101.

[13] The adage is that there is nothing the British parliament cannot do except make a woman a man, and a man a woman. De Lolme's popular expression is quoted in AV Dicey, *An Introduction to the Study of the Constitution* (10th edn, Universal Law Publishing 2008) 43.

from and is constitutionally accountable to the legislature.[14] That is to say, the Cabinet, including its prime minister, is appointed, supported and, if needs be, removed from power by parliament.[15] As far as the relationships between the legislature and the executive is concerned, there is then a fusion, not separation of power between the two organs in parliament.

Nevertheless, it is still possible to write about some level of separation of power between the legislature and the judiciary. The importance of the third arm of the government, the judiciary, has long been recognized although its organization, jurisdiction, and role vary from one political system to the other. It was Montesquieu who articulated the importance of the trinity of the political branches without necessarily defining the kind of relationship and the complex network that exists between the three branches in the different polities.[16] Yet there is some agreement on the notion that separation of powers is not an end in itself. One amongst several of its ends is to prevent abuse of power and the risk of political despotism that comes with the concentration of power in the hands of one government institution, political party, or person.[17]

Separation of powers is not directed against the government's power as such. It acknowledges the role of the government and this is critically so in many developing countries where a lot is expected of the government in terms of bringing about development. But this does not mean that power is left unregulated. Separation of powers is also about limiting power. It follows that a body external to the branch that has allegedly exceeded its power or deviated from its authority has the final say. In the Ethiopian context, this calls for specific interpretation given the fact that the House of Federation (HoF), that is, the second chamber has final authority on constitutional issues.

As already noted, the legislature and the executive share power in parliament but it is, nevertheless, possible to write about some level of separation of powers between the legislature and the judiciary. But before we do that it is vital to identify the core function of the judiciary in Ethiopia albeit the bare minimum as it is precluded from reviewing the constitutionality of laws enacted by parliament.[18]

The design and practice of constitutional interpretation in Ethiopia is distinct. Regular courts are prohibited from reviewing the constitutionality of laws enacted by the legislature. While this could have left a fair share of power for the judiciary, such as the investigation of regulations issued by the executive and decisions of government

[14] 'Parliament makes and breaks the government' expresses this in an extreme form. See D Giannetti and K Benoit (eds), *Intra Party Politics and Coalition Governments* (Routledge Taylor and Francis 2009) 10.

[15] Sartori (n 12) 101; M Flinders, 'Shifting the Balance? Parliament, the Executive and the British Constitution' (2002) 50 *Political Studies* 23.

[16] Separation of powers is understood and interpreted differently depending on whether the system is presidential or parliamentary one. For more detail see G Sartori (n 12), 101–14; Baron de Montesquieu, *The Spirit of the Laws* (Hafner Press 1949).

[17] For a clearer presentation of the concept see Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 35–50, 231. Other ends of separation of powers include creating order and efficiency within the institutions of the state.

[18] See arts 62, 83, and 84 of the constitution.

bodies for their consistency with laws and the constitution, the laws[19] that define the powers and responsibilities of the HoF further limits the jurisdiction of the courts, an institution already weakened because it lacks the competence to review the constitutionality of laws. Thus, according to articles 62 and 83 of the constitution, the HoF is mandated to interpret the constitution and resolve constitutional disputes.[20] In this process, the HoF is advised by the Council of Constitutional Inquiry (CCI), a body composed of eight legal experts (two of whom are the President of the Federal Supreme Court and his Deputy) that are appointed by the president of the country and three members from the HoF itself. Unlike second chambers in other federations, the HoF has no law-making functions. The HoF is a quasi-political body composed of, to use the words of the constitution, 'nations, nationalities and people'. Each group has at least one representative but each 'nation or nationality shall be represented by one additional representative for each one million of its population. As for the selection/election process article 61(3) of the constitution envisages two possibilities. Members of the HoF may be elected indirectly by the state legislature or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states. An overall assessment of the performance of the HoF in the adjudication of constitutional issues reveals that it has played an important role particularly over those cases that are of high political significance. One such example was the Silte internal secession[21] from the Guraghe in March 2001[22] in order to establish local/zonal administration in the South and the settlement of border disputes between Oromia and Somali regional states in 2004.[23] This is linked with the HoF's quasi political nature. However, there are clear implications for the impartiality of the HoF in a multi-party system. The HoF is a political organ dominated by the same

[19] Proclamation No 251/2001, Consolidation of the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, *Federal Negarit Gazeta,* 7th Year No 41, Addis Ababa, 6 July 2001; see also Proclamation No 250/2001, Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazeta*, 7th Year, No 40, Addis Ababa, 6 July 2001; art 84 of the constitution.

[20] See arts 62 and 84. Constitutional dispute has a very narrow meaning. It refers to cases in which a matter is referred to the Council of Constitutional Inquiry (CCI) or the HoF arising from a real case and controversy, which some refer to incidental/concrete judicial review. However, constitutional interpretation could also arise in many other cases apart from real cases and controversies. Issues regarding jurisdictional disputes between the legislature and the executive or clarifications on the mandates of the federal and state governments are often referred to the CCI or the HoF in the abstract without a specific dispute having arisen. The source of potential tension requiring clarification could be a draft law tabled before parliament where MPs raise doubts whether particular articles in the draft law affect mandates of the states or not before they decide to approve the draft law. Hence constitutional interpretation covers a much broader notion than might initially be thought.

[21] Ethiopian constitution, arts 46 and 47 allow ethno-nationalist groups to demand the right to self-rule and establish a new state from a state within the federation or even a new local government from an existing state member of the federation. The Silte is a small ethnic group in the Southern state that demanded the right to self-rule at a local government level. For more details see Lahra Smith, *Voting for Nationality: Ethnic Identity, Political Institutions and Citizenship in Ethiopia* (University of California 2005).

[22] Guraghe zone was the sub state entity in the Southern state from which the Silte internally seceded and established a new local government. See Smith (n 21).

[23] Amongst the nine member states of the Ethiopian federation, Oromia and Somali states share a long unsettled border. As a result frequent conflicts have arisen between the two states. Most of these conflicts were resolved through a referendum facilitated by the HoF that has the mandate to resolve interstate disputes. See Fekadu Adugna, 'Overlapping Nationalist Projects and Contested Spaces: The Oromo–Somali Borderlands in Southern Ethiopia' (2011) 5 *Journal of Eastern African Studies* 773.

party in power. Yet it is mandated to enforce constitutionally entrenched human rights including the civil and political rights that often set limits on the majority in power. With the emerging multi-party politics, it remains to be seen how far the HoF will serve as an impartial adjudicator on important intergovernmental conflicts and in setting limits to power.

## 4. Judicial Autonomy

There appears to be a paradox in the use of the term judicial independence. On one hand we speak about the notion of judicial autonomy, that is, a certain degree of freedom from the political institutions that judges as individuals and the judiciary as an institution enjoy in the process of discharging their functions. On the other hand, we expect the judiciary to have that freedom from the very institutions of which it constitutes a part and which have a say on the mandate of the judiciary. As will be seen later, the political institutions employ various mechanisms to influence the judiciary. This is particularly clear when we analyse the structural autonomy of the courts in relation to the legislature.

Broadly speaking, judicial independence refers to the independence of judges and the judiciary as an institution in the exercise of their judicial function, free from the influence of the other branches of the government or indeed other sources of pressure.[24] In analysing the relationship between the legislature and the judiciary, the conventional approach has been to view judicial independence as constituting both decisional/functional/substantive and structural autonomy of the judiciary and the judges.[25] While there is a consensus on the need to protect the decisional independence of the judiciary from the political branches including the legislature, the structural autonomy of the judiciary can only be a relative one.

### 4.1 Decisional independence

Decisional independence refers to the freedom of judges to decide a case as they see fit by analysing the facts and the law, without any constraint or pressures: external or internal, the limits of the bench being nothing but the law.[26] It is about the judiciary being able to dispense justice according to law and without regard to any other considerations. The Ethiopian constitution declares the establishment of an independent judiciary and vests judicial power in the courts requiring that the judge be directed solely by law.[27] Yet in reality, Ethiopian federal as well as state courts often face

[24] These include other private bodies that may exert equal pressure like the political branches, for instance, economic, social, and ethnic forces, the press, religious or regional pressure on judges. For more on the notion of judicial independence see John Ferejohn and Larry Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *NYUL* 962; Stephen Burbank, 'What do we Mean by "Judicial Independence"?' (2003) 64 *Ohio St L J* (2003) 323; James Brudney, 'Recalibrating Federal Judicial Independence' (2003) 64 *Ohio St L J* 149.

[25] See Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Martinus Nijhoff Publishers 1994) 179–80.

[26] Burbank (n 24) 326.

[27] See arts 78 and 79.

challenges of non-compliance.[28] On occasion, the political institutions have tried to stop the execution of final court judgments.[29]

Another component of decisional independence is the respect shown by, and compliance of, other branches with the courts' decisions.[30] This is a particularly important manifestation of the other branches' commitment to the rule of law. This also requires the legislature to refrain from retroactively reversing specific judicial decisions. While the legislature has the mandate to enact and amend laws, such enactment or amendments should not target specific court decisions. As illustrated in the next section, excessive legislative intervention that targets specific court judgments including cases pending, can affect the outcome of a case. This is against the core principle of judicial independence.[31] Acting otherwise implies that the legislature has turned itself into a court and resolved the dispute by legislation.[32] Yet as the following section briefly demonstrates, the legislature is at times engaged in reversing specific and final court decisions.

## 4.2 Legislative reversal of pending and final court judgments

According to article 1723 of the 1960 Civil Code of Ethiopia, rights related to immovable property must not only be written but should also be registered in the notary's office. The courts at the federal level have interpreted this clause differently in a number of cases. Some courts have stated that the written formality requirement alone is enough for validity of the contract governing the rights related to immovable property. The registration requirement is not required for validity of the contract but in relation to creating rights in *rem*, that is, rights that can be enforced against a third party. Other judges have interpreted this clause to mean that a contract involving immovable property such as that governing the sale or mortgage of property must be both written and registered to be valid even as between the two parties to the contract themselves. Not surprisingly, both government and privately owned banks have

[28] Incidents of non-compliance with court decisions, particularly in criminal cases, are common. For details see Alemayehu Tegene, *Independence and Accountability of Oromia Regional State Judiciary in Light of the Judicial Reform Program* (LLM Thesis, AAU 2007 unpublished) 97. In Gambela regional state the executive or local legislative body has, at times, reversed court decisions. See Obong Ojulu Gilo, *Problems Faced by the Judiciary in Gambela Region* (LLB Thesis, ECSC 2000) 11.

[29] In 2014 the Federal Minister of Justice issued a circular directing federal courts not to hear cases related to a bankrupt real estate investor which raised serious debates in the media during the spring of 2014.

[30] Peter Russell, 'Towards a General Theory of Judicial Independence' in Russell P and O'Brien D (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia 2001) 6.

[31] A comparative study of this issue suggests that there is a fine line between what is called the *direction principle* where the legislature repeals or amends an existing law or enacts a new law aiming to influence the outcome of a case pending before a court of law which is a violation of separation of powers; and the changed law rule, where the legislature repeals, amends, or enacts a new general law that may have an impact on a pending case or even a final court judgment. The latter is a substantial change in the law and is considered part and parcel of the legislature's mandate and not a violation of separation of powers. For more detail see Peter Gerangeios, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing 2001).

[32] Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Martinus Nijhoff Publishers 1994) 158.

provided extensive loans to borrowers based on written contracts but without complying with the registration requirement. When the court at the highest level ruled that the lack of registration nullifies the validity of mortgage contracts,[33] the entire banking system was thrown into a panic. This interpretation by the highest court that, in order for a mortgage to be valid, it required both a written contract and registration, resulted in legislative intervention[34] to save the banking sector. However, although the legislature could have enacted an amendment/repeal law with only prospective effect, the law enacted went beyond what was necessary.

The first part of the amendment states as follows:

> Notwithstanding the provisions of sub-article (1) of this article (1723), a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution may not require to be registered by a court or a notary.

The implication is that a mortgage contract between the bank or another financing institution remains valid so long as it is written. The failure to register the written contract does not nullify the contract. In effect, with this amendment, the legislature is stating that highest court's decision requiring registration in order for the mortgage contract to be valid, was wrong and that courts should continue to enforce written mortgage contracts as valid even though they are not registered. This clearly serves the intention of the government to save the banking system from collapse.

Two new articles in the amendment law, however, call for careful investigation. The first one stipulates:

> The validity of any contract of mortgage concluded, *prior to the effective* date of this Proclamation, to provide security to a loan extended by a bank or a micro-financing institution, may not be challenged for not being registered by a court or notary in accordance with Article 1723 of the Civil Code (emphasis added).

The question is, can a legislature enact a law retroactively in a manner that precludes courts from adjudicating cases which do not comply with a previously enacted law, without violating the separation of powers? The intention of the legislature is clear. It wanted to maintain the validity of contracts such as those governing sales and mortgages involving immovable property despite their lack of registration. This time, however, the intention works retrospectively and precludes the courts from nullifying such contracts.

Even worse is the second part of the amendment law. It states:

> Any court decision, *rendered prior* to the effective date of this Proclamation, to invalidate a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution, *for not being registered by a court or notary in accordance with Article 1723 of the Civil Code shall have no effect. Any such case pending before any court as of the effective date of this Proclamation shall also be terminated* (emphasis added).

[33] The leading case is *Gorfe Workneh v Aberash Dubarge* Federal Supreme Court Cassation Division File No 21448 v 4, 40.

[34] See Proclamation No 639/2009, Civil Code Amendement Proclamation.

While it is clear that the new law in its general nature does not target specific cases pending before a court of law, it is difficult to approve of this law based on the separation of powers principles. The legislature has the mandate to enact a new law or change an existing law. In doing so it is expected that the new law remains general and does not target a case pending before a court of law. This is what is called the changed law rule, as was explained earlier.[35] However, if the legislature enacts a law that specifically targets a case pending before a court of law in a way that manipulates or directs the outcome of the case, it affects the decisional independence of the court and is not a proper exercise of legislative power. It violates the separation of powers principle. This is called the direction principle. This particular part of the amendment contains no more than four articles dealing exclusively with the issue of registration, and as such, it fits squarely into the direction principle. Thus, it is difficult to agree with the legislature's position that effectively nullifies all court decisions rendered prior to the effective date of the Proclamation. To make matters worse, the amendment law does not even specify the exact date from which the retroactivity applies. Is it for the last year? Five years? Fifteen years? There is no argument about enacting or amending laws in a general manner and with prospective effect falling squarely within the legislature's core functions. However, if the law is applied retroactively and targets specific cases or reverses by targeting final court judgments rendered before the new law, this constitutes a serious violation of the separation of powers. It amounts to the legislature turning itself into a court and resolving disputes by legislation.

Another interesting law relates to corruption. Following a split within the ruling party in 2001, Siye Abraha, a former defence minister, was accused of grand corruption and brought before a court. When the lower courts ruled that the accused should be released on bail, which is a constitutional right by virtue of article 19(6), security officers prevented the release of the accused. Within a few days after the order of the court to release the accused on bail, parliament hastily convened to enact a law that deprived all persons accused of corruption of the right to bail.[36] Following this development, the press nicknamed the law 'Siye Abraha's law'. This was not the end of the story. Several years later and after the new law had served its function, parliament amended the law reinstating the right to bail to persons accused of corruption where the charge entailed a potential sentence not exceeding ten years' imprisonment.[37]

This case demonstrates that the legislature operates with little constraint on its power, and can at any time decide to intervene and reverse court decisions.

[35] For comparative insights on the changed law rule and direction principle, see Gerangeios (n 31) 11–186.

[36] The law in question is Proclamation No 236/2001, Anti Corruption Special Procedure and Rules of Evidence and Art 2 of its Amendment Proclamation No 239/2001 Anti-Corruption Special Procedure and Rules of Evidence, *Federal Negarit Gazeta* 7th Year No 7, Addis Ababa, 12 June 2001.

[37] See art 4(1) of Proclamation No 434/2005, Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, *Federal Negarit Gazeta,* 11th Year No 19, Addis Ababa, 2 February 2005.

### 4.3 Structural autonomy

While decisional independence is a crucial component of judicial independence, it is however not the only one. Judicial independence should also include structural or institutional independence. This refers to the autonomy of the judiciary as an institution and the judges collectively, from other institutions. In theory, the judiciary is supposed to be free from external pressure coming from the other branches, the usual suspects being the legislature and the executive.[38] The political institutions, particularly the legislature, play a crucial role in terms of defining at least certain aspects of the jurisdiction of the courts, in the process of appointing or removing of judges and budget allocation. Hence, the suggestion that the judiciary enjoys absolute independence from the other branches of government, of which it constitutes a part, is more of a myth than a reality.

Judicial independence cannot be considered in the abstract but in real politic. In many political systems including Ethiopia, it is a fact that the other branches exercise some degree of control over the budget of the judiciary, in the appointment, promotion and impeachment of judges, in defining the jurisdiction of federal courts and at times deciding on the establishment of lower federal courts.[39] The other branches can, if they wish, involve what some call 'jurisdiction stripping'.[40] The political institutions, particularly the legislature, have the means to keep the judiciary humble and one cannot help but repeat the famous statement by Alexander Hamilton in the *Federalist Papers* No 78. It reminds us of the weak position of the judiciary, having little to do with the purse (mandate of the legislature) or the sword (mandate of the executive) compared to the other branches. This is even more visible in the Ethiopian case. The courts merely render judgment for the enforcement of which they have to count on the cooperation of the political institutions, hence the need for them to be independent from the pressure of the other branches. In this context, judicial independence must be understood in the limited sense of judicial autonomy, an autonomy that allows a relative degree of freedom to the judiciary from the influence of the two other branches. Indeed some have argued that a more accurate description would be 'independent judges, dependent Judiciary'.[41]

Political institutions could have a significant impact on determining or influencing the jurisdiction, selection, promotion, tenure, compensation, and daily operation of the courts. In this sense it is a relational term referring to the institution's relationship with other parts of the political system and individual judges' relationships with each other.

Needless to say, most of the issues related to institutional independence are linked to the constitutional position of the judiciary. If issues related to jurisdiction, tenure, immunity, and terms of office of courts are constitutionally entrenched then such legal norms create constitutional judges and courts.[42] The role of the political branches is

[38] See art 79(3) of the constitution; Russell (n 30) 11.
[39] See, for example, arts 79, 80, and 81 of the constitution.
[40] Ferejohn and Kramer (n 24) 988.
[41] The term chosen by Ferejohn and Kramer as the title of their excellent thesis on the judiciary (n 24) 962.
[42] Shetreet (n 32)151.

then reduced because any changes in such provisions require constitutional amendment. In Ethiopia the legislatures at federal and state level are mandated to define the jurisdiction of courts and, as illustrated in Section 4.4, on a number of occasions have stripped courts of their jurisdiction.[43] This trend is a violation of the separation of powers and the exclusive role of courts. This principle prohibits the diversion of cases from the ordinary courts to disposal by tribunals which do not enjoy the same safeguards hence putting justice at risk.

The structural aspects also imply that the courts, usually through their presidents, the registrar, or the judicial councils, must be able to decide issues related to case assignment, court schedules, and transfer of judges. Primarily, the political branches should not interfere with these matters but more importantly, the court itself needs to have clear and pre-planned internal regulations dealing with these issues. The issue of case assignment is particularly crucial. In continental Europe this is a matter of great doctrinal significance. The natural judge principle is that parties should not have a role in choosing a judge, rather the judge and the bench who are to sit on a specific case should be institutionally determined in advance and planned long before the cases reach the courts.[44] It is a principle that enhances public confidence in courts as it removes suspicion that the outcome of a specific case may have been influenced by the deliberate selection of specific judges or benches by parties. In other words, it prevents judge/bench shopping. In principle this is the mandate of the respective heads of the courts and that of the judicial administrative council in Ethiopia but in practice the allocation of files to the respective benches is manipulated by the registrar who is often familiar with the position of judges on specific matters.[45]

Another crucial component of the structural autonomy is court administration.[46] The constitution authorizes the Federal Supreme Court to draw up and submit to the House of Peoples' Representatives (HoPR) for approval the budget of the federal courts, and upon approval, to administer the budget.[47] The constitution makes the courts accountable to parliament, not to the executive. Yet despite this constitutional principle that limits the mandate of the executive, in practice, both at federal and state level, the court submits its budget to the executive (Ministry of Finance and Economic Development or equivalent regional bureau). The latter consolidates it to the national budget request and may in the process slash part of it and send it for approval to the legislature. In many cases the judiciary is kept in the dark when adjustments to the initial request are made.[48]

[43] See the section that explains the relations between the legislature and the judiciary particularly on ouster clauses.

[44] Shetreet (n 32) 162.

[45] Report on Ethiopian Opinion Poll Survey (April 2008) by Steadman Group and the InterAfrica Group. The study was conducted in 2007 and organized by the InterAfrica Group, a regional organization based in Addis Ababa. It covered all regions and the two federal cities and included a total sample size of 3000 participants both from rural and urban areas (on file with the author).

[46] Russell (n 30) 20.

[47] Art 79(6) of the constitution.

[48] As a result of budget constraints, improvement of the infrastructure of the judiciary, for example providing new buildings to accommodate the ever increasing number of cases being heard by the courts, has been very limited until recently. The number of judges also does not correspond to the number of cases passing through the system. An estimate made by this author two years ago shows that one judge serves 14,000 people.

The management of courts and judges is clearly an area in which the principles of democratic accountability and judicial independence need to be carefully balanced. On one hand the judges and courts provide a public service and spend public funds. As a result, there is a need for public accountability as to how well the service is rendered and how public funds allocated to the judiciary are spent. These are often the reasons given by the legislature for its assumption of some responsibility for the administration of courts. On the other hand, there is the competing value of judicial autonomy, which calls for its relative freedom of action from the influence of the legislature in these matters. As a result, if the involvement of the legislature or the executive in matters of court administration is too great and at times too controlling of vital aspects of adjudication, judicial autonomy can be seriously impaired.[49]

Constitutionally, the Judicial Administrative Council (JAC) is empowered to decide on the salary and related benefits of judges but in reality such decisions have no effect unless approved by the executive. The judiciary does not administer its own staff or determine the qualifications, function, and recruitment of support staff. These functions are controlled by the Civil Service Commission. Thus, the judiciary has no autonomy to administer its budget and can only hire and fire civil servants, other than judges, with the cooperation of the Civil Service Commission.[50]

The Ethiopian situation largely confirms the view that whether and to what extent the judiciary in any country can be viewed as independent will not only depend on the law and the constitution but also on the nature and character of the people who hold the office of judge, the political structure and social climate, and more importantly, whether the practice conforms with constitutional principles.[51]

## 4.4 Ouster clauses

Another factor in the relations between the legislature and the judiciary that calls for careful study is the increasing tendency of the former to issue ouster clauses. This is where the legislative body takes away the mandate of the courts and confers it on quasi-judicial bodies within the executive. While such quasi-judicial bodies exist in other jurisdictions, regular courts often review their decisions on appeal. As will be seen, this is not the case in Ethiopia however. The highest court often declines to review decisions of quasi-judicial bodies.

In the last couple of years, the legislature has shown an increasing tendency to establish by law administrative agencies and tribunals outside the regular judiciary with some adjudicatory powers that diminish the powers of the courts. This is despite the constitutional clause under article 78(4) stating as follows:

> [S]pecial or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and *which does not follow legally prescribed procedures* shall not be established (emphasis added).

[49] Russell (n 30) 20.

[50] See interview with the Vice-President of the Federal Courts, 'Ye Moya Nestanet Bynoregn Noro Ezih Alkoyim Nebere' Amharic (EC 28 November 1996).

[51] Russell (n 30) 11; Shetreet (n 32) 180.

Many laws have been enacted by the legislature that take powers away from courts and deal with issues such as urban land lease, government owned houses/buildings, foreclosure of defaulting debtor's property, and taxation[52] disputes arising from these matters are by virtue of the respective laws placed in quasi-judicial bodies within the executive. In other words, there is a growing tendency by the political branches to rely on the administrative complaint system and the quasi-judicial powers within the executive. But such administrative complaint systems or quasi-judicial organs often lack the security of tenure which one finds in judges. Quasi-judicial bodies do not necessarily follow legally binding procedures and ensure due process to parties. Further, the people making the decisions in quasi-judicial bodies often lack the expertise enjoyed by the judiciary as they are rarely trained lawyers and in some cases are senior political appointees. Lastly they are not expected to be impartial given that the quasi-judicial bodies fall within the executive.[53]

The net effect of this growing tendency is either partial or complete withdrawal of jurisdiction from courts. For example, the Agency for Government Houses has been empowered to give and execute expulsion orders to tenants of state-owned houses and use the police to this effect, if it thinks there is breach of contract or the tenant is an illegal occupant.[54] Key questions that remain unresolved are what if the tenant thinks that he is being illegally evicted or has proof of a valid lease contract or the Agency abuses its power? It is to resolve precisely these sorts of issues that we need a third impartial body. The Appeals Commission established by the re-enactment of Urban Land Lease Holding law is empowered to make final decisions on land and buildings to be expropriated for public interest, except on the amount of compensation. Nowadays, it is not uncommon to find a lease contract concluded with two private investors over the same plot of land. This usually raises many questions. Who is the rightful owner?[55]

[52] See for instance arts 17, 18, and 19 of Proclamation No 272/2002, A Proclamation to Provide for the Re-Enactment of Lease Holdings of Urban Lands, Federal *Negarit Gazeta* 8th Year No 19, Addis Ababa, 14 May 2002; Proclamation No 455/2005, A Proclamation to Provide for the Expropriation of Land Holdings for Public Purposes and Payment of Compensation, Federal *Negarit Gazeta* 11th Year No 43; Proclamation No 555/2007 Agency for Government Houses Establishment Proclamation, Federal *Negarit Gazeta* 14th Year No 2, Addis Ababa, 13 December 2007, arts 6 and 12; Proclamation No 97/98 that entitles the banks to sell the property of a defaulting debtor without referral to the courts. Arts 77 and 78 of Proclamation No 286/2002 permits the Inland Revenue Authority to confiscate the property of defaulting tax payers without referral to the courts. Proclamation No 286/2002 Income Tax Proclamation, Federal *Negarit Gazeta* 8th Year No 34, Addis Ababa, 4 July 2002. Of the several semi-judicial tribunals, namely, the Tax Appeal Commission, the Administrative Tribunal for Civil Servants, and the labour courts, the Re-enactment of Urban Lands Lease holding Proclamation (arts 17 and 18) allows appeal to the regular judiciary only if there is a basic error of law. See Proclamation No 42/1993 Labour Proclamation *Negarit Gazeta* of the Transitional Government of Ethiopia 52nd Year No 27, Addis Ababa, 20 January 1993; The Federal Civil Servants Proclamation, Proclamation No 262/2002; Proclamation No 272/2002, Re-Enactment of Urban Lands Lease Holding Proclamation, *Federal Negarit Gazeta* 8th Year No 19, Addis Ababa, 14 May 2002. However, many of the government agencies that make decisions that seriously impact on the daily life of citizens, such as those dealing with renewal of licences and issuance of title deeds, are governed by Boards whose members are appointed by government. Most of the laws establishing these agencies state that the decisions made by these Boards are final and not subject to review by the courts.

[53] For general reference on the institutional limitations of quasi-judicial bodies see Russell (n 30) 14.

[54] The Proclamation does not expressly prohibit review of such measures by the regular courts. It remains to be seen how the practice will evolve.

[55] Art 40 of the Ethiopian constitution declares that land is publicly owned. As a result investors can only lease land from government for periods of up to ninety-nine years.

Which contract is valid and why did the administration conclude two lease contracts over the same plot of land? In other words, a party cannot enforce the lease contract in court even if the administration wrongly concludes a second contract with another person. The abuse of power by the administration (for example, by concluding two lease contracts over the same plot of land) that calls for strict scrutiny by the courts is now curbed. The courts' mandate has now been taken away. This paves the way for arbitrary government that is against the legitimate expectation of the citizen. This also dampens the public's confidence in public institutions.

By virtue of Proclamation No 97/1998, banks are empowered to foreclose the property of defaulting debtors. Previously, only the Civil Procedure Code allowed courts to decide whether a debtor is in default and if so to decide the amount based on the claims of the creditor and decide how the claim is to be settled. A secured creditor obviously had priority but the process often took a long time and that triggered the legislature to enact a new law that empowers the banks to foreclose a defaulting debtor's property given to them as security. The new Proclamation requires that in the process of foreclosing a defaulting debtor's property, the bank should comply with procedures laid out in the Civil Procedure Code that ensure due process to parties. This provokes a number of questions. What if the bank fails to comply with the procedures and sells the property for a price less than the market value? What if it abuses its power? Indeed these were the central issues in *Gedera Hotels PLC v Commercial Bank*[56] that came before the Cassation Division of the Federal Supreme Court. The debtor raised an action alleging that the bank has not followed the required procedures and as a result the property sold at a price below its market value. The procedures that are required to be followed when auctioning the defaulting debtor's property are stipulated in the Civil Procedure Code and are also referred to in Proclamation No 97/1998. The Cassation Court decided by a majority vote that it had no authority to review the decision foreclosing the debtor's property as the bank has the mandate despite indications of anomalies related to either abuse of power or corrupt practice. It is important to note that the law did not expressly prohibit review by courts when banks fail to ensure due process by failing to comply with procedures set out in the Civil Procedure Code nor did it state that the decision of the bank is final.

In these cases, the same institution is thus a judge in its own cause in disregard of the principle that impartial adjudication of disputes by courts is a core component of due process and the rule of law. If the same agency decides on its own case then the notion of separation of powers is also violated. In a number of cases, the court has quashed lower courts' decisions reviewing the legality of such decisions and declared the tribunal's decision within the several federal agencies as final.[57] In sharp contrast, the Federal First Instance Court seems to have adopted a correct interpretation of the concept of separation of powers. In the case of *Getachew Yimenshiwa v The Office of*

[56] Federal Supreme Court Cassation File No 33552 *Hamle* 24, 2000 EC.

[57] There are many cases that illustrate this but the most outrageous decision is *Mahberawi Watsina Belesiltan v Ato Birhanu Hiry and Ato Kebede G Mariam* Federal Supreme Court Cassation Division File No 18342 *Tahsas* 17, 1998 in which the Court stated that the tribunal's decision within the federal agency by virtue of Proclamation No 38/88 is final and the Court has no mandate to review it (vol 3, 104ff).

*General Auditor*[58] and in the case of *Birtukan Mideksa v Federal Prison Administration*,[59] the court reviewed the decisions of the respective government offices. In the former, it ordered it to renew the licence of the plaintiff, ruling that the Auditor General had arbitrarily refused to do so. In the second, the Court ordered the Prison Administration to respect the rights of the prisoner as stipulated in the constitution and other laws. The impact of the decision of the Cassation Division on lower courts remains to be seen but there seems to be a role reversal underway. This is problematic because knowing that such tribunals are within the executive and in the absence of legally prescribed procedures that ensure due process to parties, the Federal Cassation Division should have guaranteed final review on the basis of error of law or on the basis of principles of good administration.[60] By failing to ensure final review, the highest Court is misinterpreting the concept of separation of powers. The notion of separation of powers implies that the judiciary is autonomous in determining the scope of its authority. No other branch is allowed to interfere in the affairs of the courts as long as the judges have not exceeded their mandate. In the above cases the Cassation Division of the Supreme Court is abdicating what is inherently its own mandate. It has consistently stated that regular courts have no mandate to review the decisions of such tribunals.

Another interesting case is the *Heirs of Wasihun v Agency for Government Houses* (hereinafter the Agency). The Ethiopian Privatization Agency (EPA) is empowered by virtue of Proclamation No 110/95, Proclamation No 87/1994, and the amendment Proclamation No 193/2000 to return to their rightful owners houses and buildings illegally expropriated outside of the Proclamations during the military junta (Proclamation No 47/1974).[61] The heirs submitted their claim on a building located in Addis Ababa to the EPA alleging that the building was expropriated outside the scope of Proclamation No 47/1974. The EPA sent the heirs' claim to the Agency ordering it to submit its response on a specific date. After hearing evidence from both parties, the EPA decided on 3 January 2001 that the building had been expropriated outside the scope of the Proclamation and should be returned to its lawful heirs.

The Agency appealed to the Board established by law that hears appeals on decisions made by lower organs of government agencies including the decision of EPA. The Board, without summoning and hearing the heirs, reversed the EPA's decision on 27 November 2009. The law that established the Board is silent as to what procedures the Board should follow in its decision-making process and what happens if the Board's decision contains an error of law. The heirs then appealed to the Cassation Division of the Supreme Court alleging that the Board had committed a fundamental error of law as it did not allow them to respond to the appeal made by the Agency and, more

[58] Federal First Instance, Arada Bench, File No 25016 decided in 1997 EC.

[59] Federal First Instance, Lideta Bench, File No 140618 decided in 2001 EC.

[60] For details on the principles of good administration see DJ Galligan (ed), *Administrative Law* (Dartmouth 1992).

[61] Following the outbreak of the 1974 Revolution and the end of the imperial era, the military junta decreed a law that expropriated 'extra houses and land' as per the slogan 'land to the tiller'. Owners of 'extra houses and land' were expropriated following the decree and the new government that came to power in 1991 attempted to rectify some of the abuses perpetrated in violation of the decree by returning some buildings to the owners.

importantly, reversed the EPA's decision without following due process of law. However, the Cassation Division of the Federal Supreme Court held on 29 April 2010 that the Board is an administrative body and hence the Court has no mandate to review its decisions on whether they contain fundamental errors of law.

The decisions of the Cassation Division of the Supreme Court create precedents that bind all lower courts at federal and state level. These cases illustrate the position of the courts, particularly the higher courts, on the rule of law. The Supreme Court's understanding of the rule of law is a very positivist/legalistic/formalistic one bereft of any content related to justice, the right to a fair trial, or human rights. Human rights in Ethiopia are constitutionally entrenched. Nearly one-third of the constitution is devoted to all generations of rights and this is further protected by a rigid procedure of constitutional amendment. The highest court has reduced the role of the law to serve merely as an instrument of power and having little to do with protection of rights and ensuring due process to parties. The classic understanding of the rule of law assumes that it regulates political power and public institutions, limits the power of political institutions, and that the law exists for the promotion of human dignity. Yet the highest court has failed to discharge this lofty task.

The above analysis does not imply that semi-judicial bodies are unnecessary or bad in the legal system. On the contrary comparative studies indicate that such semi-judicial bodies play a vital role alongside the regular judiciary. In the United States, such institutions are known as Article I or legislative courts as opposed to Article III courts. In India too there are similar institutions. In Germany and Switzerland such tribunals exist but constitute part of the regular judiciary.[62] There is growing governmental activity and some cases may, because of their technical nature, be better addressed by a tribunal within the administration. This may also be the case because courts are already over-burdened with other cases and cannot take on these new matters. However, it is difficult to consider such quasi-judicial organs as courts in the proper sense of the term.

Against this background, comparative studies suggest that the decisions of quasi-judicial bodies must be subject to review by the regular judiciary.[63] The trouble in Ethiopia is that the Supreme Court, contrary to this established trend, has failed to review or even set the grounds for review of such bodies, leaving the political institutions with a free hand.

In general, the government appears to be suspicious of, and have little faith in, the courts. There is an increasing trend by the legislature to take jurisdiction away from the courts by law and place it instead in the hands of the executive. This in effect aggravates the problem rather than solving it. Only by improving the institutional competence of the judiciary will issues related to delays in deciding cases, efficiency, and accountability be resolved, and this should be done without necessarily violating constitutional principles and judicial independence. Or is the current situation, as some allege, a

[62] Donald Kommers, 'Autonomy versus Accountability: The German Judiciary' in Peter Russell and David O' Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia 2001) 135.

[63] Indian constitution, arts 32, 226, 227, 136; Russell (n 30) 8.

reflection of a deeper ideological orientation that desires a weak judiciary structured more along the lines of former communist countries where the judiciary remained subservient to the political institutions?[64] Or perhaps it is a reflection of the age old totalitarian conception of power in the country?

Overall, there seems to be a strange overlap in the interests of the political branches and the judiciary. There is a burgeoning interest by the political branches in having a weak and limited judiciary, a judiciary more accountable than autonomous. At the same time the judiciary remains complacent in this trend. It is not clear whether this arises from fear of the political branches or whether it is a reflection of a totalitarian conception of power rather than separation of powers, as it existed in recent political history. But certainly the judiciary has failed to interpret and apply the notion of separation of powers properly. As already noted, separation of powers is not about absolutism of each branch. It is clear that every branch enjoys autonomy with respect to its powers but that autonomy is not absolute. Certainly, it is not an advocacy for activism, whereby the judiciary attempts to appropriate the mandates of the political branches. Far from this, the Ethiopian judiciary is abdicating what is inherently its own jurisdiction to the political branches and manifesting judicial timidity. As a result, the political branches are given carte blanche to act as they wish.

## 5. Conclusion

Constitutionally speaking, the post-1991 developments concerning the judiciary have been significant. Unlike under the previous regimes, the judiciary has been organized as a distinct institution, a third branch of government, separate from the political branches. The basic principles governing its power, autonomy, and organization have been stipulated in the constitution and other laws enacted by parliament. We have however seen that in reality, the legislature encroaches on the autonomy of the judiciary by ousting its jurisdiction and placing judicial responsibilities in the hands of quasi-judicial bodies. This trend has become so prevalent that the highest court has taken the position that whatever the legislature takes away remains valid and courts are mandated to interpret whatever is left.[65] Taking these powers away from the courts violates the principle of separation of powers. The judiciary is established to interpret the law and settle disputes authoritatively. If important aspects of their judicial functions are taken away, as is the case in Ethiopia, there is little left for the courts. Particularly notable in this respect is the timidity exhibited by the courts themselves. The judiciary, particularly at the highest level, has not been able to assert its power to review decisions of quasi-judicial bodies based on errors of law or in circumstances

[64] Chi Mgbako et al, 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights' (2008) 32 *Fordham International Law Journal* 281.

[65] See, for example, the Decision of the Federal Supreme Court in *Ellile Hotel v Ayat Real Estate* where the City Government of Addis Ababa nullifying a lease contract it signed with Ayat, alleged that it had failed to develop a plot of land. Ayat, on the other hand, alleged that the procedures agreed in the lease contract had not been complied with and as a result the City Government had not followed due process, and urged the Federal Supreme Court to rectify that. The Court however stated this it this was an administrative matter as defined in the lease proclamation issued by the legislature and that it could not review it, thereby legalizing the nullity of the lease contract (reported by *Addis Admas* (Amharic newspaper), 17 May 2015).

when such bodies fail to ensure due process for parties. However, quasi-judicial bodies do not necessarily ensure due process for the parties. As is often the case, they are placed within the executive and hence are not necessarily impartial. These factors should serve as a ground for the courts to safeguard the rule of law.

The legislature is also at times engaged in reversing final court judgments. While the legislature has the mandate to amend an existing law or enact a new one, it should not target specific court decisions and should not be retroactive. If the legislature is not happy with the decision of the court it may enact a general law regulating future rights and duties.

What is noteworthy in the Ethiopian case is the position taken by the Federal Supreme Court. As the study of the decisions of the courts, particularly that of the Federal Supreme Court, indicate, the judiciary has not yet defined its role as a third branch of government within the constitutional framework. Whether the role of the judiciary is to settle 'chicken and goat theft cases' only or to engage itself beyond that, short of nullifying Proclamations enacted by parliament as unconstitutional, is yet to be defined by the courts. The judiciary has not properly interpreted the concept of separation of powers and as a result has abdicated its core function of reviewing acts and decisions of the executive and administrative agencies based on errors of law. It has not reacted to the list of ouster clauses enacted by the legislature that take away its powers and prohibit judicial review. Indeed the judiciary's conception of law reduces the role of law to an instrument of power even when due process is violated by quasi-judicial bodies.

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# 12

# Judicial–Executive Relations in Kenya Post-2010

## The Emergence of Judicial Supremacy?

*Walter Khobe Ochieng*

## 1. Introduction

At the core of the quest for a new constitution in Kenya was the need to restructure the government and this included re-configuring the relationship between the three arms of government.[1] There was a need to ensure sufficient checks and balances within government so that each arm of government functioned independently, but at the same time within defined parameters and spheres of operation, with appropriate oversight by the other arms.[2] A significant step towards achievement of this objective is the entrenchment of the principle of constitutional supremacy in the 2010 constitution of Kenya (the constitution). The constitution is the supreme law of the Republic, which binds all persons and all state organs.[3] In addition, no person may claim or exercise state authority except as authorized under the constitution.[4] In view of the limits imposed on state power and in line with the doctrine of separation of powers, all powers to be exercised in public functions must flow from the constitution. It also means that any act performed by any state organ or non-state actor outside the bounds of the constitution would be rendered unconstitutional.

In re-configuring the relationship between the arms of government, the constitution demarcates power vested in each branch of government and establishes a regime of cooperative government. The constitution envisages that executive authority is derived from the people of Kenya and is to be exercised in accordance with the constitution.[5] In order to enhance oversight and impose constraints on the exercise of state power by the executive branch, the courts have been empowered to interpret the constitution and to make pronouncements on the constitutionality of acts of state organs.[6] In this role, the judiciary is instrumental in adjudicating the constitutionality and legality of the

[1] Joshua M Kivuva, 'Restructuring the Kenyan State' (SID Working Paper Series 2011).

[2] Waruguru Kaguongo, 'Introductory Note on Kenya' (2012) <http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> accessed 26 April 2015.

[3] Constitution of Kenya 2010 (constitution) art 2(1) asserts the supremacy of the constitution over other laws in Kenya and binds all persons and state organs at the national and county levels of government.

[4] Constitution, art 2(2).

[5] Constitution, art 129.

[6] Art 165(3) of the constitution confers on the High Court the jurisdiction to determine whether a fundamental right has been denied, threatened, infringed, or violated; and to hear any question on the interpretation of the constitution.

exercise of state power by the executive branch. The roles of the executive and the judicial branch of government in Kenya as they discharge their role of checking and holding each other accountable is the subject of this chapter.

Following this brief introduction, the second section of this chapter will examine the relations between the judicial and the executive branch in the pre-2010 dispensation that informed the design of the structure of government in the 2010 constitution. The third section will discuss the influence of the executive branch over the judicial branch while the fourth section will address the question of judicial oversight over the executive branch in the post-2010 dispensation. The fifth section will review the lessons to be learned from the study of the relationship between the judicial and executive branches of government in Kenya.

## 2. Overview of Judicial–Executive Relations in Pre-2010 Kenya

The central place of the judiciary in the new constitutional order is to be seen in the context of its evolution through the post-colonial period. The intricate interplay of the executive branch and the judiciary over this prolonged period kept the judiciary in a constant state of subjection to the caprices and concerns of the executive.[7]

In 1963, Kenya formally became an independent, sovereign state, ending decades of direct British colonial rule. Kenya's 1963 independence constitution provided for a multi-party democracy, a freely elected bicameral parliament, and guaranteed judicial independence.[8] While the independence constitution sought to establish a feasible constitutional order, it fell prey to numerous amendments. Of these amendments the High Court of Kenya has lamented as follows:

> Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969, by Act. No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution.[9]

Post-independence constitutional changes and legal amendments spanning over three decades undermined and weakened key institutions including the judiciary and

[7] Jackton B Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press 2013) 43.

[8] Gibson Kamau Kuria, 'Litigating Kenya's Bill of Rights' in Kivutha Kibwana (ed.), *Human Rights and Democracy in East Africa: The Constitutional Implication of East African Cooperation* (East Africa Law Society 1997) 87.

[9] *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004) 298–9.

parliament while strengthening the executive, particularly the presidency.[10] As a result, the independence constitution lost much of its original identity and form.[11] The changes resulted in the centralization and monopolization of power by the executive, and minimized checks and balances on the executive by other institutions.

The president exercised extensive control over civic groups, the legislature, and most critically, the judiciary.[12] The judiciary during this period was subservient to the executive.[13] The judiciary did not show the ability or inclination to uphold the rule of law against the express or perceived interests of the executive and individual senior government officials.[14] This led Nowrojee to observe that 'the more senior the official against whom the Bill of Rights [was] sought to be enforced, or the more influential the individual with an interest in the case, the greater the difficulty . . . for the judiciary to assume fully its constitutional role'.[15]

In defining the nature of the relationship between the executive and the judiciary, the independence constitution stated that '[a] judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with this section'.[16] Thus the independence constitution provided for a complex process of the removal of judges, deliberately insulating them from executive power. The removal of a judge was only possible after a presidentially appointed tribunal had considered the matter and made recommendations to the president.[17] However, in 1988, President Moi prevailed over parliament to pass a constitutional amendment with far-reaching implications for judicial independence. Parliament removed the security of tenure for judges.[18] The blatant disregard for

[10] The High Court in *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR observed: 'Prior to the 27th August, 2010 Kenya's governance was based on the Constitution of 1969, which incorporated sweeping amendments effected over a five-year period, to the original Independence Constitution of 1963. I take judicial notice that, whereas the 1963 Constitution was an elaborate document marked by delicate checks-and-balances to public power, the 1969 Constitution had trimmed off most of these checks-and-balances, culminating in a highly centralized structure in which most powers radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods. Judicial notice is taken too of the fact that the Constitution of 2010 derived its character, by a complex and protracted law-making process, from the history of popular grievance associated with the limitations of the earlier Constitution.' See also Jackton B Ojwang, 'Constitutional Trends in Africa—the Kenyan Case' (2000) 10 *Transnational Law & Contemporary Problems* 517, 536.

[11] See generally Makumi Mwagiru, 'Elections and the Constitutional and Legal Regime in Kenya' in Ludeki Chweya (ed.), *Electoral Politics in Kenya* (Claripress 2002).

[12] International Commission of Jurists (ICJ), *State of the Rule of Law in Kenya* (International Commission of Jurists 2006) 8.

[13] Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 *Human Rights Quarterly* (2001) 96.

[14] See generally Abdul Majib Cockar, *Doings, Non-Doings and Mis-Doings by Kenya's Chief Justices 1963–1998* (Zand Graphics 2012).

[15] Pheroze Nowrojee, 'Fundamental Problems Regarding Fundamental Rights: The Kenyan Experience' in Kivutha Kibwana (ed.), *Law and the Administration of Justice in Kenya* (The International Commission of Jurists, Kenya Section 1992) 57, 64.

[16] Repealed constitution of Kenya (repealed constitution), s 62(3).

[17] Repealed constitution, s 62(4)–(7).

[18] Constitution of Kenya Amendment Act 4 of 1988.

a basic constitutional principle by the political branches of government underlined the subordinate status of the judiciary in Kenya.

The process of appointment of judges under the repealed constitution underlined the dominance of the executive branch. The Judicial Service Commission (JSC) played an important role in generating the names of those to be appointed to the position of judges of the High Court[19] and the Court of Appeal by the president.[20] The JSC was composed of the Chief Justice, the Attorney-General, two judges appointed by the president, and the Chairman of the Public Service Commission.[21] All JSC members were presidential appointees, either directly or indirectly, because he appointed the Attorney-General, the Chief Justice, and the Chairman of the Public Service Commission. It should be noted that the independence constitution did not provide for mandatory input by other stakeholders in the composition of the JSC.

Under the 1990 constitutional amendment restoring judicial tenure and security that had been removed in 1988, a judge could only be removed for physical or mental inability to execute the functions of the office or for misbehaviour.[22] It is the president, however, who had the power to remove a judge upon the recommendation of a five-member tribunal appointed by him.[23] The mechanism for removal began with the Chief Justice suggesting to the president that such a course ought to be pursued. The president then appointed a tribunal to consider the matter and make recommendations. The president could also appoint a panel to consider the removal of the Chief Justice. These removal procedures left a lot to be desired. The security of tenure protections posed a number of problems. The executive could easily circumvent the procedures for independent judicial removal proceedings. Judges could be removed only by the recommendation of a five-member tribunal, but the president chose those members. This degree of presidential discretion and the composition of the independent tribunal raised questions about the protections provided for the security of judicial tenure.[24] Moreover, the repealed constitution was not clear on the legal character of the recommendations made by the tribunal to the president. It seemed that such recommendations were not legally binding on the president.

These factors led to the judiciary acting as an agency of the executive branch. Patronage and cronyism became endemic leading to the appointment of incompetent judges and magistrates.[25] The wishes of the executive branch were executed by both the superior and subordinate courts without deviation. In the rare instances where individual judges or magistrates demonstrated even the slightest evidence of independence, such judicial officers were either punished administratively or professionally ruined. The case of Justice Derek Schofield provides an example of a judge who was forced to resign for refusing to decide a case in the manner preferred by the executive branch. He

[19] Repealed constitution, s 61(2).

[20] Repealed constitution, s 64(4).

[21] Repealed constitution, s 68(1).

[22] Constitution of Kenya Amendment Act No. 1 of 1990.

[23] Repealed constitution, s 62(4).

[24] Drew Days et al, *Justice Enjoined: The State of the Judiciary in Kenya* (Robert F Kennedy Memorial Center for Human Rights 1992) 21.

[25] Gibson Kamau Kuria, 'What the Kenya Advocate Who Specialises in Civil Matters Expects from the Kenya Bench' in Kivutha Kibwana (ed.), *Human Rights and Democracy in East Africa: The Constitutional Implication of East African Cooperation* (East Africa Law Society 1997) 128, 138.

handled a case in 1987 in which the family of Stephen Mbaraka Karanja sought to have the police produce him in court after all efforts to trace him had failed following his arrest. When the judge made an order that the police should produce the subject, the executive through the Chief Justice intervened to have the judge reverse his order.[26] Given that he was an expatriate judge on contract, the Chief Justice advised him that his contract was in jeopardy. Instead of giving in to the demands of the executive branch, he opted to resign. Following his resignation, the matter was referred to a different judge by the Chief Justice and Justice Schofield's orders for the police to produce Stephen Mbaraka Karanja were rescinded.

The absence of judicial independence also led to shocking instances of judicial timidity and complicity within the executive in the pre-2010 period.[27] The judiciary failed to uphold rights.[28] For example, the High Court in the case of *Gibson Kamau Kuria v Attorney General*,[29] in which the applicant applied to court for a declaration that his freedom of movement including his right to travel to and from Kenya had been contravened by the act of confiscation of his passport, held that it had no powers under the constitution to enforce the rights asserted by the applicant. The High Court found that section 84 of the repealed constitution that granted the court jurisdiction to enforce the repealed constitution was inoperative as no practice rules had been made to prescribe directions for accessing the court to enforce the Bill of Rights. This ruling has been criticized on the basis that there existed twenty years of litigation centred on section 84 of the repealed constitution as at the time of the decision.[30] It is arguable that it is the status of the applicant, who was a leading critic of the government, which played a part in the court departing from existing precedents to decline jurisdiction to hear the application for enforcement of rights.[31]

The judicial branch was crippled in its role as an independent, impartial agent of democratic governance. It is clear that apart from vesting enormous powers in the presidency, the repealed constitution also granted the institution overwhelming influence over the judicial functions of the government. These shortcomings of Kenya's post-colonial constitutional dispensation, characterized by the dominant executive branch, and the accompanying disregard of democratic practices, led to agitation for constitutional reforms. Radical restructuring of the norms, institutions, and personnel that comprise the legal and political structures of the Kenyan state to restore the judiciary's role as the guarantor of legality and the guardian of human rights became necessary.[32]

[26] Derek Schofield, 'Why I Left Kenya' (1992) 41 *The Nairobi Law Monthly* 49.

[27] George Ochich, 'The Changing Paradigm of Human Rights Litigation In East Africa' in International Commission of Jurists—Kenya Section, *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (International Commission of Jurists, Kenya Section 2007) 29.

[28] Paul Mwangi, *The Black Bar: Corruption and Political Intrigue in the Kenyan Legal Fraternity* (Oakland Media 2001) ch 8 generally.

[29] Miscellaneous Civil Application No 550 of 1988.

[30] Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kivutha Kibwana (ed.), *Law and the Administration of Justice in Kenya* (The International Commission of Jurists, Kenya Section 1992) 93, 113.

[31] Algeisa Vazquez, 'Is the Kenyan Bill of Rights Enforceable After 4th July, 1989?' (1990) 20 *The Nairobi Law Monthly* 7.

[32] Mutua (n 13) 14.

## 3. Executive Power Over the Judicial Branch in the Post-2010 Dispensation

The 2010 constitution of Kenya has fundamentally altered the defective post-colonial governance framework through various far-reaching reforms. The most critical of these reforms are the introduction of a new normative framework, constraining of executive power through the introduction of various checks on the executive, and the introduction of an expansive Bill of Rights. The constitution has meticulously defined, distributed, and constrained the use of state power along multiple lines.

The national executive authority of the Republic is vested in the president, the deputy president and the rest of the Cabinet.[33] The constitution provides that the composition of the Cabinet shall consist of the president, the deputy president, the Attorney-General, and not more than twenty-two Cabinet secretaries, none of whom shall be an elected member of parliament.[34] The interplay between the executive and the judicial branch envisages interdependence between the branches of government. However, care is taken to limit the interference of the executive branch in the operations of the judicial branch.

An empowered judiciary is one that is independent from undue interference from either state or non-state actors. In many respects, the constitution secures judicial independence from executive interference. The constitution provides in article 160(1) that: 'In the exercise of judicial authority, the judiciary shall be subject to this Constitution and the law and shall not be subject to the control or direction of any person or authority.' This is the foundational principle that informs the interaction and relationship between the judiciary and other state organs and non-state actors.

The constitution gives the judiciary relative administrative independence through the JSC.[35] The JSC derives its mandate from article 171 of the constitution. It has been vested with constitutional responsibility for promoting and facilitating the independence and accountability of the judiciary and the efficient, effective, and transparent administration of justice.[36] It has the following functions: recommending to the president persons for appointment as judges; reviewing and making recommendations on the conditions of service of judges and judicial officers and the staff of the judiciary; preparing and implementing programmes for the continuing education and training of judges and judicial officers; and advising the national government on improving the efficiency of the administration of justice.[37]

The JSC is composed of eleven commissioners as provided by article 171(2) of the constitution. The Chief Justice is the Chairperson of the Commission. The other members of the JSC are: one Supreme Court judge,[38] one Court of Appeal judge,[39] one High Court judge,[40] one magistrate,[41] the Attorney-General, two advocates,[42] one

[33] Constitution, art 130(1). [34] Constitution, art 152(1).
[35] In *Judicial Service Commission v Gladys Boss Shollei & Another* Civil Appeal No 50 of 2014, the Court of Appeal underscored the administrative oversight role of the JSC over the judiciary.
[36] Constitution, art 172(1). [37] Constitution, art 172(1).
[38] Elected by judges of the Supreme Court. [39] Elected by judges of the Court of Appeal.
[40] Elected by judges of the High Court. [41] Elected by magistrates.
[42] Elected by the members of the Law Society of Kenya.

person nominated by the Public Service Commission and lastly, two members of the public, appointed by the president with the approval of the National Assembly.[43] Members of the JSC, apart from the Chief Justice and the Attorney-General,[44] hold office for a term of five years and are eligible to be nominated for one further term of five years, provided they remain qualified.[45] This elaborate scheme of appointment of members of the JSC ensures that the Commission is not beholden to the dictates of the executive branch.

The authority and independence of the JSC has been affirmed by the High Court. In *Judicial Service Commission v Speaker of The National Assembly & 8 Others*,[46] the question was whether the president was right to set up a tribunal to remove some members of the JSC as recommended by the National Assembly. The president's actions were based on actions undertaken by the National Assembly resulting in a petition to him under article 251(3) of the constitution which empowers the president to constitute a tribunal for removal of a member of a constitutional commission upon the recommendation of the National Assembly. The High Court held that the removal process was invalid since it was as a result of a process in parliament that took place in violation of an interim court order, hence making the president's acts based on an invalid act. The High Court ruled that the president is required to establish a tribunal for removal of a commissioner of an independent commission if requested by the National Assembly, but in discharging this role the president must act in accordance with the dictates of the constitution. The High Court emphasized the fact that the JSC was a creature of the constitution, an independent commission subject only to the constitution and the law and, as provided under article 249(2) of the constitution, was not subject to direction or control by any person or authority. The Court proceeded to quash *the appointment of members of the tribunal established by the president.*

The role of the president in the appointment of judicial officers of superior courts has been limited to prevent executive interference in the judicial arena. Under the constitution, it is the president who formally appoints the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.[47] The latter requirements, namely, recommendations by the JSC and approval by the National Assembly is a means of checking the exercise of power by the president to avoid overriding political considerations in the process of appointment of the said judicial officers. With respect to the other judges of the Supreme Court, the Court of Appeal and the High Court, the president appoints them in accordance with the recommendations of the JSC.[48] The president cannot circumvent this process. In *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General*[49] the High Court emphasized the fact that the president ought to receive recommendations from the JSC before he makes any nomination for the position of the Chief Justice for such a nomination to comply with the

[43] Constitution, art 171(2).
[44] The Chief Justice holds office for a maximum of ten years or until retiring on attaining the age of 70 years but may elect to retire any time after attaining the age of 65 years. The Attorney-General serves at the pleasure of the president. See arts 156 and 167 of the constitution.
[45] Constitution, art 171(4).
[46] Petition No 518 of 2013.
[47] Constitution, art 166(1)(a).
[48] Constitution, art 166(1)(b).
[49] Petition No 16 of 2011.

constitutional requirements. The president withdrew his nomination of Justice Alnasir Visram as the Chief Justice after the High Court found that he had ignored the prescribed criteria for appointments to judicial office.

Also related to the power of appointment is the power of removal from office of a judge of the superior court. An institution upon which the executive can intrude with ease to remove judges cannot act with firmness to check the excesses of the executive. In this case, the president upon receiving a petition from the JSC setting out the grounds upon which a judge should be removed from office, should suspend the judge and proceed to appoint a tribunal within fourteen days. The tribunal will look into the matter and report on the facts, making binding recommendations to the president.[50] The mandatory nature of the need to comply with the prescribed procedure in the process for removal of a judge was affirmed by the High Court in *Nancy Makokha Baraza v Judicial Service Commission & 9 Others*.[51] In this case, the Deputy Chief Justice challenged the process leading to her suspension from office for gross misconduct. The High Court held that the process of removal of a judge must respect the rights or fundamental freedoms in the Bill of Rights and must comply with the prescribed procedure in the constitution. However, given that in this particular case, the constitutionally prescribed process for removal for the removal of a judge had been adhered to, the Court declined to bar a tribunal formed to inquire into the conduct of the Deputy Chief Justice from proceeding with its work.

The constitution also provides for the establishment of a Judiciary Fund administered by the Chief Registrar of the judiciary.[52] The fund is meant to be used for administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of the functions of the judiciary.[53] Rather than the Treasury or the Ministry of Finance, the Chief Registrar prepares annual estimates of expenditure and presents them to the National Assembly for approval, providing the judiciary with control over its own budget and ensuring that the executive has no control over the judiciary's funds. Upon approval of judicial financial estimates by the National Assembly, the expenditure of the judiciary becomes a charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.[54] The establishment of the Judiciary Fund goes some way towards guaranteeing financial independence for the judicial branch and dismantling the grip of the executive branch over the judiciary.

It is clear from this that the president is vested with what are arguably ceremonial powers in the appointment and the dismissal process of judges. In addition, the creation and empowering of bodies and mechanisms such as the JSC and the Judiciary Fund guarantee the autonomy and capacity of the judicial branch. These new features in the Kenyan constitutional scheme have ensured that the executive branch has lost its former unbridled powers over the judicial branch.

[50] Constitution, art 168(5), (7), and (9). [51] Petition No 23 of 2012.
[52] Constitution, art 173(1). [53] Constitution, art 173(2). [54] Constitution, art 173(4).

## 4. Judicial Oversight Over the Executive Branch in the Post-2010 Dispensation

An independent judiciary, the essential guardian of the rule of law, is the linchpin of the scheme of checks and balances through which the separation of powers is assured.[55] In recognition of this core role of the judiciary, the constitution expressly vests the exercise of judicial power in courts and tribunals 'established by or under the Constitution'.[56] This is a departure from the old order where there was no express vesting of judicial power in the institutions that constitute the judiciary. The independence of the judiciary in discharging its functions is guaranteed by the entrenchment of the constitutional principle that judicial authority is not subject to control by any person or authority, but is only subject to the constitution and the law.[57] The constitution then proceeds to set up a system of courts and prescribe the jurisdiction of the various courts. Any dispute as to the interpretation of the constitution is to be resolved by the courts; any conflict in the relationships of the plurality of autonomous constitutional bodies, is also to be resolved by the courts; as is any grievance in respect of the rights and liberties of the individual.[58] The vesting of these functions on the judiciary depicts the constitution's intent to make the courts the core agency for ensuring constitutionalism in the new dispensation.

The constitution limits executive power, and substantially regulates the individual official's remit in public decision-making. It establishes a framework for rationality in the management of the executive's domain. As Ojwang notes: 'The political order has been reformed, or is being reformed, to vindicate the principle of checks and balances founded on regularity, legality and constitutional process.'[59] Under the constitution, it is the duty and obligation of the judiciary to enforce the constitution. Of this judicial role in the new dispensation it has been observed that:

> Even as the era of raw, individual power is cast to the winds, the new epoch distinctly empowers one institution that was always in place albeit in enfeebled form-the judiciary. The reason is that it is this institution that, always, had a detailed scheme of guiding-steps for its actions: jurisdictional rules; procedural rules; natural justice; substantive limits defined by statute law; limits imposed by constitutional law. The moment the epoch of constitutionalism came, the rational path of governance became that which is defined by the judicial mandate. Indeed, constitutionalism has spawned the secondary ideology of judicialism. Judicialism has become the handmaiden of constitutionalism; and it follows that, of the three conventional arms of government, the one which has distinctly benefited from the changing political philosophy is the judiciary.[60]

[55] See Philip Alston, Ryan Goodman, and Henry J Steiner, *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press 1996) 711–12.

[56] Constitution, art 159(1).

[57] Constitution, art 160(1).

[58] Constitution, art 165(3).

[59] Jackton B Ojwang, 'Judicial Ethics and Judges' Conduct: The Complaint Mechanism' (2011) 9 *Judicial Training Institute Bulletin* 35.

[60] ibid 36.

Enforcement of the values and the principles of the constitution are mainly with regard to the role of the executive and administrative agencies. The judiciary in this sense has a duty to ensure that the executive branch adopts principles of good governance, is accountable, and respects and follows the letter and spirit of the constitution.

The judiciary has the power through judicial review mechanisms to review executive and administrative conduct or actions of the state, state organs, state departments, and state officials. Judicial review is meant to ensure that such conduct, actions, or decisions conform to the constitution and the law. Thus the judiciary is expected, while interpreting the constitution, to ensure that its supremacy is not compromised and further to declare void any legislation or conduct that is inconsistent with the constitution.[61]

The courts have reformed to the extent of boldly questioning executive decisions. In *Independent Policing Oversight Authority & Another v Attorney General & 660 Others*,[62] the issue before the Court involved allegations of unfairness, irregularities, and corruption in the recruitment process for appointments to the National Police Service. There were allegations that the selection criteria were not known to the public and that if there were any guidelines or regulations governing the process, such regulations were made without public participation. The High Court held that the National Police Service Commission was required to promote the values and principles of transparency, accountability, and public participation whenever it discharged its functions. It found that the National Public Service Commission had not made recruitment guidelines public in violation of the principle of public participation in the enactment of legislation, regulations, and guidelines which is an important aspect of good governance recognized by the constitution of Kenya, 2010. The Court also found that the National Police Service Commission had acted *ultra vires* its mandate by delegating its powers of recruitment to sub-county recruitment committees. This led the Court to quash the outcome of the recruitment process of 14 July 2014 and make orders for the recruitment to be done afresh. Subsequent to this finding by the High Court, and when an appeal lodged by the government was pending before the Court of Appeal, Kenya suffered a terrorist attack that resulted in the killing of 147 students of Garrissa University College. The president in his address to the nation following the terrorist attack decried the small number of police officers available to act at the time of the attack, and ordered the trainees whose recruitment had been nullified by the High Court to report to the Police Training College. This order by the president generated a public outcry and the president was forced to withdraw the directive.[63] Subsequently, the Court of Appeal upheld the decision of the High Court cancelling the recruitment process.[64]

The other area where the judiciary has questioned the exercise of executive authority is in the area of appointments to public office by the president and Cabinet secretaries. The High Court has nullified appointments to public office on several occasions. In

[61] Constitution, arts 2 and 159. [62] Petition No 390 of 2014.

[63] Gibson Kamau Kuria, 'Why the President's Directive on Police Recruitment had to be Abandoned' (2015) 6 *The Platform* 24.

[64] *Attorney General & Others v The Independent Policing Oversight Authority & Others*, Civil Appeal No 324 of 2014.

*Benson Riitho Mureithi v J.W. Wakhungu & 2 Others*,[65] the High Court held that it has the jurisdiction to inquire into the issue of propriety of appointment to public office. Further, the Court held that any state officer making an appointment has the responsibility to put in place a mechanism that would allow public participation and consideration of the suitability of the integrity of potential appointees as demanded by the constitution. Since the Cabinet Secretary for Environment, Water and Natural Resources in this instance did not involve the public when making appointments and did not consider the integrity of the appointee, the High Court nullified the appointment of the interested party as the Chairman of the Athi Water Services Board. Similarly, in *David Kariuki Muigua v Attorney General & Another*,[66] the High Court nullified the appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal on the grounds that there was no public participation in the appointment process. The Court observed that appointment to public office must involve a competitive process that enables public participation and upholds the principles of transparency and accountability in governance.

In the case of *Abdi Yusuf v Attorney General and 2 others*,[67] the president was barred by the High Court from resubmitting to the National Assembly for fresh approval, nominees for appointment as commissioners of the Teachers Service Commission on the basis that these nominees had earlier been rejected by the National Assembly. The president had resubmitted a list of nominees that had previously been rejected by the National Assembly on grounds of lack of regional balance and meritocracy. In disregard of the Teachers Service Act, the statute establishing the Teachers Service Commission (that required the president to submit new nominees), the president resubmitted the rejected list of nominees. The High Court held that the principles of rule of law and legality required the president to make appointments in accordance with statutory enactments. These decisions undoubtedly stand as examples of the judiciary circumventing attempts by the president to abuse his power of appointment.

The courts have also ordered the executive to discharge its constitutional and legal functions. In the High Court case of *Amoni Thomas Amfry & Another v Minister for Lands & 8 Others*,[68] the issue for consideration was whether the Court could issue an order directed at the president to gazette the Chairperson and members of the National Land Commission. The selection panel had shortlisted candidates, conducted interviews, and forwarded names to the president, who in consultation with the prime minister, nominated the Chairperson and members of the Commission. The National Assembly duly approved the names of persons so selected and forwarded them to the president to be gazetted. Subsequently, the president failed to gazette the appointments within seven days as provided by law. The issue before the Court was whether it could direct the president to comply with constitutional and statutory provisions. The High Court held that compliance with the provisions of the constitution and statute goes to the heart of the rule of law. Moreover, the Court observed that the rule of law is a recognized national value to which the Court must give effect. The High Court granted relief directing the president to comply with the law and officially appoint the

[65] Petition No 19 of 2014.
[66] Petition No 161 of 2011.
[67] Petition No 8 of 2013.
[68] Petition No 6 of 2013.

Chairperson and members of the National Land Commission within seven days from the date of judgment. Subsequently, the president complied with the directive of the High Court and gazetted the Chairperson and members of the National Land Commission.

The courts have also questioned the use of presidential decrees that are not backed by law. In *Attorney General & 6 others v Mohamed Balala & 11 others*,[69] the Court of Appeal confirmed the High Court's position that the requirement for presidential consent for persons wishing to acquire or dispose of first and second row beach plots in the coastal region was unconstitutional. The petitioners argued that there existed no legal backing for this requirement and that the requirement was discriminatory since it did not apply to the whole country but only to the coastal region. They also sought an order declaring that requirement of consent was illegal and discriminatory. In granting the orders sought, the Court noted that the requirement of presidential consent for the disposition or acquisition of first and second row beach plots was a contravention of the constitutional values of the rule of law, equity, non-discrimination, and transparency. The Court also noted that the requirement for presidential consent was an anachronistic provision, which has no place in present-day Kenya due to its discriminatory nature.

The advent of this new era where the judicial branch has questioned executive actions has not been without blemishes. The executive has been slow to comply with judicial decisions that are not in line with its policies.[70] This trend harms the institutional standing of the judiciary as it leads to perceptions that the judiciary cannot uphold the rule of law. The threat to the rule of law also follows from the reality that where the executive can arbitrarily decide not to comply with judicial decisions then the potential of courts acting as a check on executive arbitrariness is diminished. Moreover, non-compliance with judicial decisions is an affront to judicial independence and demonstrates lack of respect for the judicial branch by the executive.

The other affront that the judiciary has faced is public criticism by the leadership of the political branches for engaging in 'judicial activism'.[71] In this respect, the president has accused the judiciary of 'frustrating the operations of the executive'.[72] These criticisms of the judiciary for allegedly overreaching into the terrain of other arms of government show that the culture of executive dominance over other branches of government still lingers in the political landscape. Furthermore, public criticisms also diminish confidence in the judiciary since they create the perception that the judiciary is subservient to the executive. This means that the judiciary must remain resolute in affirming that it has a legitimate role in the supervision of the constitutionality of acts of other arms of government.

[69] Civil Appeal No 191 of 2012.

[70] Lucas Barasa, 'Judiciary "Concerned" Over Disregard for Court Orders' (*Daily Nation*, 19 February 2014) <http://www.nation.co.ke/news/Judiciary-concerned-over-disregard-for-court-orders/-/1056/2213140/-/d924luz/-/index.html> accessed 21 June 2015.

[71] Yash Ghai, 'It's Down with the Judiciary in Kenya!' (*The Star*) <http://the-star.co.ke/article/its-down-judiciary-kenya#sthash.K8PJbNb5.dpbs> accessed 21 June 2015.

[72] ibid.

The bold judgments surveyed in this section are a far cry from the judicial subservience of the pre-2010 dispensation. Based on the cases discussed, it can be argued that the judicial approach to oversight over the executive branch has radically changed. Unlike in the past, the post-2010 judiciary has shown willingness to exercise, and has in fact exercised, its constitutional authority of judicial review to check the executive branch. The cases discussed in this section show the courts making progressive decisions that advance the rule of law in cases that have political consequences. However, compliance with court orders and decisions that question the executive branch remains a challenge.

## 5. Conclusion

Whereas in the old dispensation the president had a free hand in the appointment of judges, the 2010 constitution has radically curtailed this role by vesting the role of identification of nominees to judicial office in an independent Judicial Service Commission. Unlike the JSC of the pre-2010 dispensation which was composed of members appointed by the president, the composition and manner of appointment of members of the JSC in the new dispensation, which is through election of the majority of the Commissioners by judges and members of the legal profession, leaves little room for executive manipulation of the JSC. The rules for removal of judges in the new dispensation guarantee that judges cannot be easily removed as a result of external pressure from the executive branch. Furthermore, guaranteeing the financial autonomy of the judiciary and the restatement of security of tenure as well as clear removal procedures for judges, have all contributed towards ensuring a degree of independence for the judicial branch.

The balance of power between the executive and the judiciary has been recalibrated in the post-2010 dispensation leading to the emergence of an emboldened judiciary that routinely questions the exercise of power by the executive branch. The jurisprudence developed by the courts in the post-2010 dispensation in the area of the exercise of presidential powers is particularly important in the context of Africa, where imperial and authoritarian presidency is the norm. Despite these positive developments, entrenching the rule of law remains a challenge in Kenya given that the executive branch has defied court orders in some instances. In addition, political leaders including the president have publicly criticized judges for questioning decisions made by the executive. Defying court orders and criticizing the judiciary lowers public confidence in the judiciary by portraying the judicial branch as subservient to the executive.

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# 13

# An Overview of the Diverse Approaches to Judicial and Executive Relations

## A Namibian Study of Four Cases

*Nico Horn*

### 1. Introduction

Few, if any form of governments are free of tension between the different organs of the state, more specifically between the judiciary and the executive. An independent judiciary is more often than not a thorn in the flesh of the executive. This chapter will look at four cases in Namibia, with a short introduction on the pre-independence era.

The fact that South Africa was still the sovereign power in Namibia before independence did not make the relationship between the courts and the colonial executive easy. Neither did South Africa's attempt to find an internal settlement without the two main liberation movements, the South West Africa National Union (SWANU) and the South West Africa Peoples' Organisation (SWAPO),[1] create a relationship of trust between the executive and the majority of the Namibian population. Between 1984 and independence in 1990, the South African Administrator-General and the South African government-created transitional government of national unity (TGNU), were constantly at loggerheads with the Supreme Court of South West Africa/Namibia.

The prosecution authority was not left out of the conflict either. Before 1977 the South West Africa Attorney-General—who was the head of prosecutions—was independent. However, when the border war between South Africa and the main liberation movement, SWAPO, intensified, the South African Criminal Procedure Act 51 of 1977 (CPA), was enacted in Namibia. The South African Act made the Minister of Justice the final authority in prosecutions; so much so that the minister had the authority to take control of prosecutions should he wish to do so. And if the South African Attorney-General in control of prosecutions did not toe the line of the South African government, the state president of South Africa used his powers under military legislation to prevent prosecutions that might harm the South African Defence Force or police.

The colonial attitude had a negative effect on the first Namibian government. The fact that the Prosecutor-General should be independent and have the final authority in

[1] When SWAPO started using the name 'Namibia' for the territory, the words 'South West Africa' in their names became an embarrassment and their names changed to SWANU of Namibia and SWAPO of Namibia, and when they returned from exile, SWAPO Party of Namibia.

prosecutions was not popular—especially since the first Prosecutor-General was an unpopular deputy-Attorney-General of the colonial era. The establishment of the TGNU, appointed from the ranks of the so-called Turnhalle or internal parties, that is, parties who were willing to negotiate with the South African government, did not create the unified anti-SWAPO Namibian government South Africa hoped for. The Cabinet came from the Turnhalle parties. As we shall see in Section 2, the internal parties often clashed with the judiciary. This left Namibia with a history of executive interventions if judicial independence threatened the executive in any way whatsoever.

This chapter will look at conflicts between the judiciary and government that threatened the independence of the judiciary in four different situations:

- A case where the government ignored judgments against them;
- the issue of the independence of the prosecutorial authority;
- the independence of the lower courts; and
- the indirect influence of the executive on judgments of the court.

The chapter begins with a short overview of the last decade before independence. This will shed some light on the historical tension between the executive and the judiciary that the first democratically elected government inherited.

## 2. The Time Between the Times: The Executive and the Judiciary During the Transitional Government for National Unity

Between 1978 and 1985, several South African attempts failed to establish an internationally acceptable internal settlement without including the liberation movements, including SWAPO and SWANU. In 1985, the state president of South Africa, acting in terms of section 38 of the South West Africa Constitution Act,[2] issued South West Africa Legislative and Executive Authority Establishment Proclamation R101 to establish a so-called transitional government of national unity (TGNU).[3] The Proclamation made provision for a Legislative Assembly and a Cabinet.

Proclamation R101 included a Bill of Fundamental Rights and Objectives in an annexure, as well as an article providing for the review of laws that contradicted the Bill of Rights.[4] As we shall see, the Supreme Court of South West Africa/Namibia approached the Bill of Rights in a liberal, purposive manner. Despite the political pressure of the armed struggle and a transitional government which still operated in the spirit of its colonial masters, the Court protected the rights of citizens in the spirit of a constitutional democracy in the making. However, neither the interim government nor the

[2] Act 39 of 1968.

[3] The traditional government of national unity (TGNU) was a creation of the South African government. Its aim was to work towards a negotiated settlement with the so-called internal parties—mostly those groups who were part of the Turnhalle negotiations. The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in South African hands. The Administrator-General, as the South African government's representative, remained the main representative of the sovereign in Windhoek.

[4] See art 34, Proc R101 of 1985.

highest court in South Africa gave any indication to the international community or to SWAPO that they were serious about the implementation of a Bill of Rights.

Although the judges of the Supreme Court of South West Africa/Namibia never saw themselves as a constitutional court, they nevertheless took the Bill of Fundamental Rights seriously and prepared the way for a constitutional democracy in more than one way. Zaaruka describes the importance of Proclamation 101 thus:

> The period from 1985, witnessed a change in the Supreme Court of South West Africa/Namibia as they started questioning some of apartheid laws application in Namibia with the adoption of Proclamation R101 of 1985. This marked a major departure from the earlier period as the country prepared for transition to independence.[5]

The South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from its stance on parliamentary sovereignty. It ignored the challenge of the Namibian Court to evaluate the values and aims of the Bill of Rights and followed the traditional, rigid approach by looking primarily at the intention of the legislator and the legal interpretation surrounding the issues. The *Katofa*[6] and *Shifidi*[7] cases which are discussed below will set the scene for what was to happen after independence insofar as the relationship between the judiciary and the executive is concerned.

## 2.1 Katofa: the first challenge for the interim government

The transitional government was confronted with human rights issues shortly after its establishment. The first case did not initially deal with the Bill of Rights of Proclamation R101, but with another notorious Administrator-General Proclamation: AG 26 of 1978. The latter Proclamation severely restricted the rights of people detained without trial or access to a court of law. The *Katofa*[8] case was heard shortly before the enactment of Proclamation R101. The legality of Proclamation AG 26 of 1978 in the light of the Bill of Rights was later argued before the Supreme Court of Appeal. Katofa[9] was the brother of Josef Katofa, a detainee under Proclamation AG 26 of 1978. The applicant brought a typical *habeas corpus* writ,[10] requesting the Administrator-General to produce the person of Josef Katofa to the court and to furnish information to the court as to whether the latter was under arrest, on what charges he had been arrested, why he was being detained, and granting him access to a legal practitioner.

[5] Benethelin Zaaruka, 'Institutional Dynamics and Impact on Capital Formation: Evidence from Namibia and Tanzania' (PhD thesis, University of the Witwatersrand 2012) 46.

[6] *Katofa v Administrator-General for South West Africa and another* 1985 (4) SA 211 (SWA).

[7] *Shifidi v Administrator-General for South West Africa and others* 1989 (4) SA 631 (SWA).

[8] *Katofa* (n 6); *Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA).

[9] The case record identifies the applicant, Katofa, as the brother of Josef Katofa, the detainee on whose behalf the application was made. See *Katofa* (n 6) 213.

[10] The Court made no distinction between *habeas corpus* and the Roman Dutch remedy of *homine libero et exhibendo*. It seems that the Court used the terms interchangeably, without any reference to the differences between them.

While there is nothing in the Proclamation preventing a detainee access to a lawyer, Josef Katofa's attorney was not allowed to see him. Since the detainee did not see a magistrate or a medical practitioner as prescribed by the Proclamation, his attorney wrote a letter to the Administrator-General, stating that the detention was illegal and demanding his client's release. In his answering affidavit, the Administrator-General insisted that since the Proclamation gave him the authority to lay down conditions of detention, he had the discretion to allow or disallow visits by a lawyer. He was also obliged to give reasons for the detention to the detainee, but not to anyone else. The Administrator-General stated that the detainee had not asked for these reasons, and neither had he requested that he be visited by an attorney. This fundamentalist reliance on textual nuances was typical of the South African authorities. Even the long detention of Joseph Katofa was concealed by detaining him under different proclamations. He was initially detained in terms of section 4(2) of Proclamation AG 9 of 1977, and on 30 May 1984 in terms of section 5 bis of Proclamation AG 9 of 1977.

Although Katofa was not released, his terms and conditions of arrest as well as the ground for arrest were changed again. On 14 November 1984, Katofa was, according to the papers before Court, arrested and detained in terms of section 2 of Proclamation AG 26 of 1978. The Administrator-General stated that he was convinced the detainee was a person as provided for in the stated section, without referring to any specifics that confirmed this conviction.[11]

The Supreme Court of South West Africa/Namibia would have nothing of this. While not referring specifically to the annexed Bill of Rights of Proclamation R101, since the Proclamation only came into operation a month later, it concentrated on the rights of the individual. The Court used specific constitutional language. It referred to liberty and the right to see an attorney as fundamental rights, with Judge Berker referring to the problem as 'one of the most basic constitutional importance'.[12] The Court made it clear that the *habeas corpus* writ or the Roman Dutch remedy of *de homine libero et exhibendo*[13] intends to protect the liberty of subjects. Citing *Principal Immigration Officer and Minister of Interior v Narayansamy*, the Court stated that every individual 'is entitled to ask the Court for his release, and the Court is bound to grant it, unless there is some legal cause for his detention'.[14] Consequently, the application was granted. The Administrator-General was ordered to grant Katofa access to his attorney, and a rule nisi (interim order) was granted.

On 17 June 1985, a mere seven days after the judgment, the Administrator-General Proclamation R101 of 1985 came into effect. The functions of the Administrator-General were transferred to the transitional government, more specifically, the Cabinet of the Executive Authority. The Cabinet was not satisfied with the result and appealed. The appeal was a huge blow for the recognition of the new quasi-constitutional development in Namibia. While the Appellate Division rejected the appeal on the

[11] *Katofa* (n 6) 215–16. [12] ibid 224.

[13] Following *Principal Immigration Officer and Minister of Interior v Narayansamy* 1916 TPD 274, the Court made no difference between the two remedies. In the Supreme Court of Appeal, the differences became a bone of contention.

[14] ibid 222.

grounds that Mr Bezuidenhout, the chairperson of the transitional Cabinet, did not relieve the burden of proving that the detainee was in legal detention, it also addressed the review powers of the courts in terms of Proclamation R101.[15]

In the Supreme Court of Appeal Katofa argued that since section 2 of Proclamation AG 26 of 1978, which allowed for detention without trial, was in conflict with the Bill of Fundamental Rights and Objectives of Proclamation R101 of 1985, it was invalid since section 34 of the Proclamation did not clearly repeal legislation contradicting the Bill of Rights. Consequently, the Court of Appeal ruled that existing legislation, including earlier Proclamations by the Administrator-General, would remain in place after the enactment of Proclamation R101, even if it contradicted the Bill of Rights. The only condition for legality of older legislation was that it had to be 'constitutionally enacted by a competent authority'.[16]

It falls outside the scope of this discussion to go into the interpretation of section 34 of Proclamation R101. It will suffice to point out that several other cases of the Supreme Court have followed the *Katofa* case in applying the Bill of Rights in this manner. However, the Supreme Court of Appeal in Bloemfontein, South Africa has, as it did in the *Katofa* case, overturned all the Namibian cases that came to it on appeal where these contained any criticism of the South African administration.[17]

## 2.2 Shifidi: oppressive South African legislation and the president

The South African government often used laws to manipulate prosecutions in the territory. A case in point is the well-known brutal murder of SWAPO activist and former Robben Island detainee, Immanuel Shifidi.[18] Shifidi was killed at a political rally in Windhoek on 30 November 1986. The Attorney-General for South West Africa instituted criminal proceedings against five members of the South African Defence Force. However, the case was stopped when a certificate was issued under section 103(4) of the Defence Act 44 of 1957 by the Administrator-General and authorized by State President PW Botha. The section in question gave the state president the right to issue a certificate and stop any prosecution against Defence Force members for acts committed in the operational area.

In the *Shifidi* case, no operational action of the Defence Force was involved and the killing took place on a football field in Windhoek. The court held that the Minister of Defence or state president, or anyone else, could not exercise their discretion to decide where an operational area was located for the purpose of section 103(4). In this case, it could not be objectively said that a football field in Windhoek was an operational area. To overcome the shortcomings of the certificate, the Administrator-General issued a

[15] *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n ander v Katofa* 1987 (1) SA 695 (A).

[16] ibid.

[17] See *Chikane v Cabinet for the Territory of South West Africa* 1990 (1) SA 349 and *The National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A). The cases in the court *a quo* were not reported.

[18] See *State v Vorster*, unreported case of the Supreme Court of SWA (on file with the author), where the prosecution was stopped on 1 March 1988 by the handing in of a certificate in terms section 103 of the Defence Act 44 of 1957 and *Shifidi* (n 7).

proclamation declaring Windhoek an operational area. In the Shifidi case the daughter of the deceased then applied for a court order declaring the Administrator-General's certificate invalid.[19] A full bench of the Supreme Court considered the case and concluded that the documentation presented to the Court did not justify the issuing of the certificate. The Court found the president did not apply his mind in considering the facts when he found that the act the accused had committed was a bona fide attempt to combat terrorism. It not only withdrew the certificate, but also set aside the decision of the Attorney-General not to proceed with the prosecution. This was a brave decision in a period of state repression and the brutal enforcement of security legislation. Bryan O'Linn, a lifelong opponent of apartheid and, at the time of the transitional government, an activist advocate critical of the Supreme Court Bench, made the following observation:[20]

> The South West African Supreme Court in this decision upheld the high traditions of the Courts. The South African State President and Minister of Defence[,] on the other hand, by this act betrayed the values of a Christian and civilised people by covering up a heinous crime . . . In doing that they became party to murder and public violence by association and collusion.

The members of the Defence Force were never prosecuted. Soon after the case had been heard by the Supreme Court, the process of Namibia's independence started. Their deeds were eventually covered by the blanket amnesty that initially applied only to returnees of the liberation movements, but was later extended to members of the security forces.[21] Even more brutal and aggressive conduct on the part of the South African government followed.[22] As far as the Supreme Court of South West Africa was concerned, a new dispensation had begun with the implementation of Proclamation R101. It is understandable that the review powers of the Court created tremendous problems for South Africa. If all the security laws made applicable in South West Africa/Namibia could theoretically come under scrutiny by the Supreme Court of South West Africa/Namibia, the chances were good that the Court would have declared them unconstitutional. The Court had a constant battle with both the transitional government and the South African Appellate Division. In doing so, the judiciary prepared the way for a new dispensation in Namibia, where the courts would play a much more significant role in enforcing constitutional rights against oppressive legislation. The interim government, however, opted to take refuge at the South African Appellate Division.

The judgments of the Appellate Division are typical of the fundamentalist approach of courts in South Africa before 1994. This is a good example of what Dyzenhaus calls 'the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation'.[23] The Supreme Court of South West Africa/Namibia took the Bill of Rights seriously and applied it, even if it reflected negatively on the transitional

[19] *Shifidi* (n 7).
[20] Bryan O'Linn, *Namibia: The Sacred Trust of Civilization* (Gamsberg Macmillan 2003) 278.
[21] Administrator-General Proclamation 13 of 1989.
[22] See *State v Heita and others* 1987 (1) SA 311 (SWA).
[23] David Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (Juta and Co 1998) 16ff.

government or the Cabinet. The executive of the transitional government, however, received their power from the South African government. They were not elected by the people, and were rejected by the majority of the Namibian people. Like their South African allies, they considered the liberation movements as enemies. Almost all the human rights cases of the period had some relation to security issues. Since the Turnhalle movement and later the transitional government, supported the South African military action against SWAPO, they seldom went against the actions of the security forces and the Administrator-General, even if such actions were in contravention of the Bill of Rights.

At independence, the democratically elected first government inherited a judiciary tested under the last days of South African occupation and its attempts to impose the rule of law under an anti-democratic government in Namibia. The brave actions of this court in some respects laid the foundation for an independent judiciary after independence.

## 3. Namibia After Independence: Separation of Powers in the Namibian Constitution and an Independent Judiciary

The Constituent Assembly, who drafted the Namibian constitution, ensured that an independent judiciary was firmly entrenched in several provisions of the new constitution. In particular, article 78(2) made it clear that courts are independent and only subject to the constitution and the law, and the High and the Supreme Courts are competent to interpret the constitution and more specifically the Bill of Rights. While the constitution prohibits direct influence of government on the judiciary and gives the courts a mandate to act independently of political interference and manipulation, it does not prevent tension when the government as an elected body feels threatened by the interpretations and judgments of the courts.

Generally, the government, and more specifically the ruling SWAPO party, was not very comfortable with the white judges that were inherited from the pre-independent Supreme Court of South West Africa/Namibia.[24] Even the white judges of the new dispensation did not escape the suspicion of the ruling party.

Shortly after independence a few unorganized, white, right-wingers were arrested while planning a coup d'état. They were poorly organized with no sustainable structures, no support in society, and hardly any weapons. While on bail the ringleaders fled the country and only a few minor accomplices eventually stood trial.[25] Although the accused were convicted, the sentences were lenient. The Prosecutor-General explained the lenient sentences in light of the fact that the ringleaders had escaped and were not prosecuted.[26] However, SWAPO and other loyalists were shocked by the moderate sentence given to white conspirators against the government. It did not matter that Judge O'Linn was appointed in the transitional period with the approval of SWAPO; that he had a history of defending SWAPO fighters and sympathizers, that SWAPO

[24] See extensively Nico Steytler, 'The Judicialization of Namibian Politics' 9 *SALJ* (1991) 477.
[25] *State v Kleynhans and others* 1991 unreported case of the High Court of Namibia, CC 9/91.
[26] Statement of the Prosecutor-General, quoted in S*tate v Heita and another* 1992 NR 403 (HC) 414.

considered him as an ally when the leadership returned from exile,[27] and that he was entrusted with the commission that monitored violence during the transitional elections. Although he was a liberal opponent of the apartheid regime, he was never a member of SWAPO.[28] The following fact added the necessary spice to make ethnic deconstruction work: he was a police officer in South Africa before entering the legal profession.

The ruling party's criticisms of O'Linn's judgment were severe. Even after the Judge-President and the Prosecutor-General issued statements explaining the reasons for the lenient sentences, the chief co-ordinator of SWAPO, Moses Garoeb, answered with barbs. He retorted in these terms:

> In the past the Namibian judiciary system was an exclusive mutual admiration and private club of the white minority. The office of the Prosecutor-General was the dispenser of selective justice using its legal authority to the detriment of the majority of black Namibians. Is it not the best of times for a drastic change from old bones to new ones in our judicial system? Thus the demonstrators were not in contempt of court as suggested by the manipulators of the Namibian Constitution and the vultures of justice. How many black Namibian patriots found their way to the gallows in the Namibian High Court of colonial times, represented at that time by the Prosecutor-General for just being in the possession of a revolver.[29]

The Prosecutor-General threatened to prosecute Moses Garoeb and some other SWAPO officials for contempt of court, and Judge O'Linn called it a constitutional crisis.[30] O'Linn made his own position clear in *S v Heita*:

> Two years ago some people called for my dismissal on the grounds of alleged sympathy with SWAPO. Now a SWAPO-leader and SWAPO-supporters ask for my dismissal, inter alia, on the ground of an alleged colonialist and anti-black mentality. According to them I have become irrelevant to black thinking in Namibia and I should not be on the High Court Bench at all.[31]

The Prosecutor-General eventually did not prosecute anyone. Nevertheless, the government's distrust of the judiciary persisted even after the High Court and Supreme Court benches consisted of a majority of black judges. In February 2003 the then prime minister (later Speaker of Parliament), Theo-Ben Gurirab, told visiting students that little progress had been made to change the dominant pre-independence order of the judiciary, which he called a 'lily white' bench. At the time of his statement, three of the nine permanent judges were white and the vast majority of magistrates were black. The prime minister later stated that he had been referring to the judiciary in a broader

[27] See, for example, the letter written by Helmut Angula on behalf of SWAPO in response to O'Linn's criticism of the 1 April 1989 crisis: 'It is not the habit of SWAPO to enter into polemic with opponents of apartheid, let alone with the distinguished President of the Windhoek Bar Council, whose personal integrity we respect.' *The Namibian* (Windhoek, 28 April 1989) quoted in O'Linn B, *The Sacred Trust of Civilisation: Ideal and Reality* (vol 1, Gamsberg Macmillan Publishers 2009) 324.

[28] See Judge O'Linn's comments in *Heita* (n 26).

[29] See *The Namibian* (Windhoek, 18 October 1991), quoted in *S v Heita* (n 26) 786.

[30] ibid. [31] ibid.

sense, possibly including the Office of the Prosecutor-General and the Law Society.[32] The distrust of the judiciary by the ruling party and government possibly had to do with the new constitutional dispensation in which, for the first time, the separation of powers between the different branches of government was made clear.

The murder of political activist Anton Lubowski, a confident of the founding president, by a covert South African Defence Force unit, the Central Cooperation Bureau (CCB), shortly before independence, resulted in the first amendment to the Criminal Procedure Act after independence. An Irish mercenary who worked with the CCB was arrested and charged with the murder of Lubowski. The Prosecutor-General requested the extradition of a South African suspect and attempted to summon several members of the CCB, who were with the suspects in Namibia at the time of the murder, albeit without success. When it became clear to the High Court that the second suspect and witnesses needed to prosecute the case, would not be sent to Namibia in the foreseeable future, the Court warned the Prosecutor-General that the accused, Acheson, would be released on bail unless the other members implicated in the murder were going to be extradited to stand trial.[33]

In the first amendment to the Criminal Procedure Act 51 of 1977 (CPA),[34] the Namibian parliament made it possible for a court to deny bail, even if the accused complied with the common law requirements for bail. The new section 3 of the Act stated as follows:

> (The Court may) refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.

This amendment of the CPA was an indication of the early tension between the judiciary and government. However, neither the *Kleynhans* case[35] nor the amendment of the Act created any real threat to the independence of the judiciary.

## 4. The Executive and the Judiciary After Independence: The Difficult Cases

In this section, we will focus on four cases which illustrate how the Namibian government has struggled to operate under a system where the courts are able to operate independently and assert their duty to hold the government accountable.

### 4.1 Conflict in the House: government and the judiciary

The first serious constitutional conflict between the judiciary and the government erupted in *Ngoma v the Minister of Home Affairs*.[36] The accused was an asylum seeker who played in a band, the Osire Stars, and appeared at a celebration of the Congress of

[32] Werner Menges, 'PM sticks to his guns on the judiciary' *The Namibian* (Windhoek, 6 February 2003).
[33] *State v Acheson* 1991 (2) SA 805 (Nm).
[34] Section 3 of Act 5 of 1991.
[35] *Kleynhans* (n 25); *The Namibian* report (n 29).
[36] Case no A 206/2000 unreported case of the High Court of Namibia (on file with the author).

Democrats (COD), an opposition party. The Osire Stars were allowed to leave the Osire refugee camp before the performance at the COD celebration. However, they were arrested after their appearance at the celebration.

The Osire Stars went to court and obtained a motion from the High Court interdicting the Minister of Home Affairs from arresting the asylum seekers or removing him from the Osire refugee camp. The judge who issued the order in the High Court was former the Chief Justice of Zambia, Justice Silungwe.

The Minister of Home Affairs reacted to the judgment by stating that he would withdraw the work permits of some foreign judges he perceived to be 'working against the best intentions of the government'.[37] However, his colleague, the Minister of Justice, Dr Tjiriange, issued a statement in which he stated that a judge performs his/her judicial functions on the basis of the presidential appointment and not a work permit. He went further to suggest that the Minister of Home Affairs had acted upon a factually incorrect report that he received from an official. He also stated that the minister had apologized to the judges; a fact that was confirmed by Chief Justice Strydom.[38] The intervention of the Minister of Justice thus prevented a stand-off between the High Court and the government.

The *Sikunda* case[39] is another instance of government intervention and disregard for the judiciary. Sikunda was one of a group of alleged members of the National Union for the Total Independence of Angola (UNITA) held in the police cells in Dordabis for some time before their detention was leaked to the press. On 10 October 2000, the Minister of Home Affairs informed José Domingo Sikunda that his activities and presence in the Republic of Namibia endangered the security of the state and that he had been declared a prohibited immigrant and his removal from the Republic of Namibia had been ordered. A week later the minister issued a warrant of detention on his letterhead stamped by the Inspector-General. Sikunda's son brought an urgent application for his release to the High Court and this was granted by acting High Court Judge John Manyarara. The state did not file to defend the application. Despite the court order Sikunda remained in detention. Sikunda's son brought a new application for his father's release. Judge President Teek postponed the case in November without taking any action whatsoever to direct the minister to comply with the order. He was severely criticized by the Society of Advocates of Namibia and several newspaper editorials. This led him to withdraw from the case *mero motu*, claiming that his credibility as a judge had been tainted. On 9 February 2001 two judges of the High

[37] See *The Namibian* (Windhoek, 18 September 2000); 'Government Falls Silent on Jerry's Tirade' (*The Namibian*, 1 August 2000) <http://allafrica.com/stories200008010065.html>, last accessed on 1 June 2015.

[38] Permanent Secretary of Justice 'Press release by Ministry of Justice, 12 September 2000' (*Afrol*, 2000) <http://www.afrol.com/News/nam002freejudiciary.htm#up> accessed on 12 June 2003; T Amupadhi, 'Strydom Applauds Ekandjo, Says Constitution the Winner' *The Namibian* (Windhoek, 12 September 2000) <http://allafica.com/stories/200009120122.html> accessed 1 June 2015.

[39] Three High Court cases and the appeal case in the Supreme Court were reported: *Sikunda v Government of the Republic of Namibia And Another* (1) 2001 NR 67 (HC) (unreported, on file with the author); *Sikunda v Government of the Republic Of Namibia and Another* (2) 2001 NR 84 (HC) (unreported, on file with the author); *Sikunda v Government of the Republic Of Namibia and Another* (3) 2001 NR 181 (HC); *Government of The Republic of Namibia v Sikunda* 2002 SA5/0 NASC 1.

Court found the minister guilty of contempt of court and again ordered the immediate release of Sikunda. Sikunda was freed 108 days after Judge Manyarara initially ordered his release. In giving his judgment, Justice Mainga made the following comment:

> I have no doubt that he wilfully and contemptuously refused to comply with the court order. There is no authority, none whatsoever, for the proposition that an order which is wrongly granted by this court can be lawfully defied for whatever laudable motive. All orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside . . .
>
> Judgements, orders, are but what the courts are all about. The effectiveness of a court lies in execution of its judgements and orders. You frustrate or disobey a court order, you strike at one of the foundations that established and founded the State of Namibia. The collapse of rule of law in any country is the birth of anarchy. The rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected.[40]

Referring to international law, the judge rejected the minister's claim that he had no choice but to disobey the court order because of the need to ensure that he meets its obligations under United Nations sanctions against UNITA. The Court ruled that the UN resolutions or any international obligation that the state may have are still subservient to the Namibian constitution. The government appealed against the judgment of the full bench of the High Court (Justices Mainga and Hoff). The Supreme Court confirmed the judgment of the High Court.[41]

In a further blow to the government, the Court ordered the government to pay Sikunda's legal costs on an attorney and own client scale.[42]

## 4.2 The independence of the Prosecutor-General vis-à-vis the Attorney-General

While the function of the Prosecutor-General is not strictly speaking a judicial function, its independence is a prerequisite for a functionally independent judiciary. A Prosecutor-General, who functions under the authority and guidance of the executive, can neither be independent nor act against executive criminality without the approval of her/his superiors in the executive.

The fact that the Namibian Attorney-General and Prosecutor-General were vaguely based on the English system without the specific boundaries of the two positions being spelled out soon led to intense conflict between the two offices, which was eventually settled by the Supreme Court.[43] The conflict centred on the functions of the Attorney-

[40] *Sikunda v Government of the Republic of Namibia and another* (2) 2001 NR 86 (HC) 96.

[41] ibid.

[42] A party who is ordered to pay legal costs on attorney and own client scale will pay much more than in the case of other types of costs. The person ordered to pay these costs is liable for the costs of *all services rendered* or disbursements incurred by the attorney in prosecuting the case.

[43] *Ex parte: Attorney-General Re: The Constitutional Relationship between The Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) (1).

General to exercise the final responsibility for the office of the Prosecutor-General.[44] In a protracted case involving racial discrimination against the public broadcaster, the Namibian Broadcasting Corporation (NBC), the conflict came to a climax. The Attorney-General informed the Prosecutor-General that he had decided that prosecution should be withdrawn.[45] The Prosecutor-General informed the Attorney-General on the same day that he did not regard himself bound by the instruction.[46]

After deliberations in the High Court, the Attorney-General brought a petition to the Supreme Court in terms of section 15(1) of the Supreme Court Act of 1990 to determine the essence of prosecutorial independence and the relationship between the two offices. The Supreme Court had to decide whether the Prosecutor-General was fully independent under the constitution. The Attorney-General argued that section 3 of the Criminal Procedure Act (a South African piece of legislation) still applied to Namibia. Section 3 gives the Minister of Justice the final authority in all decisions on prosecutions. He further argued that the Attorney-General performs the same functions under section 3 in independent Namibia that the minister performed before independence. Section 3, he asserted, was not amended by the Namibian constitution. Consequently, the final responsibility for prosecutions should still lie with the Attorney-General. He also cited article 87(a) of the Namibian constitution which defines the powers and functions of the Attorney-General as including the power to 'exercise the final responsibility for the office of the Prosecutor-General'. According to him, the words 'final responsibility' implies final authority. Hence, he argued that the only logical interpretation of article 87(a) is that the Attorney-General has the final say on prosecutions and not the Prosecutor-General.

The Supreme Court did not agree. The Court held that an interpretation which led to the Attorney-General being declared as the final prosecutorial authority would not conform to the constitutional ethos against apartheid. As the Court saw it, there was 'no other Constitution in the world that seeks to identify a legal ethos against apartheid with greater vigour and intensity' than the Namibian constitution.[47] In delivering the lead judgment, Leon AJA said:

> I do not believe that allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted can protect those rights and freedoms. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values.[48]

[44] In the heads of argument on behalf of the Prosecutor-General (*Ex parte: Attorney-General* (n 43) 119ff.), counsel quotes a letter of the Prosecutor-General to the Judicial Service Commission on 27 March 1992, after the Attorney-General had laid a complaint of insubordination against the Prosecutor-General. The Prosecutor-General complained amongst other things that his staff received instructions from the office of the Attorney-General without his knowledge, that advocates in his office were appointed as investigators, which he considered to be undesirable and that he considered an instruction from the Attorney-General to withdraw a specific case as an attempt to defeat the ends of justice (Heads of argument, 120ff.)

[45] Heads of argument, 127. [46] ibid 128. [47] *Ex parte: Attorney-General* (n 43) 14.

[48] ibid 14.

The Court discussed the whole issue of a *Rechtsstaat* and came to the conclusion that Namibia with its new constitution and its fundamental adherence to the Universal Declaration of Human Rights (UDHR) complied with a modern *Rechtsstaat* where state authority is bound by a set of higher juridical norms (*Grundsätze*).[49] The *Rechtsstaat* implies independence of the legal process. Since the South African apartheid regime was not a *Rechtsstaat*, the powers of the Minister of Justice over prosecutions could not remain intact in a democratic *Rechtsstaat* such as independent Namibia. The Court also concluded that there need not be a conflict between an independent Prosecutor-General and an Attorney-General that has final responsibility. Final responsibility means financial responsibility, and includes his duty to account to the president, the executive, and the legislature.[50]

The judgment was a big blow for the government. The Prosecutor-General, who was not a politician and accountable only to the Judicial Service Commission, now had enough power to prevent the government from applying the prosecutorial approach of the former regime since the Attorney-General had no authority or power to interfere with the decisions of the Prosecutor-General. One of the arguments of the Attorney-General had been that it was only the government that had the political will and the moral high ground to introduce a prosecutorial approach that would end the inequalities of the past and restore the people's trust in the judicial process. However, victory for the Office of the Prosecutor-General meant that the prosecutorial authority could not turn against the *Rechtsstaat*-approach when it did not suit them. Before the case the Prosecutor-General was often criticized for prosecuting in the spirit of the old order. After this case the Namibian prosecutors were regularly challenged whenever they did not comply with the requirements of the Bill of Rights in the constitution.

### 4.3 Interference by keeping the lower courts less than independent: the magistracy

The independence of magistrates was often a topic of discussion at magistrates' conferences, but only became a concern for government when the magistrate of Gobabis took a decision of the permanent secretary of the Ministry of Justice to transfer him to Oshakati on review. The case, *Mostert v Minister of Justice*,[51] eventually ended up in the Supreme Court.

The Supreme Court ruled that in light of the constitutional independence of the magistrates, the general practice to see magistrates as public servants was unacceptable.[52] Referring to the South African Constitutional Court case of *Van Rooyen and others v The State*,[53] the Court stated that it did not mean that they should be appointed in the same manner as judges for the following reasons:

- The constitution does not render the same protection to magistrates. There is not even an indication that they must be appointed by an independent commission.

[49] ibid 32. [50] ibid 38. [51] *Mostert v Minister of Justice* 2003 NR 11 (SC).
[52] ibid. [53] *Van Rooyen and others v The State* 2002 (5) SA 246 (CC).

- Magistrates have a lesser jurisdiction.[54]
- Magistrates' courts are courts of first instance; they do not have constitutional review powers, i.e. they cannot strike down unconstitutional laws.[55]
- Aggrieved persons can take all the judgments of the magistrates' courts on appeal and longer sentences of district courts are automatically reviewed by the High Court.

In spite of this, the Court said that this did not mean that their independence should not be protected. But the hierarchical differences between magistrates and judges had to be taken in consideration. The Court nevertheless made it clear that the independence of magistrates is part of the constitutional dispensation and that the judge in the court *a quo* was correct in refusing to make a declaratory order to that effect. The Supreme Court stated that article 78 of the constitution, which deals with judicial independence, covered all the courts in Namibia.[56]

Since the legislator had not complied with the expectation of article 78 of the constitution to pass legislation regulating an independent magistracy, the permanent secretary of the Ministry of Justice who took over the pre-independence role of the South African directors and the laws regulating the public service assumed this role. As a result, magistrates in Namibia were seen as public servants and dealt with in terms of the Public Service Act 13 of 1995. The authority of the permanent secretary to transfer magistrates (the issue of the *Mostert* case), was derived from section 23(2) of this Act. The main bone of contention of the appellant, Magistrate Mostert, was the challenge of the power of the Minister of Justice to appoint magistrates. The Act was amended by Act 1 of 1999, but the amendment was not aimed at bringing the magisterial profession in line with the constitution. On the contrary, the minister not only remained as the appointing officer of magistrates, he/she also had the power to appoint any other competent staff member in the public service or a competent retired staff member to act in the place of an absent or incapacitated magistrate.[57]

The Supreme Court concluded, and correctly so it can be argued, that the amendment did not give effect to article 83(1) of the constitution.[58] The Chief Justice then made the following observation regarding the two Acts:

> It seems to me futile to leave intact the provisions of Act 32 of 1944 which are in conflict with the Constitution. To do so would be to give legal impetus to provisions which are not constitutional. In my opinion it is necessary to finally cut the string whereby magistrates are regarded as civil servants, and that will only be possible once new legislation completely removes them from the provisions of the Public Service Act.[59]

[54] This is true of district magistrates but not of regional court magistrates. The jurisdiction of regional court magistrates has increased tremendously since independence. A regional court magistrate can hear any criminal case, including murder and rape. The only exception is high treason. She can bestow a sentence of twenty years per charge.

[55] It is true that the regional court has no appeal power over the district courts. However, district courts have limited appeal powers. The Community Courts Act 263 of 2003, gives district courts appeal powers over the community court judgments, although no appeal has yet gone to a district court.

[56] *Mostert v Minister of Justice* 2003 NR 31.

[57] Subsection 3.

[58] *Mostert* (n 51) 33.

[59] ibid 35.

Consequently, the Supreme Court declared sections 9 (as amended) and 10 of the Magistrates' Courts Act 32 of 1944 unconstitutional. The government was given six months to correct the legislation (that is, to give effect to article 83 of the constitution, by passing legislation that would make magistrates truly independent). Furthermore, the Court declared that section 23(2)(a) of Act 13 of 1995 is not applicable to magistrates and that consequently the order of the permanent secretary to transfer the appellant, was *ultra vires*.[60]

In compliance with this decision, the Magistrates Court Act 3 of 2003 was passed by parliament. The Act created a Magistrates' Commission to regulate and oversee the magistracy. However, the functions of the Magistrates Commission set out in section 3 of the Act seemed to still give the minister considerable powers. According to it, the Commission has the power, inter alia:

a) To ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and correctly;
b) to ensure that no influencing or victimization of magistrates takes place;
c) to promote the continuous judicial education of magistrates and to make recommendations to the minister in regard thereto;
d) to ensure that properly qualified and competent persons are appointed as magistrates; and
e) to advise the minister regarding any matter which, in the opinion of the Commission, is of the interest for the independence of the magistracy and the efficiency of the administration of justice in the lower courts.

If it had been the intention of the legislator to firmly affirm the independence of the magistracy, one would have expected a central position for the Magistrates' Commission in the Act. While the judgment did not give specific guidelines as to how the legislator should meet the demands of article 83 of the constitution, the reference to *Van Rooyen and others v The State,*[61] possibly inspired the legislator or Cabinet to look to South Africa for guidelines. In South Africa the minister was replaced by the Magistrates' Commission.

The Act described the role of the Magistrates' Commission in appointing magistrates as follows, being that of making recommendations to the minister with regard to 'the suitability of candidates for appointment as magistrates'. The effect was that the appointment of magistrates was still left in the hands of the Minister of Justice who may appoint magistrates on the recommendation of the Magistrates' Commission. If it had not been for the permissible 'may' in the Act, the fact that the minister acts on the recommendation of the Commission would have created an acceptable check on the power of the minister. It is not clear why the legislator used the permissive 'may' rather than the imperative 'shall'.

[60] ibid 39. [61] *Van Rooyen* (n 53).

The Act did not go unchallenged. Magistrate Mostert went back to the High Court[62] to challenge the independence of the Magistrates' Commission and the role of the minister under the new Act. The High Court held that although the minister does play a role in the appointment of the Commission, it cannot be said that the members are therefore bound to follow the directives of the minister. According to the High Court there are several checks built into the Act that would make the appointments credible and which would make it extremely difficult for the minister to manipulate any process.[63]

To put the Court's position in its proper perspective, it is necessary to look at how the Commission is constituted. It consists of one judge designated by the Judge-President, the Chief Lower Courts (a public servant who is the administrative head of magistrates' courts), one person designated by the Attorney-General, one person designated by the Judicial Service Commission, one magistrate appointed by the minister from a list of three magistrates nominated by the Judges' and Magistrates' Association of Namibia, a staff member of the Ministry of Justice designated by the minister, and one teacher of law appointed by the minister from a list of two teachers of law nominated by the Vice-Chancellor of the University of Namibia.[64] Although the minister appoints three persons, he/she is limited in his/her choices of the magistrate and the law teacher. The Public Service Commission is an independent constitutional organ that has the power to designate a member. The judge in this case even went further to state thus:

> I see nothing in the Constitution which suggests that magistrates should be appointed by an independent body. That would in any event be requiring standards more rigorous than those in place for the appointment of Judges and would go against the spirit of the Supreme Court judgment. I do not therefore see on what basis the fact that the Minister is the appointing authority for Magistrates can, without more, be objectionable if Judges are appointed by the President who wields ultimate executive power in the Republic.[65]

Nevertheless there are doubts whether this decision can be easily reconciled with the Supreme Court decision in *Ex Parte Attorney-General: In re: The relationship between the Attorney-General and the Prosecutor-General*. In this case, the Namibian Supreme Court after pointing out that it matters who makes the appointment of constitutional functionaries said:

> I do not believe that allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted can protect those rights and freedoms. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values.[66]

From this perspective, the fact that the Minister of Justice/Attorney-General appointed two public servants from their employees did not enhance the independence of the Commission, especially as the third member (Chief Lower Courts) was also a staff

[62] *Walter Mostert and another v Magistrates Commission and another* Case no (P) I 1857/2004 unreported case of the High Court of Namibia (on file with the author).
[63] ibid 20. [64] Section 5(1). [65] *Walter Mostert* (n 62) 23. [66] ibid 14.

member of the Ministry of Justice. The Court stated that even if the Commission was not independent, it did not reflect negatively on the independence of magistrates.

The applicants did not appeal to the Supreme Court. Despite the positive judgment of Justice Strydom, the Magistrates Act and the subsequent High Court case represent lost opportunities to make the magistrates really independent. The magistrates are still not fully independent and the authority of the Minister of Justice remains intact. However, in a ground breaking case the Supreme Court limited the power of the minister on the crucial issue of the dismissal of magistrates.[67] The minister failed to act upon a request of the Magistrates' Commission to dismiss a magistrate, Ms Shanika, who had been found guilty of misconduct in a disciplinary hearing. The minister argued that since she had a legal right to consider recommendations of the Commission to appoint individuals as magistrates, she also had discretion when the Commission recommends the dismissal of a magistrate. The Supreme Court concurred with an earlier High Court judgment that while section 13 of the Magistrates' Court Act does give the minister a discretion in following the recommendations of appointing a magistrate in terms of the Act ('the Minister *may*...'), section 21(3) dealing with dismissals does not allow the minister to reject the recommendations of the Commission ('the Minister *must*...'). The role of the minister is restricted to ensuring that the correct procedures were followed. Although the composition of the Magistrates' Commission did not remove all the questions regarding its independence, the Supreme Court ruling in dealing with the Commission's conflict with the minister strengthened the position of the Magistrates' Commission as an independent body and limited the powers of the minister.

In September 2014, only two months before the parliamentary and presidential elections, the Attorney-General brought several constitutional amendments to parliament. The amendments and the processes are still a bone of contention since civil society and the public were not consulted, and the amendments were rushed through parliament in a matter of weeks. However, the amendments brought magistrates a step closer to equal status with judges. The Magistrates' Commission is now included in article 83(4) of the constitution. Article 78(7) of the constitution also makes it clear that the Chief Justice not only supervises and takes responsibility for the judiciary, but also monitors the norms and standards of all courts. Although the Magistrates' Commission and not the Judicial Service Commission still oversees the operation of magistrates, both the profession of magistrates and the Magistrates' Commission are now constitutional functionaries of the judiciary. Learning from the *Minister of Justice v Magistrates Commission and another* case, one of these amendments made it clear that the president no longer has any discretion when the Judicial Service Commission has recommended the termination of a judge's employment.[68]

[67] *Minister of Justice v Magistrates Commission and another* unreported case of the Supreme Court of Namibia, Case no SA 17/2010, per AJA Langa. AJA Strydom and AJA O' Regan concurred, delivered on 21 June 2012.

[68] See the amended art 84(1)(c):

(c) if the Judicial Service Commission, after due deliberation, advises the President to remove the Judge for any reason referred to in Sub-Article (2), the President must remove such Judge from office.

## 4.4 Interference by executive statements

In the mid-1990s sodomy was still a common law crime in Namibia, but this was seldom enforced. Public opinion was divided on the issue. AIDS activists saw the distribution of condoms as an imperative to save lives. Since Namibia had been following South Africa in most constitutional issues, some members of the legal fraternity believed that it was only a matter of time before the crime of sodomy would also be declared unconstitutional. However, the Prosecutor-General refused to grant permission for the distribution of condoms in prisons until the legislator or a competent court changed the legal position.

The Namibian politicians managed to keep the contradiction between sexual freedom and not challenging the constitutionality of criminalizing sodomy in balance during this period. No attempt was made to arrest adult same sex partners for committing the crime of sodomy, as long as it happened in the privacy of the home. There were other reasons to believe that Namibia was on the same path as South Africa in moving towards a more tolerant society. While the constitution only lists 'sex' as a non-discriminatory identity, the Labour Act 6 of 1992 explicitly added 'sexual orientation' to the list. It would be strange if the Namibian legislator meant to broaden the categories of non-discrimination for the new labour dispensation, but not for other constitutional rights. If the Constituent Assembly did not want to protect sexual orientation in the constitution, why would the same people (then sitting as the National Assembly) decide to protect it in the Labour Act? A more likely interpretation is that the Constituent Assembly used the word 'sex' in a broad manner to include 'sexual orientation'. When the legislator dealt with the issue of non-discriminatory categories two years later they added the words 'sexual orientation' merely to make it clear that sexual orientation is also a non-discriminatory clause. In other words, they did not create a new category of non-discrimination, but explained the scope of the word 'sex'.

It therefore came as a surprise when President Nujoma and several other senior ministers, in following the example of Zimbabwean President Robert Mugabe, started a concerted attack on homosexuals and lesbians in the mid-1990s. There had been no public debate on the necessity or not for legal action against homosexuals. It seemed to be contrary to the social and legal development since independence. Not once since independence had any politician made negative comments about gays or homosexuality, and as noted above, the Labour Act included sexual orientation as a non-discriminatory clause. The anti-gay rhetoric of this period paved the way for the constitutional interpretation of the word 'sex' as a non-discriminatory category.

Although the government's verbal attacks on homosexuals and lesbians started in the mid-1990s, the Supreme Court only had the first opportunity to look at the constitutional rights of homosexuals in March 2001 in the now famous *Frank* case.[69] In this case, the Immigration Selection Board appealed against a review decision by the High Court after the latter reviewed and set aside a decision, refusing a permanent residence permit to Frank. The High Court directed the Immigration Selection Board

[69] *Frank v The Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) and *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and another* 2001 NR 107 (SCA).

to authorize the issuing to Erna Elizabeth Frank of a permanent residence permit within thirty days of date of the order. Frank's application for permanent residence was turned down twice. She alleged that her lesbian relationship with Elizabeth Kachas might have been the reason why her application for a permanent residence permit had been rejected. She argued that if her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship in terms of article 4(3)(a) of the Namibian constitution. The Board, she alleged, did not take this factor into account and therefore violated her right to equality and freedom from discrimination guaranteed by article 10, her right to privacy guaranteed by article 13(1), and protection of the family guaranteed by article 14 of the constitution.

The High Court concluded that the Board was wrong in its assumption that Frank's long term relationship was not one recognized in a court of law and was therefore not able to assist the first applicant's application. The Court relied on *Isaacs v Isaacs*,[70] in which the learned judge found a relationship where the parties put all their assets, both present and any they may acquire in future, in a pool from which they paid expenses incurred by both, as a relationship acknowledged and protected by the common law. Such an agreement is known as a universal partnership and can be entered into by verbal undertaking, in writing, or even tacitly. Referring to article 10 of the Namibian constitution,[71] the Court concluded that if a man and woman can enter into such a relationship, and since the partnership is so strong that a court of law would divide the assets when it dissolves, in terms of the constitutional equality principle of article 10(2), two lesbians should also be able to enter into such a partnership. Consequently, the Court found that a relationship between the applicants was indeed protected by law and should have been considered by the respondent. In a rather long shot the Court did not refer the case back to the Board, but instructed the board to grant the first applicant permanent residence.

The case went on appeal in the Supreme Court. It was complicated by a number of procedural issues (late filing by the appellant) as well as some factual disputes. However, focusing our attention on the lesbian issue, the Court came to a number of conclusions. First, it concluded that the Immigration Selection Board had wide discretionary powers and the High Court had gone too far in exercising its review powers in the matter. It said:

> Although this Court, as well as the High Court, undoubtedly has (sic) wide powers to set aside the decisions of administrative tribunals and even to substitute its own decision on the merits for that of such a tribunal in appropriate circumstances, the present case is not one where the substitution of our decision for that of the Board is justified. In my respectful view, that would amount to usurping the function of the Board, entrusted to it by the legislature of a sovereign country.[72]

[70] *Isaacs v Isaacs* 1949 (1) SA 952(C).

[71] 1. All persons shall be equal before the law.
2. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

[72] The Chairperson of the Immigration Selection Board (n 69) 113.

Secondly, the Court investigated the issue of the protection given to lesbian couples in terms of the constitution, especially article 10(2) and concluded thus:

(i) It is only unfair discrimination which is constitutionally impermissible, and which will infringe Article 10 of the Namibian Constitution;[73]

(ii) A homosexual relationship does not have the same status and protection of a heterosexual marriage:

> A Court requiring a 'homosexual relationship' to be read into the provisions of the Constitution and or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted 'purposively'.[74]

Thirdly, in determining the norms and values of the Namibian people in relation to same sex relationships, the Court made the following comment:

> In contrast, as alleged by the respondents, the President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77 per cent of the Namibian electorate, made any comment to the contrary.[75]

Finally, the Court then did an egg dance contradicting itself and stated thus:

> Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution.[76]

However, it fails to explain why parliament should not protect the nation against people and a practice seen by customary law as extremely wicked but rare.[77] If the views of the president and Minister of Home Affairs quoted as value markers by the Court[78] represent the norms and the values of the Namibian people, there is always a possibility that parliament will eventually pass laws to oppress homosexuality.

Although the initial hate speech and anti-gay rhetoric of the then president had no immediate legal consequences, it laid the foundation for the interpretation by the Supreme Court of article 10(2) of the Constitution. The Supreme Court determined the norms and values of the Namibian people regarding homosexual issues by taking legal notice of the anti-homosexual statements of the then president and a senior Cabinet minister. While the Supreme Court also worked with a narrow understanding of constitutional review of a pre-independence South African Act, the Court made it clear that the attitude of the president and a senior member of the executive played a decisive role in its reading of the non-discriminatory clause of the constitution. It is fair to accept that without the anti-gay rhetoric the Supreme Court may have come to a different conclusion.

[73] ibid 114. [74] ibid 115. [75] ibid 211. [76] ibid 119.
[77] ibid 106. [78] ibid 103.

When the Labour Act 6 of 1992 was replaced by a new Labour Act 11 of 2007, sexual orientation was no longer a non-discriminatory category. The only logical conclusion one can come to is that the anti-gay rhetoric was a pre-meditated process to influence public opinion and eventually break with its initial tolerant approach towards homosexual orientation. The Court was a willing partner in this process.

## 4. Conclusion

The principle of the separation of powers is one of the foundations of the Namibian constitution. The Namibian courts play an important role in guarding and protecting both the separation of powers and their independence. The Supreme Court judgments discussed in this chapter underlined that not only the judges of the superior courts, but also the magistrates and the prosecutorial authority need to be independent.

Initially it seemed as if the government and the ruling party expected the superior courts to fall in line with its policies. While the government was not directly involved in the early attacks on the court, after the *Kleynhans* judgment, a senior member of the ruling party who threatened a judge of the High Court was not reprimanded by government officials. In *Ngoma v the Minister of Home Affairs*[79] a minister who threatened a judge (the former Chief Justice of Zambia) with withdrawal of his work permit received no sanctions. However, as we saw, the government backed off once the courts made a clear statement in every case by not allowing the executive or members of the ruling party to dictate to it.

In all the other cases discussed, the government complied with the judgments of the superior courts, even where these were contrary to its political objectives. The government accepted the independence of the Prosecutor-General, despite a strong conviction that the Attorney-General should be the final authority. Once the High Court and Supreme Court ruled against the Minister of Home Affairs' deportation order of Sikunda, the latter was allowed to stay in Namibia. But a golden opportunity was lost when parliament did not bring the Magistrates' Courts and magistrates under the same authority as the superior courts and judges. Magistrates do not function under the leadership and guidance of the Chief Justice, but under the authority of the Magistrates' Commission. While recent amendments to the law brought the magistrates one step closer to being reasonably independent, there is still a difference in the appointment and accountability of judges and magistrates.

While there is no evidence that government planned the anti-homosexual rhetoric of the mid-1990s to put pressure on the judiciary, since the courts recognized the norms and values of the people as a guideline in constitutional adjudication, the *Frank* case is a clear indication of the power of rhetoric. Under the presidency of President H Pohamba the anti-gay rhetoric stopped, but no effort has been made to address the legal position of homosexual couples in a permanent relationship.

In conclusion, although there has generally been friction between the executive and the judiciary, with the former trying to control the latter, the Namibian judiciary has

[79] *Ngoma v the Minister of Home Affairs* Case no A 206/2000 unreported case of the High Court of Namibia (on file with the author).

remained fairly independent and withstood pressure from the executive. This has enabled it to ensure that the executive does not abuse its dominant position.

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# PART IV

# INDEPENDENT CONSTITUTIONAL INSTITUTIONS

# 14

# The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa

*Charles M. Fombad*

## 1. Introduction

Since the 1990s there has been a remarkable increase in the number and powers of hybrid independent institutions of accountability provided to perform one or more of the functions usually associated with the three traditional branches of government in modern African constitutions. Although this trend coincides with a global explosion of similar institutions,[1] it may be argued that the constitution of the Republic of South Africa, 1996 was the first on the continent to give these institutions of accountability the special constitutional status that has now been replicated in some recent constitutions, particularly the Kenyan constitution of 2010 and the Zimbabwean constitution of 2013. The steady rise in the number and the powers of these institutions playing a 'watchdog' role raises interesting issues not only about the continuous relevance of the doctrine of separation of powers but also about how they can be reconciled with certain basic principles, theories, and practices of democratic governance and constitutional law. Are we beginning to see the emergence of a fourth branch of government or is this simply a convenient and transient distraction to the real challenges facing good governance and accountability in Africa? Can these institutions overcome the numerous weaknesses that we have seen with the operation of the ordinary checks and balances and ensure that African governments operate in an open, transparent, accountable, and responsive manner to the needs of their people?

This chapter assesses the extent to which these institutions can contribute towards checking against abuses of powers, enhancing accountability, and strengthening constitutionalism. It is contended that the emergence of these institutions, far from

[1] For example, Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press 2007) points out that there are around 250 such institutions in the UK and 200 in the US. See also Andreas Schedler et al, *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Reinner 1999); Charles Kenney, 'Reflections on Horizontal Accountability: Democratic Legitimacy, Majority Parties and Democratic Stability in Latin America' (Paper prepared for the conference on Institutions, Accountability, and Democratic Governance in Latin America, Kellogg Institute for International Studies, University of Notre Dame, 8–9 May 2000) <http://kellogg.nd.edu/faculty/research/pdfs/Kenney.pdf> accessed 13 April 2015; John Ackerman, 'Independent Accountability Agencies and Democracy: A New Separation of Powers?' (Paper presented at 'Workshop on Comparative Administrative Law' Yale University, 8–9 May 2009) <http://www.law.yale.edu/documents/pdf/CompAdminLaw/John_Ackerman_CompAdLaw_paper.pdf> accessed 13 April 2015; Adam Przeworski et al, *Democracy, Accountability, and Representation* (Cambridge University Press 1999).

demonstrating the failure of separation of powers in checking and controlling abuse of powers may well mark an important stage in the doctrine's evolution and adaptation to the realities of modern constitutionalism. However, for these institutions to succeed, more efforts have to be made in their design to prevent them from being rendered ineffective.

The discussion proceeds with Section 2 which examines the nature and diverse manifestations of these hybrid institutions. What exactly are the institutions that we are talking about? Section 3 discusses that potential role and challenges faced by these institutions in dealing with issues of accountability and abuse of power. It considers the advantages and disadvantages of relying on these institutions. On account of their growing importance, Section 3 considers the constitutional design patterns and options that could enhance their effectiveness. In conclusion, it is argued that the explosion of these institutions comes at a critical time when numerous challenges threaten Africa's halting transition to constitutional governance. These hybrid institutions provide diverse ways in which these challenges need to be confronted. Nevertheless, the risks of their becoming a mirage that could threaten constitutional and democratic governance should not be underestimated.

## 2. The Nature and Diverse Forms of Hybrid Institutions

Generally, a wide variety of terms have been used in the literature to refer to the various non-elected and non-representative institutions, bodies, or organizations which have been created over the centuries to perform one or more of the functions usually vested in the legislature, executive, or judiciary. Some of these have been referred to as 'independent accountability agencies',[2] 'independent regulatory commissions',[3] 'independent agencies',[4] 'non-majoritarian bodies institutions',[5] or simply as 'unelected bodies'.[6] Under the 1996 South African constitution, these institutions are referred to as 'State Institutions Supporting Constitutional Democracy', whilst the 2010 Kenyan constitution refers to them in Chapter 15 as 'commissions and independent offices', and the 2013 Zimbabwean constitution refers to them in Chapter 12 as 'independent commissions supporting democracy'. The differences in nomenclature hardly reflect the incredible diversity of institutions that are supposed to be covered under these broad categorizations nor their nature and mandate. For instance, these classifications may cover independent institutions of a highly specialized nature primarily dealing with certain specific issues and operating outside the three branches of government, such as the ombudsman and the Auditor-General. They also cover some accountability institutions which are not entirely independent at least in the sense that they are usually

[2] See Ackerman (n 1).

[3] See Sanford Berg, Ali Nawaz, and Rama Skelton, 'Designing an Independent Regulatory Commission' (2000) <http://warrington.ufl.edu/centers/purc/purcdocs/papers/0017_berg_designing_an_independent.pdf> accessed 13 April 2015.

[4] See Susan Bartlett Foote, 'Independent Agencies under Attack: A Skeptical View of the Importance of the Debate' (1988) 27 *Duke Law Journal* 223.

[5] See Mark Thatcher and Alex Sweet, 'Theory and Practice of Delegation to Non-majoritarian Institutions' (2002) 25 *West European Politics* 1.

[6] See Vibert (n 1).

located within one of the three branches of government, for example, the Public Service Commission. Within this broad categorization are independent institutions whose primary functions are of a regulatory nature[7] as opposed to those whose primary functions are focused on issues of accountability in government such as the ombudsman. These few examples serve to underscore the complex nature of these institutions. However, for the purposes of our analysis, the expression 'hybrid independent institutions of accountability' (referred to in short simply as hybrid institutions or institutions) is reserved for the independent institutions provided for in the constitution, located within or outside the three branches of government, whose primary function is to investigate and hold government accountable for its actions or inactions.

The form that these hybrid institutions may take depends on several factors, such as their legal status, location, and mandate. Generally, these institutions, especially in the West and in pre-1994 Africa were created by ordinary legislation. This probably explains why there have been continuous debates about their constitutionality and democratic legitimacy. This discussion however focuses on the hybrid institutions that are constitutionally entrenched, although the detailed framework and other operational details are usually dealt with in ordinary legislation. Whilst the rationale for constitutional entrenchment is explored in a later section, the manner in which these hybrid institutions appear in present constitutions is worth noting. They may be governed by the provisions in a particular Part or Chapter of the constitution or by several provisions dispersed in different sections of the constitution, or in some cases, a combination of both. The 1996 South African constitution combines both; a number of sections dispersed in the constitution regulate some institutions whilst one particular chapter is reserved for dealing with a specific group of institutions. This was clearly no accident. The institutions established under Chapter 9 of the constitution appear to be considered so critical to 'supporting its constitutional democracy'[8] that they are specially entrenched in the sense that they are expressly protected by a number of constitutional principles spelt out in section 181(2). A number of other similar institutions which also exercise important accountability functions, such as the Judicial Service Commission and the Public Service Commission[9] are also provided for in the constitution but they do not enjoy the high level of protection reserved for the Chapter 9 institutions. A different approach is adopted by the 2010 Kenyan constitution. Its twelve hybrid institutions, referred to as 'commissions and independent offices' are widely dispersed in the constitution but they are all subject to the general

[7] For example the Consumer Product Safety Commission (CPSC), Federal Trade Commission (FTC), and Federal Aviation Administration (FAA).

[8] This provided the basis for the setting up of six independent institutions viz, the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission. The Chapter actually includes a seventh institution, the Independent Broadcasting Authority, but unlike the other six, this one is established by ordinary legislation.

[9] See the constitution, 1996, ss 178 and 196 respectively. Other similar hybrid institutions include the National Prosecuting Authority (ss 179–80), the Financial and Fiscal Commission (ss 220–2) and the South African Reserve Bank (ss 223–5).

principles in Chapter 15, Articles 248–54.[10] Zimbabwe by contrast in its 2013 constitution adopts an approach very similar to that of South Africa. It provides for and regulates its six 'independent commissions supporting democracy' in Chapter 12[11] but provisions regulating other commissions which also exercise functions relating to combatting abuse of powers are widely dispersed in the constitution.[12] Outside the common law jurisdictions, there have also been some attempts to constitutionally entrench a number of institutions aimed at promoting constitutionalism and good governance, but one can argue that this has not been done with the sophisticated creativity displayed by the South African constitution maker that was copied in Kenya and Zimbabwe. The Burundi constitution of 2005 established a number of 'national councils' some of which may play a role in enhancing accountability and promoting constitutionalism.[13] The 2010 Angolan constitution in section IV provided for what is referred to as 'essential justice institutions', made up of two institutions; an ombudsman and another, referred to as 'Legal practice'.[14] Other recent constitutional bodies which bear some resemblance to the hybrid independent institutions under discussion appear in the 2011 constitution of Morocco[15] and the 2014 constitution of Tunisia.[16]

A second point which needs to be noted about these hybrid institutions is their location vis-à-vis the other three branches of government. They range from those which are independent in the sense of being located completely outside the three branches, the most frequent example in many African constitutions being the ombudsman and some of the anti-corruption agencies, and those which operate within one of the branches of government. Under the 1996 South African constitution, all the Chapter 9 institutions are independent and located outside the three branches

[10] These are the Kenya National Human Rights and Equality Commission (art 59); the National Land Commission (art 67); the Independent Electoral and Boundaries Commission (art 88); the Parliamentary Service Commission (art 127); the Judicial Service Commission (arts 171–3); the Commission on Revenue Allocation (art 215); the Public Service Commission (arts 233–6); the Salaries and Remuneration Commission (art 230); the Teachers Service Commission (art 237); and the National Police Service Commission (art 246). The two independent offices are the Auditor-General (art 229) and the Controller of Budget (art 228). What is perhaps most surprising in the Kenyan approach is the fact that art 79 reserves the Ethics and Anti-Corruption Commission to be regulated by ordinary legislation. For reasons explained later about the importance of constitutional entrenchment, it is clear from this that there was no political will to fully commit the country to dealing with the cancer of corruption.

[11] These are the Zimbabwe Electoral Commission (ss 238–41); Zimbabwe Human Rights Commission (ss 242–4); Zimbabwe Gender Commission (ss 245–7); Zimbabwe Media Commission (ss 248–50); and the National Peace and Reconciliation Commission (ss 251–3). Although the Zimbabwe Anti-Corruption Commission appears under Ch 13, it is, according to s 256 subject to many of the provisions in Ch 12 (see ss 254–7).

[12] See, for example, the Judicial Service Commission (ss 189–91); the Civil Service Commission (ss 202–3); and the National Prosecuting Authority (ss 258–63).

[13] See arts 268–88, which provide for the National Council for National Unity and Reconciliation, the National Observatory for the Prevention and the Eradication of Genocide, of War Crimes and of Crimes against Humanity, the National Council of Security, the Economic and Social Council and the National Council of Communication.

[14] See arts 192–7.

[15] See arts 161–6, which provide inter alia for a National Council of the Rights of Man, the High Authority of Broadcasting, and the Council of Competition.

[16] Ch 6 of this constitution regulates 'independent constitutional bodies' which include the Electoral Commission (art 126), the Human Rights Commission (art 128), and the Commission for Good Governance and Anti-Corruption (art 130).

of government,[17] whilst the others which are regulated by other provisions in the constitution, are located within one or the other of the three branches, most often the executive. Increasingly, the trend is in favour of locating institutions dealing with issues such as maladministration, corruption, human rights investigations, elections, and minority rights to institutions outside the ordinary branches of government whereas institutions dealing with accountability issues within the public, judicial, security, military and police services, and national prosecution are handled by institutions located within the government.

Although the trend towards the constitutional entrenchment of these hybrid institutions in Africa may be new, many of these institutions have a very long history. For example, the first ombudsman was established in Sweden in 1809 but institutions exercising similar functions had appeared long before then and have since spread to other parts of the world.[18] The earliest antecedents of the Auditor-General have been traced to the English Auditor of the Exchequer who is referred to in documents dating from 1314.[19] In the United States, similar independent institutions to accomplish a myriad of tasks have been around for more than 100 years.[20] In spite this long history hybrid institutions have remained a regular subject of academic debate both in terms of their theoretical foundations in constitutional law and practice as well as their practical necessity. Do these institutions have anything to add to Africa's quest for accountable constitutional governance?

## 3. Assessment of the Actual and Potential Role of the Hybrid Institutions in Enhancing Accountability

Commenting ten years after the South African Chapter 9 institutions came into existence, Christina Murray summarized the general press coverage as portraying a dismal picture of 'institutions lurching from one crisis to another'.[21] She was hardly optimistic and she was right not to be. In 2014, the overall picture, whilst not one of doom and gloom, suggests that there may be cause for some cautious optimism. This may be largely due to the work of one of these hybrid institutions, the Public Protector (the South African ombudsman) whose incumbent, Advocate Thuli Madonsela,[22] has

[17] The exception to this is the Auditor-General, who operates from within the executive.

[18] See Charles Manga Fombad, 'The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995' (2001) 27 *Journal of Southern African Studies* 57.

[19] See Christina Murray, 'The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions' (2006) 9 *PER* 123, citing UK National Audit Office documents.

[20] See Mary Buffington, 'Separation of Powers and the Independent Governmental Entity after Mistretta v United States' (1989) 50 *Louisiana Law Review* 121; Foote (n 4) 224.

[21] Murray (n 19) 124.

[22] She was described by the magazine as being 'an inspirational example of what African public officers need to be', Sulaiman Philip, 'Thuli Madonsela on Time 100 Most Influential People list' (*Media Club South Africa*, 25 April 2014) <http://www.mediaclubsouthafrica.com/democracy/3814-thuli-madonsela-on-time-100-most-influential-people-list> accessed 13 April 2015. This came after one of her numerous reports highlighting corruption and abuse of office, this time with respect to the misuse of public funds to renovate the private homestead of President Jacob Zuma under the pretext of security upgrades. In a report, 'Most Popular Person in South Africa? Thuli Madonsela. The People's Champion' (*SA People News*, 22 March 2014) <http://www.sapeople.com/2014/03/22/most-popular-person-south-africa-thuli-madonsela-663/> accessed 13 April 2015, it was reported that: 'Facebook fan pages have risen rapidly to support and

so captured worldwide attention for her unrelenting, brave, and exceptional work in fighting maladministration, especially corruption in high places in South Africa that she was listed as one of Time magazine's top influential people for 2014. Is this a change in fortune for just one of these hybrid institutions or for all? Is her crusade against abuse of power, especially corruption by politicians a sign that these institutions can finally hold Africa's so-called big men to account? We shall first take a critical overview of these institutions and on the basis of this consider some of the design features that are likely to make these institutions more effective and efficient.

### 3.1 A critical review of the hybrid institutions

In spite of the rising popularity of hybrid institutions of accountability today, their importance and continuous relevance depends on how they are able to overcome the theoretical and practical weaknesses that critics have pointed out over the years. One of the main and persistent criticisms, especially from US scholars, is that they possess and exercise important powers and authority normally conferred to one of the three branches of government, without being either directly elected by the people or directly managed by elected officials. This is what is usually referred to as the non-majoritarian argument.[23] This criticism is closely linked to that made by some other opponents of these institutions who argue that by blending the functions of the three branches of government these institutions violate the principles of separation of powers.[24] It is submitted that these criticisms do not apply to the institutions created under modern African constitutions. First, there is nothing inherently inconsistent with the doctrine of separation of powers in requiring any of these institutions to perform a function that is normally associated with one of the branches of government. Far from violating the doctrine, by creating these institutions, nothing more than fragmenting and limiting power in order to prevent tyranny, which is the very *raison d'être* of the doctrine, is being achieved. Second, the so-called non-majoritarian argument has no basis in Africa. One reason is that these institutions are created by the very constitution which provided for elected officials. Arguably, on the balance of constitutional and democratic legitimacy, the institutions can claim more legitimacy than elected officials. Their existence is based on a constitution which was approved by the people. This contrasts with elected officials whose legitimacy is at best transient because it is based on their election by a section of the people. They are elected to promote the policies of a political party at a given time. Such elected officials can be voted out and their policies changed whilst the constitutional goals, objectives, and values espoused by the hybrid institutions endure regardless of who has been elected.

A more serious criticism which easily reflects African realities is the suspicion that these institutions may end up as a convenient smokescreen for, rather than as a means to counter abuse of, powers. The same problems that have rendered the checks and balances that result from separating powers ineffective could easily render these

commend Ms Madonsela for her courage and integrity, with the people of South Africa calling her their hero, a "younger version of Nelson Mandela" and requesting "Thuli for President"'.

[23] See Thatcher and Sweet (n 5) 1. [24] See Foote (n 4).

institutions impotent. As the preceding chapters have shown, the ability of African parliaments to control and check executive abuses has been substantially compromised by the fact that most of them are controlled by a dominant party controlled by the president and his cronies. For many years, one of the most popular hybrid institutions established by many African countries, with the prodding of international institutions and foreign donors were anti-corruption agencies (ACAs). A 2007 study suggested that there were about eighteen stand-alone and six integrated ACAs operating in Africa.[25] Some well-known examples of stand-alone agencies are Botswana's Directorate on Corruption and Economic Crimes (DCEC), Nigeria's Independent Corrupt Practices and Other Related Offences Commission, and the Economic and Financial Crimes Commission (EFCC), and Kenya's Anti-Corruption Commission.[26] The tremendous success of ACAs in pulling some countries such as Hong Kong and Singapore in South East Asia, and Argentina and a few countries in South America, which were previously subject to endemic corruption to relatively low levels of corruption, encouraged many African countries to adopt this approach to curbing corruption.[27] A number of studies of some of the African ACAs and similar institutions show that they have had rather limited success.[28] A number of problems have generally plagued these institutions in Africa.

A major weakness is that many of these institutions have suffered from serious design faults that have limited their independence and therefore exposed them to manipulation by politicians. Merely labelling an institution 'independent' or locating it outside any of the branches of government will not shield it from political interference and manipulation. The main form of this interference has usually come through the politicization of the appointment of the head and other senior officials. It is through the appointment systems that the effectiveness of many of these institutions has been stunted. Where the heads and other senior officials of these institutions are appointed by the president, acting alone or on the recommendations or with the approval of parliament, because of the executive reach and control of most parliaments, this effectively enables the president to appoint only people likely to be sympathetic to his line of thinking. Most studies of South Africa's Chapter 9 institutions show that the

[25] Bill De Maria, 'African Anti-Corruption Agencies—Frolics in Failure' (Paper presented at BEN-Africa Conference, Addis Ababa, 2007). The term, stand-alone or free-standing ACAs refers to those agencies that have distinct organizational identities separate from the normal state bureaucracy as opposed to the integrated ACAs which are part of departmental structures within the normal bureaucracy.

[26] Besides those mentioned above, stand-alone ACAs are found in Angola, Benin, DR Congo, Ghana, Guinea, Lesotho, Malawi, Namibia, Sierra Leone, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe. Integrated ACAs are found in Burkina Faso, Cameroon, Egypt, Mozambique, Senegal, and South Africa.

[27] See, for example, Susan Rose-Ackerman, *Corruption and Government. Causes, Consequences and Reform* (Cambridge University Press 1999) 158–62 and Andre Thomashausen, *Anti-corruption Measures: A Comparative Survey of Selected National and International Programmes*, Occasional Paper Series (Konrad-Adenauer-Stiftung 2000) 9.

[28] See, for example, Charles Manga Fombad, 'Curbing Corruption in Africa: Some Lessons from Botswana's experience' (1999) 51 *International Social Science Journal* 241; Charles Manga Fombad and David Sebudubudu, 'The Framework for Curbing Corruption, Enhancing Accountability and Promoting Good Governance in Botswana' in Charles Manga Fombad (ed), *Essays on the Law of Botswana* (Juta & Co 2007) 82–126; Office of the Public Service Commission 'A Review of South Africa's Anti-Corruption Agencies' (August 2001) <http://www.psc.gov.za/documents/reports/corruption/01.pdf> accessed 13 April 2015 and De Maria (n 25).

ANC government has always ensured that it appoints only its sympathizers to head these institutions under its avowed policy of 'cadre deployment',[29] even if some of them, such as the present Public Protector, in contrast to her predecessor, has taken a firmly independent line.[30] Such an independent line has its own risks. Governments usually show their displeasure by starving the institution of the funds that it needs to carry out its tasks. It is thus no surprise that the South African Public Protector has been losing staff because of shortage of funds to pay competitive salaries.[31]

The record of implementing the decisions taken by many African institutions is fairly poor, especially when it concerns top politicians. This is particularly so when it comes to reports of corruption. The experiences of the South African Public Protector after the publication of the public report on the Nklanda scandal is an excellent example worth recounting. Several months after the Public Protector sent her report to parliament in which she showed that President Zuma and his family had unduly benefited from the so-called security upgrades at his private residence costing R246 million and recommending that he should be asked to pay back some of the cost relating to expenditures that were not related to security, a committee to examine the report was only constituted after enormous pressure from the opposition parties.[32] After several delays, the eleven-member committee, six from the ruling ANC and five from the opposition parties eventually met, but disagreements over a number of procedural matters, especially over a demand by the opposition members that the president should be invited to come and answer questions before the committee led to the opposition walking out. The rest of the six ANC members of the committee easily absolved President Zuma of any responsibility for the wrongful expenditures on matters that were not related to the security upgrades and were very critical of the Public Protector. This was in spite of the fact that two other reports, one from an inter-ministerial committee and another by the Special Investigations Unit (SIU) had also clearly indicated that there had been extensive use of state resources for upgrades that had no bearing on security. The ANC with its 249-member majority in a parliament of 400 is making every effort to frustrate any attempts to hold the president accountable for the massive misuse of state resources. Generally, where the political stakes are very high, most of these hybrid institutions in Africa usually prefer to play it safe. For

[29] See Bheki Mbanjwa, 'ANC Won't Scrap Cadre Deployment' (*IOL News*, 17 July 2014) <http://www.iol.co.za/news/politics/anc-won-t-scrap-cadre-deployment-1.1721447#.VCvPd_mSyVM> accessed 13 April 2015, where the deputy president of South Africa, Cyril Ramaphosa has defended the ANC's 'cadre deployment' policy, saying there was nothing wrong with the ruling party deploying its members to key positions because this was an international practice.

[30] See Murray (n 19).

[31] See 'Another Resignation at Cash Strapped Public Protector' (*SA Breaking News*, 11 September 2014) <http://www.sabreakingnews.co.za/2014/09/11/another-resignation-at-cash-strapped-public-protector/> accessed October 2014, where it was reported that a number of senior officials in the Public Protector's office had resigned because the salaries they were paid were lower than those for comparable positions in the public service.

[32] For the official report, see 'Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province' Report No: 25 of 2013/14 <http://archive.org/stream/NkandlaReportThuliMadonselaJacobZuma/NkandlaReportThuliMadonselaJacobZuma_djvu.txt> accessed 13 April 2015.

example, Botswana, consistently rated as Africa's least corrupt country for the last decade,[33] its ACA, the Directorate of Corruption and Economic Crime, is well noted for leaving the corrupt elites to swim undisturbed whilst it focuses on the tiddlers.[34] Many ACAs have thus operated more like toothless bulldogs that protect the rich, powerful, and well-connected wrongdoers but raise a storm about petty offenders who should ordinarily and routinely be dealt with by the police.[35]

The creation of so many institutions certainly carries the risk not only of duplication but also of conflicts with the other branches of government, unnecessary bureaucracy, and inefficiency due to cases falling between the cracks in turf identification wars.[36] For example, one may question whether Kenya and Zimbabwe need all the several institutions they have provided for. Wouldn't it have been cheaper and probably more efficient to create fewer but more robust institutions? For example, it is doubtful whether separate and distinct institutions to deal with, for example, police, defence force and prison and correctional services issues in Zimbabwe or gender issues in South Africa are really necessary. Nevertheless, there are some whose existence can be justified. First, the case for distinguishing between some of these institutions and specially entrenching and protecting some, like the South African and Zimbabwean constitutions do is very strong. Specialized independent institutions are certainly needed to deal with Africa's four most pernicious evils viz, maladministration, human rights violation, corruption, and electoral practices. Each of these institutions will deal with different areas where transparency and accountability is crucial and where the traditional checks and balances have proven to be woefully ineffective. Besides electoral fraud, misappropriation of public funds, human rights violations, and maladministration need different types of intervention from those that the three traditional branches of government can offer. Thus, in certain circumstances, the best solution is the ombudsman, for another a permanent anti-corruption agency, and in yet another situation, an independent electoral commission. These institutions are therefore better placed to engage and utilize experienced experts with a better knowledge, for example in dealing with human rights or anti-corruption issues, which are skills politicians and bureaucrats often lack. Second, the normal checks and balances that come with the traditional branches of power allocation are very formal and are not easily accessible to the poor and vulnerable. Institutions like the human rights commissions, the ombudsman, and the anti-corruption agencies are often decentralized and have offices in many parts of the country where their services can easily be accessed by the poor who often lack the means to approach, for example, the ordinary courts. Perhaps the most important fact that is underscored by the South African Chapter 9 institutions are the guiding principles designed to shield and protect these institutions

[33] See *Global Corruption Perception Index* (*Transparency International*) <http://www.transparency.org/research/cpi/overview> accessed 13 April 2015.

[34] This is discussed in Fombad (n 28).

[35] See Mary Revesai, 'Zimbabwe has Leeches Not Scorpions' (*New Zimbabwe*) <http://www.zimbabwesituation.com/old/nov29_2006.html> accessed 26 October 2015.

[36] See Paul Hoffman, 'Hawks or Eagles: What does South Africa Deserve? (Notes for an address to the Cape Town Press Club on 15 May 2012) <http://accountabilitynow.org.za/hawks-eagles-south-africa-deserve/> accessed 13 April 2015.

from manipulation by other branches of government. Without adequate and legally enforceable safeguards entrenched in the constitution to prevent any branch of government from interfering with the activities of these institutions, their establishment will serve no purpose.[37] If the ominous and foreboding signs of developments in South Africa, in spite of its carefully crafted constitution are anything to go by, it is clear that more needs to be done to reverse Africa's apparent constitutionalism curse. It is therefore necessary to consider what measures need to be implemented to make these institutions more efficient and effective.

## 3.2 Enhancing the role of hybrid institutions

Because of the difficult and sometimes hostile environment in which hybrid institutions operate, it is clear that only carefully conceived and well-designed institutions stand a chance of making a meaningful contribution to promoting good governance, accountability, and constitutionalism in Africa. Some of the good constitutional designs, especially in Anglophone Africa have in an incremental manner improved on the innovations that were introduced in South Africa's 1996 constitution. However, the steadily multiplying challenges of governance in South Africa, where corruption and poor service delivery is becoming endemic, suggest that in spite of its pretty robust constitutional framework, there are still some loopholes that need to be closed. In order to enhance the performance of hybrid institutions generally, two important lessons from the South African experience can be built on. First, the idea of constitutional entrenchment and second, the need to specially protect these institutions from the three branches of government.

Constitutionally entrenching hybrid institutions of accountability rather than merely leaving them to be regulated by ordinary legislation has a number of advantages. First, because the constitution is the supreme law of the land and is based on, as well as reflects, the sovereign will of the people, any law that violates it will be declared invalid to the extent to which it is inconsistent with the constitution. Also as a result of its special status, constitutions are meant to endure and are often protected from careless, casual, or arbitrary amendments by transient majorities or opportunistic leaders trying to promote their own selfish political agenda.[38] Hence, once an institution is constitutionally entrenched, this provides it with a greater likelihood of institutional durability, certainty, and predictability than one created by ordinary legislation which can be changed by parliament at the convenience of the government in power at any given moment. Second, provisions entrenching the institution should be reinforced

[37] For an example of South African cases where the courts have intervened and relied on the 'governing principles' in Ch 9 of the 1996 constitution to prevent any interference with the independence of these institutions, see *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC); and particularly *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), where the Constitutional Court emphasized the meaning and importance of these institutions being independent.

[38] See further, Charles Manga Fombad, 'Some Perspectives on Durability and Change under Modern African Constitutions' (2013) 11 *International Journal of Constitutional Law* 382.

by making their implementation mandatory,[39] rather than leaving their implementation to the discretion of the government. This will open the way for an action for violation of the constitution where the alleged 'violation' consists of a failure to fulfil a constitutional obligation. The effect of this is to place the duty on the executive and legislature to establish an institution in the exact manner contemplated by the constitution obligatory and legally enforceable and not discretionary.

The second lesson and arguably, the main innovation of the South African constitution as far as accountability institutions are concerned, are the four 'establishment and governing principles', provided for under section 191 of Chapter 9 of the constitution. It is worth noting that although many African constitutions, both pre- and post-1990 provide for the establishment of some of these institutions, especially an ombudsman, public service commissions, and judicial service commissions, they have hardly been able to operate effectively because they were too easily exposed to political interference in one form or another. The four guiding principles designed to ensure that these institutions are an effective cog in the constitutional wheel and not a political charade of symbolic value only are stated in section 191 as follows:

> (2) 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 fear, favour or prejudice.
>
> (3) 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.
>
> (4) No person or organ of state may interfere with the functioning of these institutions.
>
> (5) 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.

Something close to these principles are referred to in some constitutions as 'directive principles of state policy',[40] but these, unlike the principles in the South African constitution, are stated in purely hortatory terms. In certifying the 1996 constitution, the Constitutional Court had drawn particular attention to these hybrid institutions of accountability and pointed out that 'they perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution'.[41] However, in the light of the experiences of the last two decades and the approach adopted in some of the recent constitutions, a number of changes need to be made to the section 191 provisions to give them more teeth. The first change concerns the second principle. In order to enhance the ability of

[39] See an example of such an obligation in s 2 of the South African constitution, which states that, 'this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, *and the obligations imposed by it must be fulfilled*' (emphasis added).

[40] See, for example, arts 34–41 of the constitution of Ghana; and ss 13–24 of the constitution of Nigeria.

[41] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC).

the institution to operate independently, it is necessary to expressly recognize and protect their financial autonomy. The aim should be to prevent budgetary allocation from being used to prevent them from fulfilling their mandate.[42] An equally important sentence which needs to be added to this principle should state that, in order to ensure the effectiveness of these institutions, their findings, decisions, recommendations, and conclusions, although not binding, must be complied with unless there are good reasons for not doing so. There is certainly some merit in the views put forward by some who argue that the role of these institutions should lie in 'influence, not in formal power', and in 'influence rather than enforcement'.[43] But this cannot be enough. It makes little sense to create institutions like these and give them the powers to spend large amounts of taxpayers' money to carry out investigations if the results of these investigations will simply be ignored for political reasons by Africa's parliaments, controlled as they are, by dominant parties, like South Africa's ANC has done with the Public Protector's recommendations on the Nkandla scandal. This will also address the regular criticisms that these institutions are weak and ineffective because they can only bark but not bite. It is also fair to allow the persons against whom adverse findings are made, especially since most of the processes are not adversarial, to have an opportunity to challenge an outcome that is perverse and unreasonable through a process of judicial review. In other words, the recommendations must only be ignored where there are good legal reasons for doubting their fairness. A second change that is imperative is that the fourth principle should be modified to state that quarterly reports should be submitted to a Special Parliamentary Committee on Governance and Accountability which is constituted in a manner to limit the possibility of the governing party frustrating the process.[44] The third change is to add two important new principles to the four principles in section 191 of the South African constitution, which it is hoped will help to address some of the problems that South Africa has faced, especially after the manner in which the Public Protector's Nkandla report was casually rejected by the increasingly unruly ANC government. The new fifth principle should state that any legislation, action, measures, or mechanisms introduced to regulate any of these institutions, which undermines the essential purpose of combatting corruption and ensuring accountability and transparency shall be declared null and void by the courts.

[42] The South African Constitutional Court case of *New National Party of South Africa* (n 37), discussed later explains this point further. More generally, see signs that holding back funds is being used to undermine the work of the South African Public Protector. See further, for example, in 'Public Protector hampered by dire shortage of funds' *Legalbrief TODAY*, Issue No 3609 (2 October 2014), where it was reported that the South African Public Protector's office is in dire straits and needs more money to finance operations and keep staff from leaving. Madonsela says the number of cases she deals with is disproportionate to the financial and human resources available to her office. Some investigators handle up to 500 cases and she claims the lack of resources delays the finalization of investigations and that this could lead to the erosion of public confidence in the institution.

[43] See Murray (n 19) 132–3.

[44] The Special Parliamentary Committee on Governance and Accountability proposed here does not appear in any modern African constitution. It is however considered as an important body to receive quarterly reports from all the hybrid independent institutions of accountability, monitor their activities, and ensure accountability. The constitution should expressly state that it should be constituted in a manner that ensures an equal number of representatives from the ruling party and from the opposition parties and be chaired by a member from the opposition parties. It should have the powers to subpoena anybody to appear before it and should be able to co-opt such experts as it might need to assist it discharge its functions.

A new sixth principle should address the critically important issue of appointments of the heads and senior officials of these institutions. Although appointments should still be made by the president, the procedure to be followed as well as the requirements for appointment must be expressly stated in the constitution. In this respect, the appointment process must be guided by three factors. First, members to be appointed to these institutions should be non-political or if political, should not have been actively involved in politics in the preceding five years. Second, all senior positions must be widely advertised, and members of the public should be encouraged to propose suitable persons. This should be followed by public interviews conducted by the Special Parliamentary Committee on Governance and Accountability who will prepare a short list of appropriate nominees for appointment and submit this to the president.[45] At the end of the interviews, at least two and not more than three nominees for each vacant position with the necessary motivation for each nomination should be made. The president will make the final appointments from the list of nominees. This will reinforce the independence of the institution. Whilst there is no perfect system, it can be argued that an appointment system which places the ruling party and opposition parties on a par will enhance the prospects for the appointment of independently minded persons who owe their positions to their expertise rather than political appointees who are likely to remain beholden to those who appointed them.[46]

The importance of these principles in acting as a powerful bulwark against the persistent problem of political manipulation of accountability institutions has been underlined in a number of South African cases. In *Independent Electoral Commission v Langeberg Municipality*,[47] the Constitutional Court had no hesitation in pointing out that as a result of the constitutional guarantees of the independence and impartiality of the Independent Electoral Commission (IEC), parliament had a duty in making the legislation regulating its activities to ensure its manifest independence and impartiality and that such legislation was justiciable for conformity to the constitution. In the absence of such guarantees, the courts will lack the power to review legislation on electoral commissions to ensure that it is not biased in favour of ruling parties. The importance of the independence of these institutions was again underscored in *New National Party of South Africa v Government of the Republic of South Africa and others.*[48] In this case, questions were raised about the independence of the IEC and the possibility of governmental interference with its proper functioning. The Constitutional Court, although concluding that the allegations had not been proven by the facts, nevertheless pointed out that the IEC was one of the institutions provided for under Chapter 9 of the South African constitution which are a product of a 'new

[45] It is probably only the Zimbabwe constitution of 2013 which in ss 236 and 237 comes closest to providing an appointment procedure that could limit but not in a very satisfactory manner, the avenue for politically motivated appointments.

[46] See Geoff Budlender, '20 Years of Democracy: The State of Human Rights in South Africa' <http://blogs.sun.ac.za/law/files/2014/10/annual-human-rights-lecture-2014-adv-g-budlender-sc.pdf> accessed 13 April 2015, who in commenting on South Africa's institutions says: 'A disturbing feature of recent years has been the weakening and undermining of those institutions. We have had too many appointments in which a key qualification for appointment seems to be a willingness to protect those in power, or loyalty to a particular faction.'

[47] 2001 (9) BCLR 883 (CC). [48] 1999 (3) SA 191.

constitutionalism'[49] whose independence had to be jealously preserved by the courts. Two factors that were relevant to this independence were highlighted by the court. First, it pointed out that independence implied financial independence which required that the IEC should be given enough money to discharge its functions. This had to come, not from government but from parliament and the IEC had to be 'afforded an adequate opportunity to defend its budgetary requirements before parliament and its relevant bodies'.[50] Second, the IEC's status also implied administrative independence which meant that the IEC was subject only to the constitution and the law, and answerable only to parliament rather than the executive. The issue of adequate resources needs to be emphasized. An institution that is understaffed and under-resourced may cause more harm than good because its over-stretched staff will be easy prey for those who want to bribe their way out of lengthy prison sentences. Finally, the Court in referring to the principles in section 191 of the constitution pointed out that they imposed obligations which must 'be scrupulously observed'.[51]

The Constitutional Court's decision in *Glenister v President of the Republic of South Africa*[52] further illustrates what is meant by these institutions being independent. The brief background to the case is that in December 2007, the ruling ANC in a historical conference swept aside the leadership of then President, Thabo Mbeki. The Congress resolved that South Africa should have one single police force and that the special corruption fighting unit, the Directorate of Special Operations, popularly known as the Scorpions, should be disbanded. There was widespread media speculation at the time of this resolution that the ANC were engaged in a vendetta against the Scorpions because they had investigated many senior officials in the party, including the then newly elected leader of the party, Jacob Zuma.[53] When the bill that disbanded the Scorpions and established a new unit popularly known as the Hawks became law, Glenister brought an action challenging the constitutionality of this new legislation. The Court by a majority of 5 to 4 declared that the amended Chapter 6A of the South African Police Service Act introducing the Hawks was inconsistent with the constitution and invalid to the extent that it failed to provide for an adequate degree of independence for the corruption-fighting unit that it sought to establish. Although there was no specific provision in the constitution specifying that the unit must be independent, the majority held that the constitutional obligation to set up an independent unit could be inferred from the duty imposed by section 7(2) of the constitution to 'respect, protect and fulfil' the rights in the Bill of Rights. It went further to point out that, based on section 39(1)(b) of the constitution which required the Court in interpreting the Bill of Rights to consider international law and section 231 which states that all international agreements approved by parliament are binding, the establishment of a corruption-fighting unit ignoring binding international instruments which required such a unit to be independent was not a reasonable constitutional measure. The Constitutional Court explained the meaning and significance of independence for these institutions thus:

[49] *New National Party of South Africa* (n 37) per Langa DP at para 78. [50] ibid [98].
[51] ibid [162]. [52] 2011(3) SA 347 (CC).
[53] See further, Joey Berning and Moses Montesh, 'Countering Corruption in South Africa. The Rise and Fall of the Scorpions and Hawks' (2012) 30 *SA Crime Quarterly* 1–10.

> This Court has indicated that 'the appearance of perception of independence plays an important role' in evaluating whether independence in fact exists ... By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy – protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.[54]

In this indirect manner, the court declared legislation unconstitutional for violating international law which became relevant not only because it was based on instruments that are binding on the South African government but also because they reflect the ethos of constitutionalism. In other words, the constitutional duty to create a corruption-fighting unit was not discharged by creating one which will be ineffective because it was placed under the control of politicians whom it is required to investigate. On the other hand, independence does not require complete insulation from political accountability. Rather, it requires insulation from a degree of management by political actors that would enable the institution to operate without fear, favour, or prejudice. Where it is palpably clear that the institution being created will not be able to operate independently, then citizens have a right as well as a duty to approach the courts to intervene and invalidate the relevant piece of legislation for violating the principles which should inform the establishment of these institutions.

One other important point that emerges from the *Glenister* case is the importance that the courts should attach to the numerous international treaties and conventions to promote good governance that African governments sign and ratify but rarely rush to implement in domestic law. Many forms of abuse of power, such as corruption, are now matters of global concern and subject to international cooperation, especially through mutual legal assistance in criminal matters, and extradition is crucial. The *Glenister* case and the famous Botswana case of *Attorney-General v Dow*[55] suggest that whilst courts cannot compel governments to incorporate these international treaties and conventions in domestic law, they can at least compel them not to act in breach of them. In dealing with the position where a treaty had been signed but had not been incorporated into national legislation, Amissah JP in *Attorney-General v Dow*, cited with approval the following passage from the judge *a quo* in the same case:

> I bear in mind that signing the Convention [the OAU Convention] does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be

[54] 2011(3) SA 347 (CC) para 207.
[55] [1992] BLR 119.

> preferable to a 'narrow construction' which results in a finding that section 15 of the Constitution permits discrimination on the basis of sex.[56]

In doing so, the Court basically followed the well-established presumption in statutory interpretation that courts will strive to interpret legislation in such manner that it will not conflict with international law. The judge went further to explain this thus:

> Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act . . .[57]

If courts are willing and able to rigorously enforce the six guiding principles, there is a reasonable likelihood that these hybrid institutions may be able to bring endemic problem of abuse of powers under control.

## 4. Conclusion

Any constitutional framework which stands a chance of working must be informed by, built on, and reflect the people's history, their particular circumstances, their fears, aspirations, and goals. The rise in number and powers of hybrid institutions of accountability is clear indication that the traditional checks and balances associated with the three branches of government are no longer sufficient. Africa's big men have, with the complicity of their dominant parties captured and tamed the legislature and through the appointment systems limited the effectiveness of the judiciary.

Much as it can still be said that Africa is better governed today than it has ever been, there is no reason to celebrate or even become complacent. South Africa, with its liberal and well-crafted constitution of 1996 raised high expectations that it would lead the continent on the difficult path towards good governance and consequently economic recovery and growth. Two decades into its constitutional democracy under a black government, it appears to be heading down the well-trodden path that led many African countries a few years after independence into political instability, repression, economic stagnation, and generalized poverty. Even accepting that the country is still grappling with the legacy of the evils of apartheid, twenty years with a solid constitution to build on is too soon for the country to start heading towards the precipice of dictatorship and repression.[58] An even more significant sign of the changing times

[56] ibid [154]. [57] ibid.

[58] See Budlender (n 46) 24, who accurately captures the mood when he states: 'I do not think it is alarmist to say that we are now in the midst of a struggle about whether we will remain a genuine constitutional democracy. There are a number of symptoms of this. Key institutions of state have been undermined and weakened. Attempts are made to capture and use state institutions for anti-constitutional purposes . . . There is an "*emerging trend towards security-statist approaches to governance*." Corruption is a real problem. In critical areas, Parliament is failing to perform its constitutional function of oversight of the executive, preferring instead to protect those in power.' (Emphasis in original and footnotes have been excluded.)

concerns Botswana; for more than three decades it was held up as one of the two or three African beacons of liberal, accountable, clean, and democratic governance. Alas, it too appears to be moving into reverse gear.[59] The problem with Botswana, and the same holds true for South Africa, is that their relatively good performance vis-à-vis other African countries hides the fact that these countries have in the last decade been progressively subjected to similar standards of corruption and misrule as other African countries, even if to a lesser extent, than was previously the case. The resulting effect is that their previously high standards are dropping at an alarming rate.[60] The overall governance picture is one of a continent whose leaders seem to have recovered from the strategic retreat forced on them by the 1990 democratization wave. The removal of term limits in most constitutions—with many more states, such as Burundi, Congo DR, and Rwanda set to follow this reverse tide, the progressive transformation of ruling parties into dominant parties with all the trappings of the repressive one party system that go with this, and many more such openings for abuse of power have considerably limited the efficacy of the checks and balances associated with separating powers. Because of the slow but steady erosion of some of the critical gains in entrenching constitutionalism and democracy from the 1990s, the existence of these hybrid institutions of accountability that provide some prospects of arresting this backward slide needs to be taken seriously.

However, these hybrid institutions of accountability are no magical solution to the complex problem of abuse of powers. If anything, the South African experience shows that these institutions can steer and steady the faltering ship of African constitutionalism and democracy which is permanently being rocked in the stormy sea of abuses of powers controlled by Africa's unruly leaders. Some of South Africa's institutions have worked very well. Since 1994, elections in the country have been free and fair largely because of the fairly independent and commendable efficiency of its Independent Electoral Commission. The South African Human Rights Commission has also played a role in limiting human rights abuses. The indefatigable Public Protector has, against enormous odds and an avalanche of attacks,[61] especially from the ruling party, intimidation, and even 'official' blackmail,[62] tried to control a new culture of endemic

[59] See, for example, Kenneth Good, 'The Presidency of General Ian Khama: The Militarization of the Botswana "Miracle"' (2009) 1 *African Affairs* 315; Yvonne Ditlhase, 'Khama Inc: All the President's Family, Friends and Close Colleagues' (*Mail & Guardian,* 2 November 2012) <http://www.mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues> accessed 12 April 2015.

[60] See, for example, Liesl Louw-Vaudran, 'Botswana's Clean Image Hides the Dirt' *Mail & Guardian* (3 October 2014) 24, where the writer states that 'A group of six senior MPs of the BDP [the ruling Botswana Democratic Party] broke away from the party in 2010, claiming that democracy in Botswana has been threatened since Khama came to power'. The writer adds that 'Khama weathered the storm and remains popular, thanks to generous social grants and a relatively stable economy' and will easily win the October 2014 elections in spite of increasing repression, especially of the media.

[61] See a summary of recent attacks in Gareth Van Onselen, 'Adding up the ANC's Attacks on Madonsela' *Sunday Times* (Johannesburg, 14 September 2014) 8.

[62] Thuli Madonsela, the Public Protector, has in the past few years come under sustained criticism and attacks from top ANC and government officials. In September, the Deputy Minister of Defence and Military Veterans, Kebby Maphatsoe, described her as being a CIA plant and of undermining the ANC and the government to create a puppet regime for the US. Describing her as acting like a counter-revolutionary, he is quoted as having said: 'They are even using our institutions now... These Chapter 9 institutions were created by the ANC but are now being used against us, and if you ask why, it's an agenda

corruption by politicians who give the impression that self-enrichment and not the general welfare of the people was the goal of bringing down apartheid.

It is in the light of these challenges that it has been argued in this chapter that unless the hybrid institutions increasingly appearing in modern African constitutions are conceived and crafted in a manner that will ensure their effectiveness, they will easily be captured, tamed, and reduced to acting as the handmaiden of Africa's imperial presidents and a waste of scarce resources at a time when many citizens are living in abject poverty. The constitutions of Kenya and Zimbabwe, building on the South African constitution, have improved on the model. Nevertheless, three main suggestions have been made as a way of enhancing the effectiveness of these institutions.

First, the basic framework of these institutions must be laid down in the constitution and not reserved to ordinary legislation. Second, a number of fundamental principles which are designed to make these institutions genuinely independent (institutionally, functionally, and financially), competent (personnel) and effective (as regards the outcome of their processes) have been suggested. Third, the importance of the positioning of these institutions vis-à-vis the other branches of government has also been underscored. Whilst for certain purposes and with respect to certain matters, some institutions operating within the three branches of government will suffice, when dealing with what has been described here as Africa's four pernicious evils, namely, maladministration, human rights violations, corruption, and electoral malpractices, there is a need for institutions that are manifestly independent of any of the three branches of government. What makes these institutions distinctive and potentially critical to Africa's democratic project is their independence from the other branches, their ability to be both reactive and proactive and their accessibility to the most vulnerable in society. In many respects they will act as the intermediary institutions between the ordinary citizens and the three branches of government and give them an opportunity to directly seek solutions to their problems. But what's more, these institutions are capable not only of countering the numerous threats posed by majoritarian abuses of power but also of protecting people against the consequences of their own naivety, ignorance, and impetuosity.[63]

In many respects, these hybrid institutions not only complement the traditional accountability measures but also reflect the political, social, and constitutional changes

of the Central Intelligence Agency. Ama (the) Americans want their own CEO in South Africa and we must not allow that'. After widespread criticism of the remarks which also almost provoked a diplomatic row with the US government, and following protestations by the Ambassador, the ANC forced the Deputy Minister to offer a somewhat limited apology for his comments. See further, Baldwin Ndaba, 'Thuli a CIA spy, says deputy minister' (*IOL News*, 8 September 2014) <http://www.iol.co.za/news/politics/thuli-a-cia-spy-says-deputy-minister-1.1747300#.VC0hUvmSyVM> accessed 13 April 2015.

[63] Weaknesses like corruption, incompetence, and non-delivery of basic services which would ordinarily lead to a party being voted out of office have not affected the popularity of parties such as South Africa's ANC and Zimbabwe's Zimbabwe African National Union-Patriotic Front (ZANU-PF) because of their liberation credentials and the fact that very many people still associate them with their freedom from the horrors of white minority rule and the human rights abuses of that era. For example, in a recent survey, 74% of ANC supporters believed that the party should be supported regardless of the fact that it has not delivered on its promises of a better life for its people. See Gareth Van Onselen, 'Blaming Apartheid is No Longer a Credible Excuse' *Sunday Times* (Johannesburg, 30 March 2014) 10. Yet, these are the people who suffer most from bad governance.

that are taking place. They demonstrate the ability of the doctrine of separation of powers to adjust to modern realities as well as reflect the peculiar needs and governance deficits and risks of today. We are arguably moving towards a fourth branch of government. Unlike the other three branches, its primary purpose is not to 'govern' but to exercise certain investigative and regulatory functions. Operating outside the loaded environment of party politics, it is bound to ruffle some feathers through its investigations into sensitive and potentially embarrassing affairs of government. The danger for modern constitutionalism is not caused by the emergence and institutionalization of these independent hybrid institutions of accountability but rather by the failure of the other branches to recognize their entry, and re-orientate and adjust their policies and functions in order to accommodate them. They now constitute an unavoidable strategy for any serious effort to ensure an effective, accountable, and responsible government constrained by basic principles of constitutionalism. In fact, it may be said without fear of contradiction that without diverse robust and independent hybrid institutions of accountability to oversee the enforcement of modern African constitutions, the goal of entrenching a culture of constitutionalism and respect for the rule of law will remain a pipe dream for the majority of citizens.

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# 15

# The Public Prosecutor and the Rule of Law in Anglophone Africa*

*Jeffrey Jowell*

## 1. Introduction

This chapter considers the role of the public prosecutor with a particular focus on Anglophone Africa, in the light of two constitutional principles: the separation of powers and the rule of law. It draws upon UK experience only to highlight some of the issues and possible reforms by way of comparative example.

The separation of powers is mostly considered in the context of the independence of the judiciary from the executive and the legislature. However, there are other legal actors who need to be insulated, wholly or partially, from executive or legislative control. These include the legal profession as a whole, and others who perform legal roles, such as the Attorney-General. To what extent should that independence also extend to the office of the public prosecutor?

In relation to the prosecutor I ask to what extent his role, and his individual decisions, ought to be separated from 'policy' or 'party-political', or otherwise 'partisan' considerations. How 'objective' should (or can) he be? I shall also consider to what extent the prosecutor's constitutional role and institutional functions require him to be insulated from judicial review.

In relation to the rule of law, again it could be said that all government lawyers need to act as guardians of the rule of law. That is part of their calling as lawyers, although they also have a duty to the government they serve. In this context I shall consider the extent of the prosecutor's discretion to enforce the law and, even more significant, not to enforce the law. Finally, I shall ask whether there may be ways to structure his discretion in the interest of the rule of law.

## 2. The Constitutional Setting of the Public Prosecutor

Should the public prosecutor be part of the judicial or executive branch of government, or in some way independent? Either way, how should the prosecutor be appointed? On what grounds and by whom might he be dismissed? Should his decisions be able to be reviewed or overturned by someone more connected to government, the legislature, or the executive, such as the Attorney-General or Minister of Justice? Should prosecutorial decisions be reviewed by the courts?

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In addressing these questions it must be realized that the prosecutor's role is complex. It requires both quasi-adjudicative skills, involved in assessing whether there is sufficient evidence to pursue a charge, as well as the need to make value judgments such as which charge to prefer, and which of a number of interests to favour. These interests include those of the victim, the general public, the state, and indeed the police. Can any structure or guidelines successfully reconcile these duties, or must they inevitably be left to the broad discretion of the prosecutor on a case-by-case basis?

On the other hand, there is a growing consensus internationally that the decision to initiate a prosecution should not be influenced, or seen to be influenced, by partisan considerations. This is because such selective enforcement of the law is seen to violate the rule of law. In addition, the setting in motion of a prosecution not only adversely affects a person's dignity, status, and reputation, but can lead to that person's punishment, loss of status, or even loss of freedom. Decisions of that significance to the individual should therefore patently be seen not to be driven by narrow political considerations, but only by an objective consideration of whether the person is likely to have breached the law. Such a decision should therefore best be taken by someone clearly separated from political attachment.

There is a wide spectrum internationally in the way that public prosecutors are appointed and the extent to which they are under the direction of parliament or the executive. At one end of the spectrum there is complete independence of the prosecutor. This is true not only in countries such as Italy and other civil law countries, where each prosecutor is individually independent, but also in countries such as Ireland, Israel, India, and some Canadian provinces and Australian states.

We must note here that in many civil law countries, with an inquisitorial system of criminal prosecution, the nature of the prosecutor is more like that of a judge, and the judge more like that of a prosecutor, with an active fact-finding role that is absent under an adversarial system. This kind of system is also normally accompanied by the fact that the prosecutor has little or no discretion to take into account the public interest as a ground not to prosecute. It is therefore largely in common law systems, where there is no *prima facie* duty to prosecute, that the question of freedom from partisan control comes into its own as prosecutorial discretion becomes a potential political tool.

Article 157(11) of the 2010 Kenyan constitution provides, that in exercising his powers, the Director of Public Prosecutions (DPP)

> shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the legal process.

Although this discretion to take into account the public interest allows the prosecutor discretion that is not allowed in some countries, the Kenyan constitution does require prosecutorial independence. Under article 157, the DPP is nominated by the president but appointed only with the approval of the National Assembly. Article 157(10) provides that the DPP

> shall not require the consent of any person or authority for the commencement of criminal prosecutions and shall not be under the direction or control of any person or authority.

In Nigeria the constitution places the decision to prosecute firmly in the hands of the Attorney-General[1] who is appointed by the president and confirmed by the Senate, and who has broad discretion to take into account matters of public interest. In Malawi, the DPP is fully subordinate to the Attorney-General, and acts as his delegate. In Uganda the DPP is relatively independent, subject to any directions given by the Attorney-General on matters of general policy.[2] The Ugandan system is thus close to the English model, where there is an independent DPP, who heads the Crown Prosecution Service (and there is also a Serious Fraud Office and a Revenue and Customs Prosecution Office, each with separate directors). However, the Attorney-General has a degree of oversight (superintendence) over the prosecution service, such as the ultimate responsibility for the decision whether or not to refuse consent for prosecution on the ground of public interest, and he may direct the Prosecution Directors accordingly.

Under the UK model, the Attorney-General is a member of the government who sits in one or other house of parliament and takes the ruling party whip. So the Attorney-General is a politician, but with a difference, as he is also expected to give the government objective legal advice.

The tension between the powers of the Attorney-General and the DPP is interestingly resolved in Zambia, where the DPP himself regulates the degree of the Attorney-General's involvement. In any case where, according to the DPP, considerations of public policy are involved, he will consult with the Attorney-General who will then decide whether to prosecute.[3] The crucial point is that the judgment of whether a case involves public policy or not is fully up to the DPP.

At the extreme opposite end of the spectrum, Ghana and Sierra Leone maintain a system where the Attorney-General and the Secretary of State for Justice is the same person. Like in the UK, the person appointed to this office is a politician who sits in the legislature as a member of the ruling party, but additionally also discharges the duties of the Justice Minister. Section 64(1) of the 1991 constitution of Sierra Leone provides:

> There shall be an Attorney General and Minister of Justice who shall be the principal legal adviser to the Government.

So we see that there are different models, some entirely independent and not permitted to take matters of 'public interest' into account, others which do permit public interest to be taken into account but otherwise leave the prosecutor free to exercise his discretion, and yet others which permit a higher official (normally the Attorney-General) to 'superintend' the prosecutor's decisions.

Some argue that there is no need for the prosecutor to be completely independent, as if he were a judge. It is said that where the prosecutor lays a charge, the defendant will later have the opportunity of defence before a judge. And where the prosecutor decides not to lay a charge, he may be entitled, as we shall see later, to take into account matters of public interest, which inevitably involves the prosecutor in matters of policy, which is often best decided by the government of the day. Even where there is no oversight or

[1] See ss 150(1)–(2) and 195 of the 1999 constitution of Nigeria. Also see *State v Ilori* (1983) SCNLR 94.
[2] See arts 123 and 124 of the 1995 constitution of Uganda.
[3] See art 56(7) of the 1996 constitution of Zambia.

superintendence of an Attorney-General or equivalent over the public prosecutor, some degree of political input may be built into his role by way of the appointment process.

There has been a lively discussion recently in the UK about the Attorney-General's role in general,[4] arising out of doubts about the then Attorney's advice to the government that it had the power in international law to invade Iraq. In favour of that role, it is contended that the Attorney-General, by established convention, stays at arm's length from party politics. His role is in practice functionally independent in its day-to-day activities. Against that it is argued that, however independent and impartial the Attorney-General is in fact and practice, some of his decisions are vulnerable to being interpreted by the public as driven more by political convenience than law. This may be a matter of perception rather than fact, but is nevertheless important to the integrity of the law and the confidence of the public in the public decision-making process.

In South Africa, section 179 of the constitution establishes a prosecuting authority, headed by a National Director of Public Prosecutions, which by national legislation must exercise its functions without 'fear, favour or prejudice'. Although the DPP is appointed by the president, section 179(6) states that 'The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority'. The National Prosecuting Authority Act provides for the provision of certain information by the prosecuting authority to the minister and also accountability to parliament for powers, functions, and duties under the Act, including decisions regarding the institutions of prosecutions.

There has been much controversy in South Africa about whether the public prosecutor is or should be functionally independent from the president and the executive, and the extent to which the president may appoint and dismiss the prosecutor on 'political' grounds. The issue was engaged when President Mbeki suspended the then-DPP Vusi Pikoli.[5] There is also litigation pending on the suspension of proceedings against President Zuma.[6] Similarly, in Zambia (where the DPP enjoys similar constitutional protections as in South Africa) there are currently tribunal proceedings under way considering allegations against the incumbent DPP, instituted by the Zambian President Edgar Lungu. Though this is the proper procedure for holding the DPP to account, it follows a series of attempts to remove him unconstitutionally, allegedly due to his unwillingness to bow to the president's pressure on several high-level corruption prosecutions.

[4] See Alexander Home, 'The Law Officers' (Standard Note SN/PC/04485, Parliament and Constitution Centre, House of Commons Library, 1 August 2014). See generally John Edwards, *The Attorney General, Politics and the Public Interest* (Sweet and Maxwell 1984).

[5] See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) and see fn 109 noting that the DPP need not be isolated from the political sphere. See also *Pikoli v The President of the Republic of South Africa* 2010 (1) SA 400 (GNP) and *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 146.

[6] *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA). See Mtendeweka Mhango, 'Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South African Constitution' (2014) 35 *Statute Law Review* 19.

## 3. International Guidance

At the time of the drafting of the current South African constitution there was very little such guidance on an international level on the prosecutorial role, and there is still no binding convention on the subject. However, a growing amount of 'soft law' is now developing, especially by the United Nations and the Council of Europe, including the Council of Europe's Venice Commission, which was formed in 1990 to assist the constitutions of the former Soviet Union. Of these, the two most important texts are the Council of Europe Recommendation Rec (2000) 19 on the Role of Public Prosecution in the Criminal Justice System, and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors on 23 April 1999.

This guidance has been drafted largely in response to the new constitutions in the countries of the former Soviet Union. Some of those countries have been tempted to place the prosecutor under the direction of the executive (partly as a reaction to the Soviet office known as *Prokuratura*, a seemingly independent prosecutorial authority, which was in practice wholly under the thumb of the party apparatus). However, even where this has happened, international guidance requires that the prosecutor be given functional day-to-day independence in relation to particular cases.

That is not to say that the executive branch, or even the legislature, may not have the right, and indeed the duty, to lay down general prosecutorial policy. To respect the rule of law in the sense of legal certainty, it is best that these choices about priorities be set out in a policy statement that is open to discussion and then published. Most prosecuting authorities have such policies, as can be found, for example in the prosecution policy required under the South African National Prosecution Authority Act 1998. These policies are developed in conjunction with the executive. However, as was said in the Venice Commission's Opinion on the draft revision of the Romanian constitution, prosecution policy should be seen as general guidance, and

> in no way implies that prosecutors are personally issued with specific orders in a given case. Each prosecutor retains freedom of decision. In determining how [policy] should be applied to individual cases, each prosecutor must be independent.[7]

In this respect Rec (2000) 19 of the Council of Europe provides:

> Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
>
> 'instructions not to prosecute in a specific case should, in principle, be prohibited.'

Similarly, the guidelines issued in 1999 by the International Association of Prosecutors (IAP) require that where prosecutorial discretion is permitted in a particular jurisdiction, it should be exercised independently and free from political interference.[8]

[7] Venice Commission, 'Opinion on the Draft Revision of the Romanian Constitution' CDL-AD (2002) 012-e paras 61 and 62.

[8] IAP, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) para 2.1.

International opinion therefore strongly favours the notion of an independent prosecutor in relation to the decision whether or not to bring charges. In order to ensure that goal, it has also considered the issue of the appointment and dismissal of prosecutors. In its Opinion on the constitution of Hungary, the Venice Commission suggested that non-political experience should be involved in the selection process of prosecutors, and in relation to dismissal it said this:

> An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified . . . It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result.[9]

Note how different this is from the situation in South Africa, where the president appoints the National Director of Prosecutions and may dismiss him on the ground, inter alia of not being a fit and proper person to hold the office, subject only to the view of parliament. Similarly in the UK the Attorney-General can be appointed or replaced simply through a Cabinet reshuffle (although the position of the public prosecutor is more secure).

## 4. The Rule of Law and Public Prosecutions

We can now return to my second question: the extent to which the rule of law permits prosecutions not to be pursued, or to be discontinued. Does the rule of law require everyone who breaks a law to be held to account? If not, under what conditions may anyone be exempt from prosecution?

Popular talk has it that there must be 'law and order'. This phrase is sometimes used emotively to seek better policing and harsh and exemplary punishments for certain kinds of crime. However, there are also three connotations of 'law and order' which fall squarely under the principle of the rule of law. First, that existing legal rules must be obeyed. This tenet speaks both to members of the public (who are expected to obey the law) and to public officials (who are expected to enforce the law and to act within the

[9] Venice Commission, CDL-INF (1996) 002 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)002-bil> accessed 25 June 2015; and Venice Commission, CDL (1995) 073 <http://www.venice.coe.int/webforms/documents/?pdf=CDL(1995)073rev-e> accessed 25 June 2015.

scope of the powers conferred upon them). Second, it connotes that those who do break the law should not be permitted to do so with impunity. Third, it connotes that the law must be enforced 'without fear or favour', meaning equally and regardless of the status of the defendant or any threats to the decision-maker or benefits offered.

It follows therefore that the rule of law is breached if our law enforcement officers fail systemically to prosecute violators of the law, as a matter of general policy or through selective non-enforcement that effectively grants impunity to certain categories or individuals. But does that mean that law must be fully enforced?

Some countries do have a policy of 'zero tolerance', in an effort to deter crime. However, it is neither possible, nor even desirable, to have full enforcement of the law. Who could possibly advocate the prosecution of a doctor who had exceeded the speed limit while driving to the aid of an accident victim late at night on an empty road? And the prosecution process is inevitably constrained by limited resources, not to mention limited prison space.

As we have seen, in many jurisdictions there may also be wider matters of 'public interest' that justify lax law enforcement, such as matters of national security or the fear of provoking retaliation or unrest in sensitive social situations.

### 4.1 The decision not to prosecute and *nolle prosequi*

A first reason not to prosecute is the fact that there is simply insufficient evidence to justify a trial. This is known as the 'evidentiary test', which asks whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful conviction. Factors considered here are the strength of the case, whether the evidence is admissible, the credibility of witnesses, and the availability and reliability of the evidence.

In some countries, especially in continental Europe, if the evidentiary test has been attained, then there is a duty to prosecute, and the prosecutor can be sued if he does not proceed. In most common law countries, however, there is discretion to prosecute. This is because it is believed that prosecution should be flexibly pursued in what is called the public or national interest. The 'public interest test' engages, for example, if prosecution would inevitably reveal, during the process of obtaining evidence, secrets about intelligence networks that could damage national security. But it can also take into account more personal issues, such as whether it would be best to implement a non-criminal alternative to prosecution, particularly in the case of first-time or juvenile offenders.

The decision not to prosecute should be distinguished from the decision to withdraw a prosecution once proceedings are under way, also known as *nolle prosequi.* In Anglophone Africa, there is generally a constitutional power wielded by the DPP or the Attorney-General to discontinue any criminal trial. Though not all constitutions state it explicitly, the power is designed to achieve justice or uphold the public interest, should circumstances change since deciding to go ahead with the prosecution.

The debate as to how much discretion there should be to exercise this power is particularly pronounced in Ghana, where various sources are calling on greater accountability of the Attorney-General's use of it, in the light of several controversial instances of *nolle prosequi* where it has been alleged that the withdrawal was exercised

for improper purposes.[10] The issue is greatly exacerbated by the fact that the Attorney-General is a member of the Cabinet and of the ruling party (though he does need the qualifications of a Justice of Appeal) which means that there is a situation where for all intents and purposes a political figure is empowered to stay any prosecution without the need to give reasons. Even the small protection of the public interest test is absent—article 88 of the 1992 constitution contains no reference to it.

The scope of the public interest test bristles with questions. Where the prosecutor is not a politician, the question arises of the extent to which he is equipped to decide the broader public interest. In cases where the prosecutor is an independent lawyer and not a politician, it is surely all the more important for the prosecutor to assess the public interest after consultation with the relevant government ministers, although that in itself raises issues about how close the prosecutor should be with government. There are respected voices in Anglophone Africa defending the independence of the prosecution, but requiring it to be subject to influence by such as the office of the president, the legislature, etc who, it is said, are best able to decide the public interest since they actually represent the public.[11] In the UK over the years there has been debate as to whether there is a duty or power on the part of the Attorney-General to consult on individual cases with the government. It is now agreed that she may so consult at her discretion although, in the words of a former Attorney-General, in some sensitive cases she would be a 'fool not to do so'.

My view is that in a system where prosecutors have a discretion to prosecute, there is no harm in their consulting widely, with whomsoever they wish, including ministers. After all, the public interest is a broad concept based upon material and opinion of a greater range and complexity than is likely to exist in the office of a specialist prosecutor. However, such consultation should be subject to a very strict proviso, namely that the prosecutors do not consider themselves bound to follow the advice they receive.

### 4.2 How broad is the public interest test?

The South African prosecutorial guidelines which deal with the issue say that once the evidence test is passed, 'a prosecution should normally follow, unless public interest demands otherwise'. We see here that the burden of proof is placed on the prosecutor to justify his decision not to prosecute. However, the guidelines go on to say that 'there is no rule of law which states that all the provable cases . . . must be prosecuted' and then submits factors which might justify a refusal to prosecute, in the public interest. These are:

1. the nature and seriousness of the offence (which includes its 'effect on public order and morale' and 'the economic impact of the offence on the community'), and
2. the interests of the victim and the broader community, and the circumstances of the offender (for example, whether the accused has shown repentance).

[10] Kwadwo Boateng Mensah, 'Discretion, *nolle prosequi* and the 1992 Ghanaian Constitution' (2006) 50 *Journal of African Law* 47.

[11] Austin Amissah, *Criminal Procedure in Ghana* (Sedco Publishing Ltd 1982) 22.

These guidelines leave a great deal to the discretion of the prosecutor. Could the public interest test, for example, legitimately take into account the fact that the prosecution of a high official would cause a crisis in the governance of the country? Would it be in order to drop charges against a company because its exports are vital to the economy?

The question then becomes whether, in cases where these decisions on the public interest are challenged in the courts, the courts themselves should interfere with them. Here the rule of law—requiring law to be implemented—comes into conflict with the separation of powers. Should the courts interfere with the independence of the prosecutor? And indeed, are these decisions ones that the courts cannot make on *institutional* grounds (namely, that courts are not well-equipped to make decisions as to what the public interest is—or at least less equipped than the prosecutor or Attorney-General so to decide)?

## 5. Judicial Review of Prosecutorial Decisions

In the 1970s in England the public interest test was examined in a case brought by a Mr Gouriet.[12] The British Post Office Union had indicated their intention to boycott all mail to and from South Africa as a protest against apartheid. Such an action was against the law, said Mr Gouriet, but he could only institute a private prosecution with the assistance of the Attorney-General (a procedure known as a relator action), who refused his consent to prosecute in the public interest. The House of Lords, then England's highest court, held both that it was perfectly proper for the Attorney-General to apply the public interest test, and also that the scope of that test was so wide as not to be subject to review by the courts. This is because the Attorney-General should be free to take into account questions of 'policy' such as whether the prosecution would exacerbate an already sensitive industrial situation. Would it be effective or futile? Would it lead to political martyrdom? Would it provoke a national strike? This utilitarian weighing of political costs and benefits was not best answered by judges.

As Lord Wilberforce said:

> The decisions to be made in the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which courts can resolve.

More recently that deferential approach of the courts has somewhat softened. The *Gouriet* case was partly coloured by the fact that the Attorney-General was acting under the 'prerogative power' which at that time could not be challenged by judicial review but which has since been held to be challengeable, at least if the power to do so is within the institutional capacity of a court.[13] More recent cases in different jurisdictions have opened the door to judicial review of decisions not to prosecute, although on very restricted grounds. For example, in 2002 the Supreme Court of Ireland (which has an independent public prosecutor), held that the only grounds of review are those

[12] *Attorney General v Gouriet* [1978] AC 435.

[13] *Council of the Civil Service Union v Minister of the Civil Service* [1985] AC 374.

where it can be shown that the decision of the prosecutor was taken in bad faith or influenced by an improper policy or motive or where the prosecutor had abdicated his functions. It was further held that the prosecutor did not have to provide reasons for his refusal to prosecute.[14]

In 2003 the Supreme Court of Fiji, in *Matalulu v DPP*, similarly refused to uphold a challenge to a decision not to prosecute, saying:

> The polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.[15]

Nevertheless, the Fiji court held that the power would be reviewable if it were made in excess of the prosecutor's constitutional or statutory grant of power, when he had acted under the direction of another or in bad faith or fettered his discretion by a rigid policy. However, it was held that the decision could *not* be reviewed

> by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

In 2006 the matter was considered in an appeal to the Privy Council, which serves as the final court of appeal for a number of Commonwealth countries, against a decision not to prosecute by the DPP of Mauritius. It cited the *Matadulu* case from Fiji, cited earlier, and adopted its approach entirely.

In 2008 the House of Lords itself endorsed the approach of the Fiji case, which it cited with warm approval. The case concerned the following: In December 2006 the Director of the Serious Fraud Office (the Director) decided to abandon an investigation into allegations of bribery and corruption by BAE Systems Ltd (BAE), in relation to contracts for Al-Yamamah military aircraft with the Kingdom of Saudi Arabia. The Director had yielded to a threat from Saudi officials (in particular, Prince Bandar bin Sultan bin Abdul Aziz of al-Saud) that if the investigation were to continue the Saudi government would cancel a proposed order for Eurofighter Typhoon aircraft and withdraw security and intelligence cooperation with the United Kingdom.

Both the Director and the Attorney-General had previously refused to bow to pressure from the prime minister and the foreign and defence secretaries of state to drop the investigation. The Director again held firm when the Attorney-General considered that the investigation was not justified by the available evidence. Just at the point when the trail of investigation was extended to Swiss bank accounts, the Director was persuaded to drop the case on the advice particularly of the British Ambassador to Saudi Arabia that national security ('British lives on British streets') would be imperilled if the threat were carried out. The Director's decision was

[14] *Eviston v DPP* [2002] 3 IESC 62.

[15] *Matalulu v DPP* [2003] 4 LRC 712, 735–6.

challenged through judicial review by Corner House Research Ltd and the Campaign against the Arms Trade.

In the House of Lords, Lord Bingham[16] began by indicating clearly that the courts should be 'very slow to interfere' in prosecutorial decisions outside of 'exceptional cases'. This was because, first, respect should be accorded to the independence of the prosecutor. Secondly, the words quoted earlier from the Supreme Court of Fiji about the 'polycentric' character of the decision were again cited with approval.[17]

Explicitly guided by this highly deferential approach to the exercise of broad discretion by a prosecutor, Lord Bingham acknowledged that the discretions conferred on the Director were not unfettered, at least to the extent that:

> He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice (para 32).

Note that Lord Bingham's list of administrative imperatives is sited firmly on the ground of judicial review known as 'legality'. Surprisingly, it omits reference to the need to make a decision which is within the 'range of reasonable responses' (as the old *Wednesbury*[18] test has now evolved).[19] Nor does it address the question of the degree of scrutiny (light or heightened) that may be appropriate for a case such as this, or whether the more rigorous test of proportionality ought to be engaged. The ultimate question for the House was said simply to be:

> whether in deciding that the public interest in pursuing an important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens, the Director made a decision outside the lawful bounds of the discretion entrusted to him by Parliament (para 38).

It was unanimously held that the Director had acted within his power's lawful bounds.

A similar hand-off approach to prosecutorial discretion has been followed in three recent appeals in Singapore.[20]

In my view, this hands-off attitude of the courts to the public interest is simply too deferential and outmoded for three reasons. First, there is no logical reason to confine the categories of review of the prosecutorial decision to those mentioned (bad faith, etc) and to exclude fundamental categories of review such as the taking into account of relevant considerations, or even unreasonableness. Second, the hands-off approach presumes that prosecutors will inevitably subordinate party or partisan interest to a wider national or public interest. With respect, experience shows the opposite, that

[16] With whom Lords Hoffmann, Rodger, and Brown and Baroness Hale agreed.

[17] *Matalulu* (n 15).

[18] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229–30.

[19] For examples of that reformulation see Lord Harry Woolf, Sir Jeffrey Jowell, and Andrew Le Sueur, *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2013) ch 11.

[20] See Kumaralingam Amirthalingam, 'Prosecutorial Discretion and Prosecution Guidelines' [2013] *Singapore Journal of Legal Studies* 50.

there are great pressures, whatever the formal structures of the office of prosecutor, to conflate the interest of the nation with that of the party in power. Particularly in those African nations with weak independence of the public prosecutor there is increasing pressure to sever the link with the politicians, usually based upon the experience of withdrawing prosecutions of high-level corruption cases involving individuals close to the government.[21] There seems to be no reason why the courts should exclude themselves from scrutinizing the concept of national interest, for example, whether it permits non-prosecution on any of a number of doubtful grounds, well short of bad faith, such as economic interests, to which I have already alluded.

Third, while it may be technically correct, as is set out in the South African prosecution policy cited earlier, that 'there is no rule of law which requires prosecution of all cases', it is a fundamental principle of the rule of law that the law should be enforced where possible, and enforced equally. I would also contend that a utilitarian attitude towards the public interest—seeking the greatest good for the greatest number and excusing wrongdoing on the ground of a balance of convenience—sends out signals that diminish respect for legality, encourages lax policing, excuses the duty of those public officials charged with enforcing the law, encourages the lawless, creates anxieties in the lawful, and undermines a culture of legality. It also creates a sense of justified grievance on the part of the ordinary people, who are rarely treated as exceptions to the rule, yet watch with deep resentment when high officials and the masters of industry are exempt from law's strictures.

Of course, the enforcement of law should not eschew compassion. On the contrary, the public interest might well be utilized from time to time so as to promote or protect vital interests—such as those of the terminally ill who genuinely and of their own volition wish to embark on assisted suicide, or where there is a strong likelihood that national security may be threatened by the revelations at a trial. Nor am I suggesting that courts are always well equipped to substitute their view for that of the prosecutor on what the national interest requires.

What I am suggesting is that the courts are these days familiar with ways to examine claims of national interest as they have not been in the past. The late Etienne Mureinik, one of Africa's greatest public lawyers, said that the new South Africa had moved from a 'culture of authority' to a 'culture of justification'[22] and it is this culture that these days subjects most decisions of public officials to more intense scrutiny than in the days when their decisions were basically immune unless 'grossly unreasonable'. In South Africa the fact that decisions not to prosecute are not exempt from review under any or all of the grounds of review under section 6 of the Promotion of Administrative Justice Act (PAJA) gives some hope that it may once again take the lead in this respect, as the courts have already started to do, in using the tools available to judges not to second-guess these decisions, but to probe their evidentiary basis and rationality to the limit.

[21] For example in Ghana, where the DPP is subordinate to a politically appointed Attorney-General.

[22] Etienne Murienik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) *South African Journal on Human Rights* 31, 32.

## 6. Reasons, Guidelines, and Victims Appeals

The difficulties of adjudicating public interest may be at least partially addressed through requiring the DPP to disclose reasons for his decision, whenever he exercises the constitutional powers of the office. This approach is taken in Malawi, where section 99(3) of the constitution requires the DPP to give reasons for his decisions to the Legal Affairs Committee of Parliament, within ten days of each decision being handed down. That said, parliamentary scrutiny is not always effective. With or without parliamentary scrutiny, there is good reason why the DPP should publish his reasons to the public at large who are probably best-placed to judge what their interest entails.

As we have seen, in some countries the prosecutor issues guidelines showing the factors to be taken into account in exercising their discretion. In the UK the Attorney-General issued a protocol between herself and the prosecuting departments, confining her interference largely to matters of national security, but also requiring consultation on some sensitive matters that may systemically affect the framework of the law or operation of the criminal justice system.[23] The DPP has also set out guidelines in respect of prosecution of particular issues, such as assisted suicide, or in relation to offensive messages on the social media.[24] As has been said by Lord Bingham, the rule of law requires that questions of legal rights and liability be governed by law, and not by an arbitrary decision. But that does not mean that all decisions about rights and liabilities should be decided by courts or tribunals. They should however, be based on 'stated criteria . . . amenable to legal challenge'.[25]

Prosecutorial guidelines assist by laying out the 'stated criteria'. Although there is a danger that the guidelines may fetter the discretion of the prosecutor,[26] discretion is thus structured, the public can better understand the rationale of selective enforcement, and the courts may well enforce them as 'legitimate expectations'.[27] On the other hand, they sometimes induce rigidity by creating the impression that they have the effect of strict rules, or may be applied in such a way by the courts.[28]

Insofar as the existence of prosecutorial discretion creates the impression of selective justice, the DPP in England has recently decided to issue a 'Victim's Code', under which the DPP will provide reasons for the failure to prosecute, and also permit any victim of crime, which includes bereaved family members or other representatives, to ask the Crown Prosecution Service to look again at a case following a decision not to prosecute, or to discontinue proceedings, or to offer no evidence.[29] These reviews will provide a fresh examination of the evidence and circumstances of the case. This is a model that other countries may do well to emulate.

[23] See in general, Attorney-General's Office, Protocol between the Attorney-General and Prosecuting Departments (2009).

[24] Lecture by a recent DPP, Sir Keir Starmer, 'Prosecutorial Discretion and the Rule of Law' (Bingham Centre for the Rule of Law, London, 16 July 2016) <http://www.biicl.org/files/6471_prosecutorial_discretion_&_the_rule_of_law_final.pdf> accessed 25 June 2015.

[25] Tom Bingham, *The Rule of Law* (Penguin 2011) 50.

[26] See the examples in Amirthalingam (n 20).

[27] See, for example, *R v DPP ex parte Manning* [2000] EWHC 562 (QB), [2001] QB 330.

[28] See the cases cited by Amirthalingam (n 20).

[29] See Starmer (n 24).

## 7. Conclusion

With such diversity of different constitutional arrangements within Anglophone Africa, it is difficult to point to a single direction of practice. However, it is clear that there is concern to achieve prosecutorial independence and greater transparency and fairness. The area of prosecutorial discretion bristles with problems about divisions of functions that are necessary in a constitutional democracy. As there are so many interests involved, from the accused, to the victim, to the general public interest, much greater attention to institutional design and the rule of law is needed in this neglected area of constitutional discourse. In general, the constitutional principle of separation of powers is best observed where public prosecutors are separate from the political branches of government so that they can fulfil their tasks as independent guardians of the rule of law.

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# 16

# Separation of Powers and the Position of the Public Prosecutor in Francophone Africa

*Horace Adjolohoun and Charles M. Fombad*

## 1. Introduction

As African countries grapple with the challenges of entrenching an ethos of constitutionalism, one of the issues that has not attracted much attention when dealing with the efforts to promote transparency and accountability through the separation of powers has been the role of the public prosecutor. Commonly known as the representative of the people, of society, or of the public interest, the public prosecutor has, particularly in respect of its status, raised complex issues of where exactly they fit within the three branches of government. Understanding the nature of this relationship is particularly important because of the impact it has on the good administration of justice and consequently respect for the rule of law. This chapter will consider the position in Francophone Africa.

Most of Francophone Africa inherited and has maintained the French civil law tradition which confers on the public prosecutor constitutional and institutional status of dependence on and limited independence from the executive and judiciary. It is a delicate balance which tilted more in favour of dependence than independence before the 1990s, during the long era of dictatorship that followed independence. The roots of the institution of public prosecutor can be traced back to the royal system of administration of justice in France which subsequently spread to the rest of Europe. This also influenced the adoption of the French approach in other civil law jurisdictions in Africa. However, the French prosecutorial system and the role of the prosecutor have evolved considerably in the twentieth century. In fact, from the 1990s, a review of the French system was embarked upon probably due to a number of decisions by the European Court of Human Rights (ECHR) which called into question the independence of the public prosecutor in France. The review culminated in a series of legal and institutional reforms in the 2000s.[1] The question that this raises is whether the approach in Francophone Africa has also evolved. Situating the status and role of the public prosecutor in Francophone Africa today is important because it will give an indication of the extent to which the process of establishing democratic and accountable institutions strengthened by the checks and balances that go with the separation of powers has progressed.

[1] See Pauline Guilhot et al, 'Le Procureur de la République est-il un magistrat indépendant?' (2012) ISTM 8–9 <http://www.montplaisir.dokeos.com/courses/CAMPUSISTM/document/Diplome_de_Comptabilite_et_de_Gestion/TRAVAUX_D_ETUDIANTS/DCG1LeprocureurdelaRepubliqueest_ilunmagistratindependant.pdf?cidReq=CAMPUSISTM> accessed 15 April 2015.

The chapter is divided into five sections. Section 2 will briefly discuss the historical origins of the public prosecutor in France and its adoption in Francophone Africa. Section 3 will examine his functions. In Section 4, his status vis-à-vis the other branches of government will be discussed. The concluding Section 5 will point out that the relationship of dependence on the executive and judiciary has largely remained unchanged and poses challenges not only to the good administration of justice but also the entrenchment of a culture of constitutional democracy. A number of reforms are suggested which it is hoped will enhance the ability of the public prosecutor to discharge his functions more effectively and in this way contribute to sustaining Africa's fragile transition to constitutional democracy.

## 2. The Historical Origins and Evolution of the Public Prosecutor in France and Its Adoption in Francophone Africa

Historically, the function of public prosecutor emerged from the profession of lawyers or advocates in the fourteenth century.[2] The very name of 'prosecutor' and the role of its incumbent was inspired by the procedure established within the tribunals of the Inquisition in France. Prosecutors were then legal practitioners who not only defended the interests of the king, lords, cities, and municipalities, but also represented individuals before courts. While the *Ministère Public* or *Parquet* (Office of the Public Prosecutor or Directorate of Public Prosecution) as it operates today appeared only under Napoleon Bonaparte, its function may be traced back at least to the fourteenth century. The practice of prosecutors representing kings was also developed in the fourteenth century in French courts and parliaments. When the king had personal, mainly patrimonial interests, in the matter, he appointed *procuralores* to defend such interests before his own judges in the royal courts.[3]

However, the function rapidly evolved from defending the king's interest to defending the public interest, particularly in criminal matters. The principle of public interest itself stems from the legal rule of *interest rei publicae ne maleficia remaneant impunita*. Devised by civil law specialists in the twelfth century, the rule provides that it is in the interest of the public that crime does not remain unpunished. Prosecutors of the monarch adopted the public interest principle in the thirteenth century to prosecute the most serious crimes in royal courts upon the request of judges themselves or under the king's instruction. From that development, royal prosecutors were separated from their counterparts, and the king progressively requested them to provide him with their exclusive services. Prosecutors of the king thus became public prosecutors and joined royal courts, although, during court sessions, they appeared away from the *siège* (the bench), standing on the *parquet*.[4]

[2] See Université de Nantes, 'Le Procureur de la République' <http://www.droit.univ-nantes.fr/m2dp/upload/word/Expose_Procureur.doc> accessed 15 April 2015.

[3] See Jean-Marie Carbasse, 'Histoire du Parquet' Equipe de recherche de l'Université de Paris II associée au CNRS et aux archives nationales (2000) 2 <http://www.gipjustice.msh-paris.fr/publications/histparquet.pdf> accessed 15 April 2015.

[4] Carbasse (n 3).

Taking advantage of the public interest principle, the king's lawyers spearheaded the development of criminal law. They subsequently used all means provided by that new development to zealously prosecute and punish crime, and also played a role in civil and administrative matters.[5] This development expanded the ascendance of royal public prosecutors over other prosecutors. The public prosecutor's role was expanded to include a role in the administration of the police and they received instructions directly from the king. The king's prosecutors were equally appointed as *pro bono* lawyers for indigent litigants, particularly when the interest at stake coincided with those of the king.[6]

Expanding the role of the king's prosecutors to defending the public interest logically led to their participation in the administration of the royal police. Even though they remained independent in the discharge of their duties, public prosecutors increasingly received instructions from the king. They ultimately assumed duty with the dilemma of either obeying royal instructions or resigning, but they could not be removed.[7] The office of the prosecutor became more politicized under the reign of Louis XIV. Subsequently portrayed as an 'agency of government', prosecutors lost the privilege of irremovability and the guarantee of security of tenure, which was supposed to prevent them from being removed from office arbitrarily. This led to conflicts between the public prosecutor and the executive arm of the state which reached its climax in the nineteenth century. The main bone of contention was the independence of the office, particularly whether it should obey executive instructions or not. As will be seen later in this discussion, the current functioning of the office in France and Francophone Africa suggests that the policy of acting on executive instructions prevailed.[8]

The ascendance of the executive over the office of the contemporary French public prosecutors is inspired by developments of the function under monarchies but even more by the ancient principle of indivisibility between the king and justice. In fact, French kings held full judicial authority and administered justice for which they believed they had received spiritual and temporal powers from God. However, progressively, they delegated part of their judicial powers to clerics and other magistrates but retained the power to deal with or reallocate any case to a different tribunal. In courts, assigned magistrates wore red gowns similar to those of the king.[9]

The French model of the public prosecutor was thus developed predominantly from the functioning of the monarchical administration of justice for the king and the public interest. Although the historical origins and evolution of the public prosecutor in France is fairly peculiar, the approach adopted is very similar to most of continental Europe, especially countries like Belgium, Portugal, and Spain which also had colonies in Africa.[10]

[5] ibid 4. [6] ibid. [7] ibid 5. [8] ibid.

[9] See République Française Ministère de la Justice, 'La justice sous la monarchie' (7 February 2007) <http://www.justice.gouv.fr/histoire-et-patrimoine-10050/la-justice-dans-lhistoire-10288/la-justice-sous-la-monarchie-11910.html> accessed 15 April 2015.

[10] See Organisation Internationale de la Francophonie (OIF), 'La réforme des systèmes de sécurité et de justice en Afrique francophone' (2010) 129 <http://www.francophonie.org/La-reforme-des-systemes-de.html> accessed 15 April 2015. See also generally, Council of Europe *The Prokuratura in a State Governed by the Rule of Law* (Council of Europe Publishing 1998).

The present judicial system and organization of the judiciary in Francophone Africa is a replica of the French model. France designed a judicial system for colonies very close to the one in metropolitan France by which the highest judicial authorities of the colonies were based in Paris. The *Ministère Public* in Francophone African countries adopted the French Code of Criminal Instruction (CCI) of 1808.[11] Under the CCI, the purpose of the criminal justice system was to protect individuals against crime, protect the rights of victims and guarantee a fair trial for the accused. The inquisitorial prosecution system was in force as opposed to the accusatorial system mainly used in common law jurisdictions. Under the accusatorial system, parties are equal at all levels of the criminal proceedings and under the control of a neutral judge who acts more or less as an umpire. By contrast, the inquisitorial system established a sort of quasi-monopoly of the public prosecutor over the prosecution right from the initial stages of the case, the investigations of the crime, and the gathering of evidence to the trial and sentencing. The CCI did not separate preliminary investigations by police under the authority of the public prosecutor from the examination and prosecution by the judge. The public prosecutor therefore had full and unchallenged discretion to institute proceedings, investigate, and gather evidence in a process that was opaque. As an agent designated by the state, the prosecutor had full control over the pre-trial phase with no control by the judiciary as no other actor had access to the file until the trial commenced.[12]

With this approach to criminal prosecution, the public prosecutor appeared to be a party to a case in which it had previously had full and exclusive discretion to investigate, order coercive measures such as pre-trial detention, and decide whether or not to try the accused, whilst the accused and the court remained passive. Suspects were remanded in police custody with no access to lawyers. Furthermore, the public prosecutor had full discretion to decide a *non-lieu* (that is, whether or not to discontinue) or refer the matter for trial. Throughout the pre-trial phase, the prosecutor had leeway to order detention or other coercive measures.[13]

While France has made a number of changes to this prosecutorial system that it transplanted to Africa, especially with regards to the guarantee of equality of the parties, the role and powers of the public prosecutor in Francophone Africa has remained by and large unchanged. For instance, France's judicial reforms introduced access to a lawyer right from the outset of the pre-trial phase in a bid to balance the rights of the accused with those of the victims and that of the society, which is defended by the public prosecutor. Nevertheless, it must also be pointed out that a number of Francophone African countries have since the 1990s tried to reform the inherited system and have brought some changes to the role and powers of the public prosecutor. For instance, under the 2005 Law on Criminal Procedure adopted in Cameroon, the public prosecutor becomes a party at par with other actors in the criminal trial. Moreover, the right to legal counsel is provided for from the commencement of the investigations, and there is now provision for an investigative judge. Under the same reform, bail is granted at all stages of the proceedings and there is provision for

[11] OIF (n 10) 133. [12] ibid. [13] ibid 142.

compensation in cases of illegal pre-trial detention.[14] However, in spite of these reforms, public prosecutors in Francophone Africa still function very much within the same constraints as they did before independence. We shall now examine these functions.

## 3. The Functions of the Public Prosecutor

It is axiomatic that the discretion to prosecute is key to the functions of the prosecuting authority. To fully understand the functions they perform, it is important to note that the public prosecutors in the civilian systems in Francophone Africa operate within the broader institution of the *Ministère Public*, which could be compared with the Office or Department of the Public Prosecutor in the common law systems. The main difference with the practice in the common law jurisdictions is that, in the civil laws system in Francophone Africa, the public prosecutor retains full control over both the investigatory and post-investigatory stages.[15] In spite of a few variations in some of these Francophone African countries, the common core functions of the public prosecutor which involve instructing the instigation of investigations, instructing the police on the scope of investigations, personally investigating criminal cases, participating in investigations, and deciding on the type of investigations are very similar.[16]

In general, the provisions in the law on criminal procedure setting out the mission of the *Ministère Public* in Francophone African countries are more or less similar to articles 1 and 31 of the French Code of Criminal Procedure. The *Ministère Public* has two main missions: to initiate public prosecutions and to enforce the criminal law. To attain these objectives, the public prosecutor may conduct or supervise preliminary investigations, and decide whether or not to prosecute. Both the public prosecutor and the police have the powers to carry out preliminary investigations. However, it is the public prosecutor who assesses the strengths and weaknesses of the case and decides whether there is sufficient evidence to take the matter to court.

Although prosecuting criminal matters constitutes the main function of the public prosecutor, they also sometimes represent the interest of society in civil and constitutional proceedings, for instance in cases of change of name, or adoption.

The primary prosecuting function of the public prosecutor is in many respects political. As part of that mission, the prosecutor discharges a duty of prosecuting crime for the good of society, and thus aims to protect the public interest. Accordingly, the public prosecutor tries, in his daily functions, to enforce the penal policy of the state, which is designed, coordinated, and enforced under the primary responsibility of the executive. As such, in Francophone Africa, the Minister of Justice enforces the penal policy determined by the executive and sees to its coherent application

[14] ibid 144.

[15] See Despina Kyprianou, 'Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies' (2008) 2 <http://www.google.bj/?gws_rd=cr&ei=CyPxUvqDpDb7AaekoDgAQ#q=D+Kyprianou+'Comparative+Analysis+of+Prosecution+Systems+> accessed 15 April 2015.

[16] See ibid 8.

nationally. It is however the public prosecutor, and more generally, the *Ministère Public*, which implements this policy on the ground.[17]

Another important aspect of the role of the public prosecutor is termed as *régalien*—royal—to mean that these are functions of the state that are so attached to its sovereignty that they may not be entrusted to a non-state entity. These duties traditionally include national defence and security, economic sovereignty and, as a matter of course, justice.[18] In the pursuit of this mission attached to the sovereignty of the state, the public prosecutor is bestowed with the discretion to decide whether or not an offence should be prosecuted and whether or not alternative procedures should be used to deal with the offence.[19] In other words, and borrowing from the historical perspective of justice being a sovereign function of the state, the public prosecutor, as an agent of the king, is entrusted with the power to decide whether a crime should be punished, as he acts on behalf of society. However, as will be shown in the next section, both the *Procureur Général*, who is the head of the *Ministère Public* within the jurisdiction of the Court of Appeal and the Minister of Justice, exercise some control over the public prosecutor's discretion in these matters.

In general, judicial reforms undertaken in most Francophone African countries in the 2000s have tried to share the functions and powers of the prosecutor under the inherited French Code of Criminal Procedure amongst three separate judicial authorities. Under the new laws, the prosecutor's role is limited to investigating offences and requesting the *juge d'instruction*—examining judge—to undertake a formal inquiry, continue investigations, and give directions to the police. A third judicial authority, the judge in charge of the execution of sentences and pre-trial detention, may order detention or remand, or release.[20] For example, Benin in 2012, Cameroon in 2005, and Senegal in 2014 (as part of a consolidation of their laws) have enacted new codes of criminal procedure which now provide that preliminary investigations and prosecution are conducted by police officers or designated officials but under the instructions and supervision of the public prosecutor.[21] In supervising the investigation of criminal offences, the prosecutor issues general or specific directives to investigators in which the choice and priority of penal policy are highlighted. Investigators must at all times report to the public prosecutor who has the power to take over any investigation they deem appropriate. Under the same laws, the prosecutor may authorize police custody and order pre-trial detention. Importantly, he may institute criminal prosecution upon request or *suo motu*, and may request the examining judge to add new charges. A refusal to grant such a request must be by way of a reasoned decision and the prosecutor, if dissatisfied, may request that the case be referred to a different judge.

As indicated earlier, an important power at the disposal of any public prosecutor in the discharge of his functions is whether to refer the case to court or filter it out of the

[17] See Guilhot et al (n 1) 8–9.

[18] See Pierre Raoul-Duval, 'Renforcer les droits de l'Etat pour présenter l'Etat de droit' <http://www.lecercledeseconomistes.asso.fr/IMG/pdf/S13-Raoul-Duval-05.pdf> accessed 15 April 2015.

[19] See Guilhot et al (n 1) 9.

[20] See, for instance, art 148 of the Code of Criminal Procedure of Benin.

[21] See Codes of Criminal Procedure of Benin (n 20); Codes of Criminal Procedure Cameroon, arts 78 and 98; and Codes of Criminal Procedure Senegal, art 33.

system. As a general trend, civil law countries apply the principle of legality of prosecution, in contrast to common law jurisdictions who apply the opportunity principle.[22] Under the legality principle, every case in which there is enough evidence and no legal hindrance to prosecute must be brought before the court. The underlying reasoning behind this principle is that the legislative authority, and not the courts, should address any shortcomings resulting from the strict application of the legal or mandatory prosecution rule.[23] By contrast, the principle of opportunity dictates that the evidence and any other relevant factors should influence the decision as to whether to prosecute or not. This approach allows the public prosecutor to make his decision whether or not to prosecute on the basis of factors classified as of public interest and must take into account factors such as the status of the accused, the victim, the gravity of the offence, and the availability of resources.[24]

In all, although the new codes adopted by Francophone African countries in the 2000s have brought about some significant changes to the old French prosecution approach, the public prosecutor still retains important powers in the administration of justice in particular and in the judicial system as a whole. For instance, under most of the reforms, the previous *omnipotent* prosecutor shares his functions and powers with an examining judge and a judge in charge of enforcement of sentences and pre-trial detention. The reforms also appear to have given the public prosecutor greater powers in the making of decisions on whether or not to prosecute for reasons other than legality.[25] For instance, French reforms in the early 2000s allow the public prosecutor to adopt alternatives to prosecution, such as the use of mediation of sentences in criminal cases.[26] Senegal has adopted a similar approach in its new criminal legislation.

In the light of their mission, functions, and powers, the public prosecutor in Francophone Africa is a major actor in the dispensation of justice and the operation of the judicial system. Sometimes the public prosecutor participates in the exercise of judicial powers and at other times he is closely linked with the exercise of executive powers. It is necessary to see to what extent this may interfere with his ability to operate independently and effectively.

## 4. The Anomalous Status of the Public Prosecutor: A Mix of Dependence and Independence

As we have alluded to in the preceding discussion, the public protector occupies a rather complex position in his relations with the three branches of government, particularly the executive and the judiciary. It is now necessary to examine exactly how this plays out and what possible impact it may have in the proper discharge of his duties particularly in the context of separation of powers which is designed to

[22] See Kyprianou (n 15) 15.
[23] See Andrew Ashworth and Mike Redmayne, *The Criminal Process* (3rd edn, Oxford University Press 2005) 147.
[24] ibid.
[25] See Marianne Wade, 'The Changing Role of European Prosecution' (2005) 4 *ESC Newsletter* 3.
[26] ibid.

guarantee checks and balances between the different branches whilst ensuring that none unduly interferes with the functions of the other.

## 4.1 Relations with and independence from the executive

As we have seen, the public prosecutor is vested with the responsibility for protecting the public interest and acts as the chief enforcer of the state's penal policy. As such he has unavoidable ties with the executive, which is responsible for defining penal policy and enforcing the law, as was the king in the early years of public prosecution. However, going by the postulate of separation of powers, the traditional function of the executive is to ensure the implementation of the law adopted by the legislature while the judiciary sees to the proper implementation of the law. The relations between the public prosecutor and the executive therefore appear to be anomalous when assessed in the context of separation of powers. One could correctly describe such a situation as being somewhat incestuous. The numerous issues that arise can be summed up under two main heads—the implications that arise from the constitutional power of the executive to appoint, promote, transfer, and discipline public prosecutors; and the implications of subordinating public prosecutors to the hierarchical control of the minister of justice.

### *4.1.1 The constitutional power to appoint, promote, transfer, and discipline public prosecutors*

The constitutions in Francophone Africa usually provide that public prosecutors and judges are to be appointed by the president of the republic or in some cases, upon the proposal of the Minister of Justice based on the advice or opinion of the *Conseil Supérieur de la Magistrature* (CSM)—which could be compared with the Judicial Service Commission in common law jurisdictions.[27] A close relationship of dependence and control ensues due to many factors. First, the vague language used, indicating that the CSM only expresses an opinion or gives advice means that there is no strict obligation to comply with this. This is particularly problematic because of the weak system of judicial review over executive actions in Francophone Africa. In those few Francophone jurisdictions which have introduced some form of judicial review along lines closer to the American model of judicial review than the French model of control of constitutional review through the *Conseil Constitutionnel*—the best example of which is Benin—the courts have sometimes intervened to check executive abuse. For instance, as far as appointments are concerned, the Constitutional Court of Benin has consistently held that the silence or failure of the president to appoint a magistrate as a judge or prosecutor following the recommendations of the CSM amounts to a violation of the constitution. The Court had previously held, while undertaking the constitutional review of the Act on the CSM, that the latter has a prominent role in

[27] See, for instance, art 129 of the constitution of Benin of 1990; art 134 of the constitution of Burkina Faso of 2009; art 37(3) of the constitution of Cameroon of 1996; and art 90 of the constitution of Senegal of 2010.

safeguarding the independence of the judiciary. According to the Court, the related provision of the law had to be amended to make it clear that the recommendations of the CSM bind the president of the republic in the appointment of judicial officers.[28]

Second, although the CSM is supposed to play a key role in the management of judicial officers, including public prosecutors and judges, it is not really an independent body that is capable of taking impartial decisions. Most of the constitutional provisions dealing with the judiciary in Francophone Africa state that the president of the republic is the guarantor of the independence of the judiciary.[29] The CSM is only supposed to assist the president of the republic to discharge this function. In most of these countries, the CSM is packed with officials directly or indirectly appointed by the president mainly from the executive and some from the judiciary and the legislature. This is confounded by the fact that in the same countries, the president of the republic acts as the president of the CSM and his Minister of Justice as vice-president.[30] They also draw up the agenda and convene meetings of the CSM. It is thus an illusion to require a body that operates in such a manner under the control of the president and his minister to make recommendations to them or even 'assist' them as some constitutions state. As a matter of fact, the French structure of the judiciary which most Francophone African countries inherited at independence, has since undergone radical changes from the late 2000s. For instance, in the course of its constitutional reforms of 2008, France excluded both the president of the republic and the Minister of Justice from membership of the CSM. Hardly any African country in Francophone Africa has done this.[31]

Third, the scope for independent action is limited because of the extensive powers of the CSM over the public prosecutors as well as judges on all matters relating to appointments, promotions, transfers, and discipline. Besides this, some of the constitutional measures entrenched to protect judges do not apply to public prosecutors. For example, some constitutions expressly provide that judges may not be transferred without their consent even in cases of promotion;[32] no similar provisions are made for prosecutors. Again many constitutions expressly limit the provisions which prohibit arbitrary dismissal of judicial officers only to judges[33] and in those cases where there is silence regarding security of tenure for prosecutors, the relevant laws

[28] See DCC 00 – 054 of 2 October 2000; DCC 95 – 027 of 2 August 1995, interpreting art 129 of the constitution on the compulsory visa of the CSM for the appointment of all magistrates, including judges and prosecutors. In the matter, the president refused to appoint the complainant to the Supreme Court after the CSM had issued a positive visa for her appointment and those of two other colleagues, whose visas were followed.

[29] See, for example, art 37(3) of the Cameroon constitution of 1996 which states: 'The President of the Republic shall guarantee the independence of judicial power.' Also see art 209 of the constitution of Burundi of 2005; art 140 of the constitution of the Congo Republic of 2002; and art 69 of the constitution of Gabon of 1991.

[30] See, for example, art 132 of the constitution of Burkina Faso of 1997 and art 71 of the constitution of Gabon of 1991 (amended in 1994, 1995, 1997, and 2000).

[31] An exception is art 152 of the constitution of the Democratic Republic of the Congo of 2006 which in the composition of the CSM excludes the President and his Minister of Justice.

[32] Art 126 of the constitution of Benin; art 5 of *Loi portant organisation judiciaire en République du Bénin*; art 103 of the constitution of Côte d'Ivoire of 2000.

[33] See, for example, art 141 of the constitution of Congo of 2002; art 109 of the constitution of Guinea of 2010; art 119 of the constitution of Niger of 2010.

organizing the functioning of the judiciary and the status of judges grant full discretion to the executive when it comes to appointing, moving, or removing prosecutors.[34] For example, in Benin, article 6(2) of the *Loi portant Statut de la Magistrature*, provides that

> magistrates of the *Ministère Public* [that is public prosecutors] may be moved without promotion by a Cabinet decree, from one post to another, upon their own request or automatically—as a matter of course—in the interest of the public service after the opinion of the CSM.

More generally, the executive also exercises control over prosecutors and other legal officers who work within the *Ministère Public*, through the Minister of Justice. A quite illustrative case is the one of Cameroon, where a Permanent Disciplinary Commission is set up within the Ministry of Justice to deal only with disciplinary matters relating to prosecutors.[35] Besides the CSM, the executive also holds various subordination strings namely through the Minister of Justice, and factors that are inherent to the system but also to the judicial officers themselves.

### *4.1.2 The control exercised through subordination to the Ministry of Justice*

This control can be exercised in two main ways. First, the judiciary depends on executive provisions for its budget and logistics. Second, judicial officers, particularly public prosecutors, depend not only on the Ministry of Justice but also on several other ministries. Third, the judiciary has seemingly developed a type of 'sociological dependency' vis-à-vis the executive.

Regarding the first point, due to its direct involvement in the management of judicial officers, the executive in Francophone Africa is also the custodian of the financial and logistical resources needed for the proper administration of justice, and therefore the functioning of the *Ministère Public*. For instance, the budget of the Supreme Court, the Directorate of Public Prosecutions, and in fact that of the entire judiciary is part of the general state budget managed by the executive. Courts and judicial officers, including the public prosecutor, do not therefore receive resources directly from the allocation voted by parliament but from the budget allocated to the executive.[36] Studies focusing on the independence of courts in Francophone countries, including Africa, have shown that financial autonomy and security are key to the independence of the judiciary from both the executive and legislature.[37] In such circumstances, it is difficult for public prosecutors to perform their functions independently where the executive has the discretion to decide what resources will be made available to them.

[34] See, for instance, art 6(2) of the *Décret No 95/048 du 8 mars 1995 portant statut de la magistrature in Cameroun*; art 6(3) of the *Loi organique No 92/27 du 30 mai 1992 portant statut des magistrats au Sénégal.*

[35] See art 52 of the *Décret No 95/048 portant statut de la Magistrature du Cameroun.*

[36] See Joseph Djogbénou, *La Gouvernance par l'exemple: contribution programmatique sur l'Etat de droit et la justice* (vol 1, COPEF 2014) 151–2.

[37] See, for instance, Nicole Duplé, 'Les menaces externes à l'indépendance de la justice' AHJUCAF <http://www.ahjucaf.org/Les-menaces-externes-a-l.html> accessed 15 April 2015; Alioune Fall, 'Les menaces internes à l'indépendance de la justice' <http://www.ahjucaf.org/Les-menaces-internes-a-l.html> accessed 15 April 2015.

Furthermore, since the public prosecutor, who is under the authority of the executive, may be a party in the trial in which the government has increasingly had interest, possibilities of controlling the administration of justice are real.[38]

The second factor relates to the multiple hierarchical systems to which the public prosecutor responds. Public prosecutors are not only under the hierarchical dependence of the Ministry of Justice but also subordinate to both the Ministries of Interior and Defence. Indeed, investigating officers in the police and gendarmerie discharge prosecutorial functions under the direct control of these two ministries. These links further limit the possibility of an independent and fearless discharge of prosecutorial functions as prosecutors are under the control and authority of multiple executive ministerial agencies. Such situations have impacted directly on the opportunity, scope, and outcome of prosecution especially where the executive itself is an actual or potential litigant. The effect is that whether it is the executive or private parties, the wealthier or more powerful party has shown a potential to dictate the direction of prosecution.[39]

A last ancillary factor is manifested by the inherent tendency of the Francophone African *magistrat* to entertain a culture of subordination, particularly vis-à-vis the executive. All Francophone countries in Africa have copied the French model of recruiting judges and prosecutors through National Schools of Administration and Judicial Training. Access to the schools are open to young law graduates who undergo a two-year training programme after which they are appointed to perform judicial functions, including prosecuting complex matters. With little or no experience, these junior judicial officers are especially vulnerable to taking instructions from third parties, especially the executive. In Africa where the culture of bowing to the wishes of the chief or elders in society is well-entrenched, only bold prosecutors can disobey the *premier magistrat*.[40]

The general trend in Francophone Africa is that judicial officers are often recruited early in their careers and retire by the age of 65. It may, therefore, be argued that they join the judiciary at a time when they are too inexperienced and immature to withstand executive pressure. In addition, since professional advancement requires only fifteen years' experience in the judiciary to be eligible to sit in the Supreme Court for instance, it is not surprising that judges sitting in the top court are only in their forties or fifties, where they are expected to officiate as the 'most senior members of the judiciary'.[41] Moreover, judicial officers in Francophone Africa are not recruited on the basis of their experience in legal practice but rather fresh from the famous National Schools of Administration and Judicial Training with no experience other than a one-year internship in lower courts.

[38] See Djogbénou (n 36) 150–3. [39] See ibid 152–3.

[40] Most if not all constitutions adopted in the 1990s or thereafter in Francophone Africa confer on the president of the republic the title of 'premier magistrate', which literally means first judicial officer of the country.

[41] See in general Richard Cornes, 'Reforming the Lords: The Role of Law Lords' (1999) <http://www.ucl.ac.uk/spp/publications/unit-publications/42.pdf> accessed 7 May 2015; L Faggion, *Les Seigneurs du droit dans la République de Vénise* (Editions Slatkine 1998).

Another major avenue through which the executive is able to influence the functioning of public prosecutors is through the so-called power of instructions and recommendations that can be issued by the Minister of Justice to public prosecutors. Through this mechanism, the Minister of Justice may indirectly influence the decision of the public prosecutor in any pending matter through the *Ministère Public*. If one considers the fact that the power to decide whether or not to prosecute a criminal offence is at the heart of the functions and the independence of the public prosecutor then it is easy to imagine what implications this might have in practice. It therefore means the public prosecutor's discretion is no longer unfettered.

In fact, all codes of criminal procedure in Francophone Africa are couched in language similar to article 30 of the French Code of Criminal Procedure which provides that:

> The Minister of Justice may report to the *Procureur général* of the Appeal Court, responsible for all prosecutions within the jurisdiction of that court, any breach of the criminal law which comes to his knowledge and enjoin him, through written instructions . . . to initiate criminal proceedings or seize the competent court with such submissions which the Minister deems fit.[42]

Laws on the status of the *Magistrature*, which is composed of judges, public prosecutors, and judicial officers working within the Ministry of Justice, emphasize the importance of the role of the Minister of Justice by providing that public prosecutors, in the discharge of their functions, must follow instructions given by the hierarchical authority—which is ultimately the Minister of Justice.[43] Even Côte d'Ivoire, which during its reforms tried to enhance the guarantees for judicial independence (including public prosecutors) in its 2000 constitution, conferred similar powers to the Minister of Justice.[44] In Cameroon, article 134(1) of the Code of Criminal Procedure provides that only judicial authorities may instruct the public prosecutor to initiate or drop criminal proceedings.[45] This apparently progressive stance is virtually neutralized by article 64(1) of the same Code which states that the prosecutor may, upon the written authorization of the Minister of Justice, request that criminal proceedings are halted at any stage when such is likely to endanger public peace and interest. Furthermore, some laws take away the discretion of the prosecutor to freely make oral submissions contrary to written ones filed upon the instructions of the Minister of Justice as encompassed by the well-known judicial maxim: '*la plume est serve mais la parole*

[42] See, for instance, art 34 of the Code of Criminal Procedure of Benin and art 28 of the Code of Criminal Procedure of Senegal.

[43] See, for instance, art 3 of the *Décret No 95/048 du 8 March 1995 portant Statut de la Magistrature du Cameroun* and *Loi Organique 92/27 du 30 mai 1992 portant Statut des Magistrats au Sénégal*.

[44] See art 36 of the Code of Criminal Procedure of Côte d'Ivoire. On the independence of the public prosecutor in Côte d'Ivoire, see Kouable Clarisse Gueu, 'L'indépendance du Ministère Public et le principe constitutionnel de la séparation des pouvoirs en Côte d'Ivoire', draft paper presented at the African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi (April 2007) <http;//www.ancl-radc.org.za/sites/default/files/Article%20Ministere%20Public%20Definitif%20by%20Kouable%20Clarisse%20Gueu.pdf> accessed 25 April 2015.

[45] See art 134(1) of the Code of Criminal Procedure of Cameroon.

*est libre*'.[46] For instance, while the law in Senegal places no conditions on free oral submissions in courts, Cameroonian law subordinates such submissions to prior and timely notification to their immediate hierarchical authority.[47] The possibility thus allows for the Minister of Justice to influence the course of prosecution and provides considerable scope for direct or indirect interference with the functioning of the administration of justice and respect for the rule of law. This can hardly be reconciled with the constitutional provisions in most Francophone constitutions which state categorically that all judicial officers in the discharge of their duties must be independent and act in accordance with the law only.[48] Since both judges and prosecutors pursue the same goal, that of protecting society against criminal activities and upholding the law, it can be argued that they should be protected by the same rules and enjoy the same independence in their functions.

The continuous scope for wide ranging interference by the executive in the work of the public prosecutors in Francophone Africa is quite at odds with reforms in France, the country from which the present system was borrowed. However, it needs to be said that the French reforms were probably due more to their desire to conform to European standards dictated upon it by a series of judgments of the ECHR than a deliberate attempt to free public prosecutors from the stranglehold of the executive.[49] France's highest courts have shifted jurisprudential positions following the ECHR's judgments. Before the ECHR's judgments, both the Court of Cassation and Constitutional Council were of the view that the prosecutor with its current features may discharge judicial functions despite its obvious lack of independence vis-à-vis the executive.[50] Immediately after the *Medvedyev* and *Moulin* judgments by the Strasbourg Court, the French courts reversed their precedents and decided that the prosecutor is not a judicial authority in the sense of the convention as he lacks independence and impartiality, and is a party to the trial.[51]

A number of recent cases and incidents in some jurisdictions in Francophone Africa aptly illustrate the pressures that public prosecutors come under as a result of executive interference. The first concerns the attempts to prosecute the former Chadian president, Hissène Habré, for alleged crimes against humanity committed during his time in power. After relentless international pressure was brought to bear on the Senegalese

[46] Literally, written instructions—of the Minister of Justice or higher judicial officers—bind the public prosecutor even though he is free to make contrary submissions orally at the hearing.

[47] See Laws on the Status of the Magistrature, Senegal, art 6(2); Laws on the Status of the Magistrature Cameroon, art 3(3).

[48] See, for example, art 209 of the constitution of Burundi of 2005; art 68 of the constitution of Gabon of 1991; and art 118 of the constitution of Niger of 2010. However, some constitutions, such as that of Cameroon of 1996, art 37(2), limit the scope of this provision to cover only judges and not public prosecutors.

[49] For instance, in *Medvedyev and Others v France* App No 3394/03 (ECtHR, 10 July 2008) the ECHR for the first time decided that 'the Public Prosecutor is not a judicial authority in the meaning adopted by the jurisprudence of the Court: as the Complainants stress, he particularly lacks independence from the Executive, to be qualified as such'. The ECHR confirmed and expanded its position by holding in *Moulin v France* App No 37104/06 (ECtHR, 20 November 2010) that the prosecutor must also be independent from the parties.

[50] See, for instance, Decision of the Court of Cassation of 10 March 1992; Decision of the Constitutional Council of 11 August 1993.

[51] See Court of Cassation Decision 10-83674 of 15 December 2010.

authorities, he was finally indicted in 2000 by Senegal judge, Demba Kandji. The former President of Senegal, Abdoulaye Wade, when presiding over his first meeting of the CSM, decided to remove Kandji from his position as investigating magistrate, while the case against Habré was still ongoing. During the same meeting, the CSM decided to promote Cheickh Tidiane Diakhaté, President of the Indictment Chamber of the Court of Appeal of Dakar, to the position of judge of the Administrative Chamber of the Supreme Court of Senegal. The state's appeal against Kandji's decision was still pending before the Court of Appeal of Dakar, which was due to hand down its judgment within three days of the appointment of Diakhaté. The Court of Appeal eventually reversed the indictment, and this led to the decade-long judicial saga that ensured Habré immunity until the establishment of the Extraordinary African Chambers within the Senegalese judicial system after President Wade left power in 2012. Besides, both decisions of the CSM were made immediately after the president of the republic had appointed as his personal legal advisor, Advocate Madické Niang, then lead counsel for Habré in the matter pending before the Senegalese courts.[52]

A second example comes from Benin in the so-called *Talon* case, which has been in the news since 2011 to the time of this publication. After allegedly sponsoring Boni Yayi's successful bid for the presidency in 2006 and again in 2011, prominent Beninese businessman Patrice Talon obtained a number of lucrative public contracts as reward for his efforts. Having, according to his subsequent declaration, opposed Yayi's project to amend the constitution and stand for a third term, Talon fell out with the president. The businessman was then accused of planning a coup and plotting to poison the president. Fearing for his life, he went into exile in France. The executive then proceeded to cancel all contracts previously awarded to him and seized his companies on the basis of national interest and through non-judicial processes. Meanwhile, arrest and extradition warrants were issued against him. The president lost two cases he brought against him in French courts.[53] However, what is of interest here is the case brought before the Benin courts against the president's personal bodyguard, maid, private doctor, and former minister for collaborating with Talon in the poisoning plot to assassinate the president. The first instance investigating judge, Angelo Houssou, who ordered the release of the accused on 17 May 2013 for lack of evidence was kept under house of arrest by the executive for a couple of months and eventually fled to the US where he applied for political asylum.[54] The Court of Appeal of Cotonou upheld the decision of Judge Houssou, but both the president of the republic and the public

[52] See Afrimap, 'Les Conseils Supérieurs de la Magistrature ou Organes équivalents en Afrique: Brève présentation comparative de leurs pouvoir et composition' <http://www.afrimap.org/english/images/research_pdf/CSM_en_Afrique.pdf> accessed 27 May 2015.

[53] See 'Demande d'extradition de Patrice Talon: la France dit non à Yayi Boni' (*Construire le Bénin,* 2013) <http ;//www.journal-adjinakou-benin.info/?id=4&cat=1&id2=20661&jour=05&mois=12&an=2013> accessed 15 April 2015.

[54] See 'Décision du Juge Angelo Houssou au sujet de la tentative d'empoisonnement et tentative de coup d'état: Un non lieu qui suscite étonnement et stupéfaction' (*Le blog de la presse béninoise,* 18 May 2013) <http://www.pressedubenin.over-blog.com/article-decision-du-juge-angelo-houssou-au-sujet-de-la-tentative-d-empoisonnement-et-tentative-de-coup-d-eta-117879313.html> accessed 15 April 2015; 'Angelo Houssou's Asylum Case : A Friend of the Court View' (*The Friends of Benin in the United States of America*, 11 February 2014) <http://www.fob-us.org/_angelo_houssou_s_asylum_case_ a_friend_of_the_court_view> accessed 15 April 2015.

prosecutor appealed to the Supreme Court. On 2 May 2014, the highest court reversed the decision of the previous courts on mere technicalities, namely that the Court of Appeal used the numbering of the relevant provisions as per the previous criminal code rather than the recently adopted code.[55] In fact, it can validly be argued that the Supreme Court affirmed the pronouncements of the lower courts, as the substance of the provisions referenced in the judgments did not vary from the old code to the new one.

Meanwhile, without awaiting the outcome of the retrial of the case by the Court of Appeal, the president decided to pardon the accused in the poisoning case, including not only the four aides and relatives prosecuted in Benin but also Talon and an alleged accomplice who had sought asylum in France. It is notable that the presidential pardon has no legal basis in the circumstances of this case where there had been no trial, no sentencing, and the persons involved were only in pre-trial detention. Following the president's televised declaration of pardon, the public prosecutor announced that his office was going to request that the charges be dropped and the detained persons released because the presidential pardon had been granted 'in the interest of the nation'. The accused persons were released after the pardon and before the Court of Appeal could hear the matter. The public prosecutor in acting the way he did argued that his duty was to uphold the public interest, and since the president's pardon was granted 'in the highest interest of the nation', there was no longer any need to proceed with the matter before the Court of Appeal.[56] It must be noted that the prosecutor in this case had first refused to transfer the file to the Supreme Court, thus prolonging the detention of the accused for four months, stating, amongst other reasons, that he was awaiting instructions from the Minister of Justice.[57] On 11 August 2014, a reconstituted bench of the Court of Appeal of Cotonou corrected the material errors highlighted by the Supreme Court and merely upheld the initial appeal judgment. It is interesting to note that, on 6 November 2014, the Constitutional Court held that the Public Prosecutor of the Appeal Court of Cotonou had violated article 35 of the constitution, which requires that persons holding public offices 'perform their duties with diligence'.[58]

[55] See 'Décision de la Cour suprême à propos de l'affaire Talon : des prisonniers victimes de procédures' (*La Croix du Bénin*, 13 May 2014) <http://www.lacroixdubenin.com/decision-de-la-cour-supreme-a-propos-de-laffaire-talon-des-prisonniers-victimes-de-procedures/> accessed 15 April 2015; Patrice Talon, 'Bénin : affaire Patrice Talon, la Cour suprême casse les arrêts de la Cour d'appel de Cotonou' (*Koaci*, 2014) <http://www.koaci.com/benin-affaires-patrice-talon-cour-supreme-casse-arrets-cour-dappel-cotonou-91512.html> accessed 15 April 2015.

[56] See 'Pardon de Yayi à Talon/abandon de poursuite dans les affaires « empoisonnement et coup d'Etat »: les explications du procureur général Gilles Sodonon' (*Fraternité*, 2014) <http://www.news.acotonou.com/h/24200.html> accessed 15 April 2015.

[57] See Léonce Gamaï, 'Affaires Patrice Talon : les dessous de la non-transmission à la Cour Suprême des dossiers du pourvoi' (*La Nouvelle Tribune,* October 2013) <http://www.lanouvelletribune.info/index.php/actualite/une/16483-affaires-patrice-talon-les-dessous-de-la-non-transmission-a-la-cour-supreme-des-dossiers-du-pourvoi> accessed 15 April 2015; Marcel Zoumènou, 'Affaires Patrice Talon : le Procureur Général transmet enfin les dossiers à la Cour Suprême' (*Nouvelle Tribune*, October 2013) <http://www.lanouvelletribune.info/index.php/actualite/une/16615-affaires-patrice-talon-le-procureur-general-transmet-enfin-les-dossiers-a-la-cour-supreme> accessed 15 April 2015.

[58] In a petition filed by a citizen, the Court found that more than three months to transfer the appeal file to the Supreme Court constituted an inordinate delay in breach of the diligence duty prescribed by art 35 of

A number of Francophone countries in Africa have witnessed instances of the public prosecutor obviously abusing his powers particularly when actual or potential opponents to the incumbent government are involved, as has been illustrated above. An example from Benin is illustrated by the case involving former Minister of Relations with State Institutions, Alain François Adihou, who was remanded in pre-trial detention for almost three years. As the executive and *Ministère Public* failed to substantiate the initial charge of contempt of parliament, he was subsequently accused of embezzlement of public funds. The investigating judge ordered his release but the prosecutor had his detention renewed beyond the legal limits as the incoming government apparently resolved to use him as a scapegoat in its purported fight against corruption.[59] The minister was eventually released without trial for lack of evidence.

Such cases have also made the news in Cameroon since the inception of the *Opération Epervier* against corruption in 2004, as a result of which, several former and incumbent high ranking officials have been placed in pre-trial detention beyond the time prescribed by law and through the abusive and illegal acts of the prosecutor or investigating judicial officers.[60] In other instances, the *Ministère Public* was granted full access to the file, while counsel for the accused persons were denied such access throughout the pre-trial detention. In some cases, the prosecutor brought charges after the expiry of the initial detention order, or split up the initial charges to extend the detention.[61] Officials involved were mostly either former ministers who fell out with the incumbent regime after they were believed to entertain presidential ambitions or had formed dissident political parties.[62]

Similar trends have been seen in Côte d'Ivoire of the executive taking action against prosecutors for dissenting from or challenging the official position of the government. An illustration is the removal of the prosecutor of Abidjan for publishing an investigation report, which blamed the executive for failing to deploy enough security forces and the poor street lighting at the site of the fireworks on the 2012 Saint Sylvester's Eve in the municipality of the Plateau. The stampede that occurred that night led to more than sixty deaths. The prosecutor's televised statements contradicted

the constitution. See DCC 14–185 of 6 November 2014 <http://www.24haubenin.info/IMG/pdf/dcc_14-agbodjan.pdf> accessed 15 April 2015.

[59] See in general Alain Francois Adihou, *Kérékou, la Lépi et moi* (published by author 2014).

[60] While the law in Cameroon—just as in most Francophone Africa jurisdictions—provides for a six-month pre-trial detention, which is renewable once, persons indicted were held in detention for three to four years as the prosecutor split up charges severally, brought new charges after the expiry of the legal period of detention, or froze the prosecution. The cases involving Hamidou Yaya Marafa, Jean-Marie Atangana Mebara, and Lydienne Yen Eyoum are illustrative of such practices. See 'Une avocate franco-camerounaise détenue sans titre depuis trois ans' (*20 minutes fr*, 19 March 2013) <http://www.20minutes.fr/societe/1121291-20130319-avocate-franco-camerounaise-detenue-titre-depuis-trois-ans> accessed 15 April 2015; Christophe Bobiokono, 'Affaire Atangana Mebara: le détournement de 1,5 milliards F cfa était fictif' (21 October 2011) <http://www.christophe.bobiokono.over-blog.com/article-affaire-atangana-mebara-le-detournement-de-1-5-milliard-fcfa-etait-fictif-86972217.html> accessed 15 April 2015.

[61] See Jacques Doo Bell and Joseph Olinga, 'Me Alice Nkom : Affaire Marafa, un procès suspect et regrettable' Camerbe (2012) <http://www.cameroon-info.net/stories/0,37047,@,me-alice-nkom-laquo-affaire-marafa-un-proces-suspect-et-regrettable-l-executif-e.html> accessed 15 April 2015.

[62] See Joël Didier Engo, 'Marafa Hamidou Yaya, le présidentiable encagé au Cameroun' (*Mediapart*, April 2014) <http://www.blogs.mediapart.fr/blog/joel-didier-engo/160415/journee-internationale-du-prisonnier-politique-marafa-hamidou-yaya-le-presidentiable-encage-au> accessed 15 April 2015.

the position taken by the Minister of Justice on the case. The government's spokesperson had indicated that all necessary measures had been taken to prevent casualties, including deploying more security forces than needed.[63] It is worth remembering that the same prosecutor was in charge of cases involving several supporters and close allies of the former president Laurent Gbagbo, including his wife in the 2010 *Post Electoral Violence* case; in which the prosecutor was believed to have resisted instructions from the executive.[64] Importantly, a journalist who was known to be very close to the prosecutor and acted as his 'unofficial' communication officer, published a piece indicating that the list of pro-Gbagbo detainees freed by the prosecutor in December 2012, in the *Post Electoral Violence* case, was issued by the executive.[65] The Abidjan prosecutor's determination to make public the findings of his investigations, which he surely knew were contrary to the views and instructions of the government in the cases concerned, eventually resulted in his dismissal.

The various case studies presented above share the common feature of disguising an abusive use of legally granted prerogatives under technicalities in order to interfere with the independent administration of justice. For instance, the Benin public prosecutor in the *Talon* case made a plausible technical point that he was acting in the interest of society as a whole. However, the problem here is that the basis of this argument is the motivation of the president. But the president could not have been motivated by public interest when he was the complainant in the case. Moreover, the confusion between the 'interest of the nation', which is a purely political concept with no legal basis, and the public interest protected by the prosecutor, dangerously threatens the independence of the prosecutor vis-à-vis the executive. This is where the contradictory position of the public protector becomes acutely manifest. The executive generally, and the Minister of Justice in particular, are responsible for preparing and implementing penal policy. This may include deciding between prevention, punishment, conciliation, and even other sanctions of a penal, administrative, or disciplinary nature other than prosecution. We have also seen that the Minister of Justice has the right to issue instructions or recommendations to the public prosecutor as part of this duty to determine and implement penal policy. The Minister, however, may not in any way intervene in the direction of criminal proceedings nor carry out the acts of prosecution himself. However, the challenge posed by this delicate situation is to determine which instructions and advice concerning penal policy are such that the public prosecutor in the exercise of his functions has the right to accept or disregard, and which instructions and advice are issued by the Minister as the hierarchical superior of the public prosecutor making compliance legally binding. In France,

[63] See 'Drame du Plateau: le procureur contredit le Gouvernement' (*Steve Beko,* 2013) <http ;//www.stevebeko.wordpress.com/2013/01/07/drame-du-plateau-le-procureur-contredit-le-gouvernement/> accessed 15 April 2015; Fulbert Koffi, 'Côte d'Ivoire: le procureur de la République subitement débarqué' (*Oeil d'Afrique,* 2013) <http://www.oeildafrique.com/cote-divoire-le-procureur-de-la-republique-subitement-debarque/> accessed 15 April 2015.

[64] Assane Niada, 'Justice ivoirienne: les dessous du limogeage du procureur de la République' (*Imatin,* 14 January 2013) <http://www.imatin.net/article/politique/justice-ivoirienne–les-dessous-du-limogeage-du-procureur-de-la-republique_6590_1358147743.html> accessed 7 May 2015.

[65] William Gbato, 'Limogeages des trois procureurs: des révélations fracassantes' (*Abidjan*, 16 January 2013) <http://news.abidjan.net/h/448983.html> accessed 15 April 2015.

abuse has been limited by the new laws, which require that all ministerial instructions must be in writing and included in the case file. Even if this were introduced in Francophone Africa, it is doubtful that it would limit the ability of the executive to manipulate the processes for, as noted above, the executive through the CSM not only has the ability to control public prosecutors but also to control judges. However, the links between judges and public prosecutors, to which we shall now turn, also raises its own issues.

## 4.2 Relations with and independence from the judiciary

In the previous section, we saw how the executive in the management of penal policies generally, and the president, as guarantor of judicial independence, influence the way the public prosecutor discharges his functions. We also noted that in some instances judges appear to play a role in matters that are usually dealt with by the public prosecutor. It is now necessary to see the exact nature of this relationship and how it affects the ability of the public prosecutor to discharge his functions independently.

Unlike in the common law jurisdictions, constitutional provisions dealing with the judiciary in Francophone African constitutions use the word 'magistrature' when they refer to both public prosecutors and judges and usually treat the former more or less as part of the judiciary.[66] As we have seen, some of these provisions, especially those dealing with appointments, promotions, and removal from office, apply to both judges and public prosecutors. From the constitutional perspective, public prosecutors are part of the judiciary even if some of the constitutional provisions regulating the judiciary do not apply to them.

From an administrative and institutional perspective, public prosecutors are also part of a group of judicial officers known as the *Ministère Public* or *Parquet*, which could be considered as the equivalent of the Directorate of Public Prosecution in common law jurisdictions. The *Ministère Public* is composed of all judicial officers serving as prosecutors posted at the Supreme Court, Courts of Appeal, and first instance tribunals. Prosecutors of the Supreme Court and Courts of Appeal are known as 'Procureur general' or 'Avocat general', while those of first instance courts are called 'Procureur de la République'. The terminology of 'public prosecutor' should therefore be understood as encompassing all members of the *Ministère Public* in jurisdictions adopting the French model of prosecution. Although the formulation is confusing, codes of criminal procedures and relevant laws stress the professional connection between the public prosecution service and the judiciary. An illustrative provision is that of article 6 of Benin's Law on the *Magistrature*, which provides that '*magistrats* of the *parquet* are placed under the direction and control of their superiors and under the authority of the Minister of Justice'. There are similar provisions in Benin's Code of Criminal Procedure. For instance, under Section II of the Code, which deals with the functions of the *Procureur Général* of the Court of Appeal, all

[66] See, for example, art 37(3) of the Cameroon constitution of 1996; art 82 of the Congo DR constitution of 2006; arts 136 and 141 of the constitution of Congo Republic of 2002; art 109 of the constitution of Guinea of 2010; and art 90 of the constitution of Senegal of 2010.

prosecutors within his jurisdiction report to him on all cases being prosecuted. He may instruct them to initiate prosecution. Investigating police officers are also placed under his control. The *Procureur Général* has authority over all public prosecutors within the jurisdiction of the Court of Appeal and has the same hierarchical authority over them as does the Minister of Justice.[67]

In many respects, the manner in which the public prosecutor discharges his functions is very similar to the way that a judge operates. As we have seen, his primary function is to initiate prosecution and to ensure the proper application of the criminal law. However, in doing so, the public prosecutor conducts prosecution for and against the accused, in the sense that he assesses all the evidence both militating for charging the accused or dropping charges against him. It is part of his duty to guarantee liberty, security, and freedoms, in much the same way as judges do.[68] This judicial role of the public prosecutor is even more evident within the framework of recent reforms granting increased powers to the prosecutor not merely to drop charges and discontinue prosecution but also in case of sufficient evidence, to mediate sentences, to propose more lenient sentences in exchange for remedial action by the accused, or alternative sanctions, which are ordinarily matters over which judges have discretion. Such powers have been adopted in the reforms in France and Senegal for instance.[69] Whilst such reforms appear to strengthen the independence of public prosecutors, their subordinate relationship to the Minister of Justice exposes them to external interference. Many Francophone African countries have laws similar to article 128(1) of the Code of Criminal Procedure of Cameroon, which states that the public prosecutor is a party to criminal proceedings before all criminal courts. And further that he must attend all hearings failing which the decision is void; may not be recused by the parties; and may not be condemned to pay costs.[70] The challenge this poses to the proper administration of justice is that the public prosecutor is vested with judicial powers while being a party to criminal proceedings in which he had previously acted as either an accuser or a mediator.

Another peculiarity of the relationship between the public prosecutors and judges in Francophone Africa is that both categories of judicial officers receive exactly the same training, usually at the national school for the training of judges. On graduation, they can be appointed either as judge or public prosecutor. What poses a particular threat to the good administration of justice is that the CSM can at any time appoint a public prosecutor as judge and vice versa. It is a practice which can easily be abused by the

[67] See art 35 of the Code of Criminal Procedure of Benin.

[68] See Université de Nantes, 'Le Procureur de la République' <http://www.droit.univ-nantes.fr/m2dp/upload/word/Expose_Procureur.doc> accessed 15 April 2015; Michel Laurain, 'Le Procureur de la République est-il une autorité judiciaire?' Notes de synthèse, Institut d'Etudes Judiciaires (2012) <http://www.iej.unistra.fr/uploads/media/Corrige_M.Laurain_Note_de_synthese_procureur_de_la_republique.pdf> accessed 15 April 2015; 'Pour la Cour de Cassation, le Parquet n'est pas une autorité judiciaire' (*Le Petit Journal*, 16 December 2010) <http://www.lesactualitesdudroit.20minutes-blogs.fr/archive/2010/12/16/pour-la-cour-de-cassation-le-parquet-n-est-pas-une-autorite.html> accessed 15 April 2015; 'Le rôle du parquet : Le dossier de la Cour de cassation' (*Le Monde*, 16 December 2010) <http://www.libertes.blog.lemonde.fr/2010/12/16/le-role-du-parquet-le-dossier-de-la-cour-de-cassation/> accessed 15 April 2015.

[69] For Senegal, see art 32 of the Code of Criminal Procedure of Senegal.

[70] See arts 129–31 of the Code of Criminal Procedure of Cameroon.

executive which retains different degrees of control over both judges and public prosecutors.

It can be said that the functions of the public prosecutor clearly make him a member of the judiciary, which is the organ of the state in charge of administering justice. As stressed earlier, the role of the prosecutor is to defend the interest of the public and that of society by protecting individual liberty, security, and freedoms, and ensuring that breaches of the criminal law are punished. In that sense, it should be understood that the public prosecutor may only discharge that duty through a legal entity that represents each individual member of society, and of the public. That institution is the state,[71] or the Republic as seen from the civil law perspective. In many respects, the main client of the public prosecutor is the state.[72] The question that arises is how the public prosecutor can defend the interest of society, the interest of the accused, and that of the state; and at the same time be part of the judiciary but work under the authority of the executive from which he may receive instructions regarding prosecution. The ensuing conflict of interests was at the heart of the ECHR's disapproval of the French prosecutorial system. As we saw earlier, the ECHR held in the landmark cases of *Medvedyev* and *Moulin*, amongst others, that the concentration in the hands of a French prosecutor of such extended powers and conflicting interests does not meet the requirements for qualification as an independent judicial authority in terms of the relevant provisions of the European Convention on Human Rights. Be that as it may, the public prosecutor in Francophone Africa continues to remain in a paradoxical situation and it is not clear whether the reforms that have taken place in France will, as they usually do, influence the evolution of this important institution in Francophone Africa.

Having noted that reforms in France were prompted mainly by the European human rights system, a comprehensive review requires allusion to the impact of similar mechanisms with jurisdiction on Francophone Africa. In that regard, it is worth mentioning that cases of violation of fair trial rights have featured prominently in the jurisprudence of regional adjudicatory bodies such as the African Commission on Human and Peoples' Rights (the African Commission), and the African Court on Human and Peoples' Rights (the African Court). These bodies have had several opportunities to sanction inordinate delays or complete inaction in the prosecution of so-called 'high profile cases' including in African Francophone jurisdictions. As an illustration, while decisions of the African Commission on fair trial rights abound, the case of *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* is particularly notable. In the matter, the Commission found Burkina Faso to be in violation of amongst others article 7 of the African Charter on Human and Peoples' Rights for delaying or denying, for fifteen years, the prosecution of human rights abuses perpetrated during the political upheaval experienced by the country in the 1990s.[73]

[71] See 'Le Ministère Public' (Burundi) <http://www.justice.gov.bi/spip.php?rubrique72> accessed 15 April 2015.

[72] 'C'est quoi, un procureur?' (*Journal d'un avocat*, 23 October 2007) <http://www.maitre-eolas.fr/post/2007/10/23/766-c-quoi-un-proc> accessed 15 April 2015.

[73] See *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* Communication 204/97 (2001) AHRLR 51 (ACHPR 2001).

An even more emblematic case is that of *Gunme v Cameroon* where the Commission found a breach of the independence of the judiciary and separation of powers on the basis of the Respondent State's submission that the president of the republic and minister of justice were Chairperson and Vice-Chairperson of the *Conseil Supérieur de la Magistrature* respectively.[74] Although several other similar pronouncements of the Commission have alluded to states' failure to allow independent prosecution, such decisions have yielded a modest impact on the domestic systems of African Union member states.[75] Furthermore, there has been no empirical evidence of their influence on the relative improvement resulting from recent reforms implemented in the prosecution systems in Francophone Africa.

The case of *Norbert Zongo and Others v Burkina Faso* in the African Court has also revealed how much influence the executive holds in the good administration of justice by using its superior hierarchical position to the prosecutor to prevent or delay the prosecution of the so-called 'high profile cases'. This instance concerned the assassination in 1998 of prominent Burkinabé investigative journalist Norbert Zongo and three of his companions. At the time of his assassination, Zongo was about to release a report on cases of corruption and other crimes involving individuals in the inner circle of President Blaise Compaoré. In the fifteen years of investigations, no suspect was arrested and the actual perpetrators were never found. In the matter before it, the African Court found that the total of eight years' duration of the domestic proceedings was unduly prolonged.[76] The Court further found that such a delay violated the applicants' rights to have their cause heard as guaranteed under article 7 of the African Charter.

As in instances discussed earlier, the interest in the *Zongo* case lay in the role of the public prosecutor in the good administration of justice. To say the least, the prosecution of the *Zongo* case was marred with procedural flaws and serious fair trial rights violations. Amongst other notable unorthodox actions, it took the prosecutor five years to confront the main suspect and prosecution witness. The president's brother, who featured as the main actor in the case, was heard only over two years after the formal investigation began. Moreover, the prosecution of the case was delayed for five years on account of the ill health of the main suspect who was however discharged immediately after his examination resumed. The prosecutor also chose to hear the 'civil parties', namely the journalist's wife, only eight years after they filed an intervention suit and a few months before the end of the proceedings. Finally, the prosecutor decided to not undertake any further investigations after the initial charges against the main suspect were discontinued in 2006.[77] While the case was still pending and the offence was

[74] See *Gunme and Others v Cameroon* Communication 266/03 (2009) AHRLR 9 (ACHPR 2009) paras 209–12.

[75] See, for instance, Frans Viljoen and Lirette Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 *Journal of African Law* 1; Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 339–42; Frans Viljoen and Lirette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994–2004' (2007) 101 *The American Journal of International Law* 1.

[76] See *Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ibouldo & Le Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* App No 013/11 Preliminary Ruling (ACtHPR, 21 November 2013) para 106.

[77] See ibid paras 152–7.

prescribed till 2016, the prosecutor simply froze the case until an application was filed with the African Court in 2011. Unfortunately, the African Court was arguably not bold enough to find the relationship between the prosecutor and the executive detrimental to an independent administration of justice as did the Strasbourg judges. That was despite the fact that the role of the prosecutor expressly arose as a main issue in the case.

Events subsequent to the March 2014 judgment of the African Court in favour of the applicants in the *Zongo* case are very revealing as to the role of the prosecutor and his acquaintances with the executive. In October 2014, Burkina Faso experienced a short popular revolution that led to the demise of the Compaoré regime. Most notably, the prosecutor in the *Zongo* case who was appointed as Minister of Culture and Tourism in the transition Cabinet, was forced to resign following two days of street protests accusing him of 'freezing' the prosecution of the case.[78]

Compared with the African Commission, the Court is nascent. It remains to be seen whether its jurisprudence will have such a positive impact as that of its European or Inter-American counterparts in providing a supranational check and balance mechanism for the executive's interference with the functioning of prosecutorial authorities across Francophone Africa.

## 5. Conclusion

A national prosecution system which is not completely independent of the other branches of government, especially the executive, is not an aberration in itself. Not only did Francophone African countries inherit this from their former European colonial masters, particularly France, but this civilian approach is still widely used in continental Europe. Nevertheless, the continuous use of this approach to prosecution, which in Europe itself is not considered beyond reproach, creates problems which the European progenitors of the model are continuously looking for ways to resolve. It may be argued that some of the reforms undertaken by African countries have not gone far enough to limit the inherent weaknesses of this approach to the good administration of criminal justice. It is particularly in the context of separation of powers and the checks and balances that this is designed to provide that the model of public prosecution in Francophone Africa is found wanting.

The weaknesses of the French model have been recognized in France itself and since the 1990s, serious efforts have been made to modernize it. Besides this, the possibility of recourse to the ECHR and other European judicial and quasi-judicial institutions have provided a reasonable safeguard against any abuses of the national prosecution system. Although similar systems have been in operation in Africa, they have arguably not

[78] See amongst others, 'Guy Zongo, à propos de l'assassinat de son père, Norbert Zongo' (*Le Reporter*, 18 December 2008) <http://www.reporterbf.net/index.php/periscope/item/33-guy-zongo-a-propos-de-l-assassinat-de-son-pere-norbert-zongo> accessed 15 April 2015; 'Burkina Faso General takes over as Compaoré resigns' (*BBC News Africa*, 1 November 2014) <http://www.bbc.com/news/world-africa-29851445> accessed 15 April 2015; Mathieu Bonkoungou and David Lewis, 'Street protests in Burkina Faso prompts minister's resignation' (*Reuters*, 25 November 2014) <http://www.reuters.com/article/2014/11/25/us-burkina-politics-idUSKCN0J91XT20141125> accessed 15 April 2015.

reached the level of effectiveness required for ordinary citizens in Francophone Africa to utilize them when the executive abuses their national systems. This means that reform of the present system of national prosecution in Francophone Africa is imperative as international mechanisms are merely subsidiary to domestic systems. The need for such reforms is underscored by the fact that modern African constitutions in general, and those in Francophone Africa in particular, usually confer exorbitant powers on the executive branch of government, especially the president, or allow them to arrogate such powers to themselves with little in the way of effective checks against abuses of these powers. Even the entrenchment of important core elements of constitutionalism such as the separation of powers has not succeeded in guarding against the arbitrary abuse of these excessive powers by Africa's imperial presidents. The present system of prosecutions which exposes public prosecutors to manipulation by the executive, as in the examples of Benin (which in many respects has one of the most modern and liberal Gaullist-style constitutions in Francophone Africa today) and Senegal, clearly shows that there is a need for public prosecutors to be made more independent of the executive.

It is not desirable to transform the office of public prosecutor into an independent branch of government. There are certainly important policy and theoretical reasons for not doing so. It will and should remain an institution that operates within the Ministry of Justice, but it must however be made autonomous rather than independent. In the light of this, there are a number of reforms that need to be introduced in Francophone Africa to enable this institution to discharge its critically important role in facilitating the good administration of justice and respect for the rule of law.

First, its role needs to be clearly and rationally stated and entrenched in the national constitutions and all the safeguards provided to protect judicial independence must apply to it. There is, for instance, no rational reason why it should not benefit from the same safeguards against arbitrary dismissals that are now presently reserved only to judges. This is particularly odd because any judicial officer who has undergone the necessary training can be appointed as judge or prosecutor at any stage of their career. Nevertheless, the regular practice of transfers between the offices of prosecutor and judge is highly undesirable and if anything, exposes these officers to executive manipulation. A judicial officer must be made to choose, either to be a prosecutor or a judge, and not both, even if only at different times dictated not by the officer but by the executive when it suits their convenience. All the constitutional provisions dealing with the CSM must be revised and one of the most important changes should be to exclude the president of the republic and his Minister of Justice from being members. There is also a need to limit the possibility of representatives, whether directly or indirectly appointed by any of the three branches of government, having a controlling majority.[79] Second, all the laws that often contain contradictory provisions dealing with issues such as the independence, hierarchical authority, and career management of public prosecutors must be harmonized. Third, a system of checks and balances must be put

[79] See further Charles Manga Fombad, 'Appointment of Constitutional Adjudicators in Africa: Some Perspectives on how Different Systems Yield Similar Outcomes' (2014) 46 *Journal of Legal Pluralism and Unofficial Law* 249.

in place to ensure transparency in the decisions taken by the public prosecutor that allows the executive, the legislature, and any aggrieved citizen to challenge decisions made by the prosecutor. Fourth, whilst the Minister of Justice as the executive member responsible for laying down and implementing the government's penal policy should, as indicated above, retain his position as the hierarchical superior of public prosecutors, all issues concerning their appointment, discipline, transfers, and promotion should be exclusively dealt with by a reformed CSM.

The role and functions discharged by public prosecutors on an African continent that is still struggling to cope with the rising tide of authoritarian resurgence is too important to leave in the hands of Africa's notoriously unruly executives who have hardly been tamed by constitutionalism, separation of powers, and rule of law. It is contended that one of the best ways to consolidate constitutionalism and make the separation of powers meaningful and effective in Francophone Africa is to strengthen the office of public prosecutors along the lines suggested in this chapter.

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# 17

# Constitutional Legitimacy and the Separation of Powers

## Looking Forward

*Michaela Hailbronner*

## 1. Introduction

A recent history by Mark Massoud of the development of Sudanese law over the past decades records the author's meeting with a respected Sudanese lawyer: 'Law in Sudan?' the lawyer asks, 'Really? Your book will be a very short one!'[1]

Yet, law is everywhere, as Massoud rightly points out,[2] and this volume confirms this. Each new regime, whatever its ideological pedigree, has to take a stance on the existing legal system and must reform and transform it to better achieve its goals. Military rulers are no exception in this regard and courts don't usually stop working even in times of turmoil; indeed, as Ginsburg and Moustafa have demonstrated, courts often fulfil important functions even in authoritarian regimes.[3] Whether they defer or stride ahead and make bold expansive decisions—sometimes successfully as in Ghana,[4] sometimes less so as in Nigeria,[5] to take two examples from this book—their presence indicates that law matters. And more than that: In the last two decades, African countries have undergone a new round of constitution-making, in many cases combined with a return to civilian and democratic forms of governance—going hand in hand with their international commitment under the auspices of the African Union to take action against 'unconstitutional changes of government'.[6] Constitutionalism is therefore increasingly taken seriously by African states and societies, in line with the international trend.

This volume focuses on the separation of powers in African systems. The conclusions of the individual authors, it seems fair to say, are often cautiously optimistic: problems remain, but in many African states things have improved. At the end of this volume, it therefore seems appropriate to take a step back and take a look at the picture

[1] Mark F Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge University Press 2013) 1.

[2] ibid 1–18.

[3] Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).

[4] See ch 9 (Kofi Quashigah, 'An Overview of Approaches to Judicial and Executive Relations: Case Study on Ghana') in this volume.

[5] See ch 10 (Ameze Guobadia, 'Judicial–Executive Relations in Nigeria's Constitutional Development: Clear Patterns or Confusing Signals?') in this volume.

[6] See Constitutive Act of the African Union, 2000, art 4.

painted here from a broader comparative perspective. The question (foreshadowing the theme of the next volume) is then: What types of constitutional regimes do we see emerging in African states over the last two decades and what does this mean for constitutional courts in particular?

This conclusion can, of course, not provide a comprehensive answer to this question, which would require a monograph of its own. I therefore confine myself here to making two preliminary observations. The first concerns the role of constitutions as safeguards against past 'regimes of horror' (Scheppele)[7] in the countries of sub-Saharan Africa and its consequences for the authority of constitutional courts[8] in these countries. This comes, secondly, with a particular, very traditional conception of separation of powers as a device for preventing tyranny; and there are reasons to consider this conception as problematic.

Neither of these two observations is particularly surprising, once we think about it. More than anything else, the ghost of previous dictatorships today haunts African constitutionalism and those who write about it here. As Charles Fombad observes, contemporary African constitutions appear first and foremost as tools to

> free the state and the people from the authoritarian and repressive logic of the colonial state which post-independence leaders perpetuated in order to maintain, like the colonial authorities did, a firm grip over everything and everybody within the state.[9]

The consequences of this understanding of African constitutionalism remain to be tested.

## 2. Constitutional Legitimacy Revisited

Constitutions designed to guard against the return of past mistakes are not unique to Africa. In fact, most constitutions share the impulse to improve—otherwise, why enact a new constitution? From the US constitution, to the German Basic Law and the French Fifth Republic, to the constitutions drafted in Eastern Europe and Latin America in the 1980s and 1990s, there is an element in many constitutions currently in force of seeking to avoid past mistakes and setting out a new path for state and society. Yet the need for change can be more or less urgent and the change contemplated more or less comprehensive.

A number of factors influence the importance of a constitution in shaping state and society; amongst them are the magnitude of the historical evils experienced (with Germany at one end of the spectrum and South Africa somewhere close to it), but also the strength of the commitment to change in the population and amongst elites. The paradigmatic case for strong *public* entrenchment is revolutionary constitutionalism,

[7] Kim L Scheppele, 'Constitutional Interpretation after Regimes of Horror' U of Penn Law School, Public Law Working Paper No 05 (May 2000) <http://ssrn.com/abstract=236219> accessed 20 August 2015.

[8] I am using the term 'constitutional courts' here to refer to all courts that have jurisdiction to apply the constitution and to exercise constitutional review of legislation, independent of their exact title and other fields of jurisdiction.

[9] See ch 1 (Charles M Fombad, 'The Evolution of the Modern African Constitutions: A Retrospective') in this volume.

which Stephen Gardbaum defines as the use of a 'constitution-making process to attempt to institutionalize and bring to a successful conclusion a political revolution'.[10] Given the strong presence of US concepts and constitutional history in African legal developments, as the repeated references in this volume reflect (see more below), it is important to take a closer look at revolutionary constitutionalism as a potential explanatory category in the African context. Key to revolutionary constitutionalism (at least in its US-influenced form)[11] is its insider–outsider dynamic to which Bruce Ackerman's recent work points:[12] A movement of revolutionary outsiders who are initially not part of the ruling elites mobilizes against the existing regime, overcomes internal resistance and takes power, and in doing so lays down its vision for a better state and society in a constitution.

African constitutions have historically often emerged out of successful uprisings, and in Ackerman's and Gardbaum's taxonomy: revolutions,[13] against the former colonial powers. Though many of them installed constitutions that adopted large parts of their colonial legal heritage, the change was nevertheless momentous. However, many post-independence constitutions were not successful in creating constitutionalism. Leaders of the former revolutionary movements often turned out not to want to restrain themselves in the legalistic corset of a constitution—after all, they themselves had succeeded in the revolution against the former colonial masters, and wished to exercise that hard-won authority. Sometimes they encountered resistance, however, and in response some African countries adopted new constitutions, often strengthening the executive. As this era ushered in some of the worst dictatorships on the globe, the third round of African constitution-making sought to end this trend and re-install multi-party democracies in African countries. The change sought was significant and often propelled by pressure of social movements on the governing elites. Yet, to a large degree, existing elites weren't exchanged in this process and the typical insider–outsider dynamic of revolutionary constitutionalism with outsiders taking away power from insider elites was therefore absent. While a number of North African countries in the wake of the Arab Spring have taken the path of revolutionary constitutionalism,[14] most sub-Saharan African constitutions since the 1980s have instead emerged out of a mix of insider reforms, internal and external political pressure, and elite construction.

An important exception seems to be the South African transition whose revolutionary basis Francois Venter may underestimate.[15] Though the South African constitution

[10] Stephen Gardbaum, 'Revolutionary Constitutionalism', draft presented at the 2015 I.CON Conference, 3 July <http://law.huji.ac.il/upload/Revolutionary.constitutionalism.pdf> accessed 22 August 2015.

[11] For a somewhat broader take on this concept see Gardbaum (n 10). I am following the Ackermanian concept here, partly because the US case is so influential in much of African writing that it makes sense to use the Ackermanian notion as a reference point.

[12] Bruce Ackerman, 'Three Paths to Constitutionalism—and the Crisis of the European Union' (2015) 45 *British Journal of Political Science* 1.

[13] See Gardbaum (n 10) and Ackerman (n 12).

[14] Gardbaum (n 10).

[15] See ch 3 (Francois Venter, 'Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa') in this volume.

was based on the interim constitution negotiated between the National Party (NP) and the African National Congress (ANC), we know now that the ANC's commitment to constitutionalism was both more principled than strategic and also that it was, in nearly all respects, successful in its endeavour.[16] This suggests that it may be more appropriate to treat South Africa as a genuine case of revolutionary constitutionalism than merely a negotiated transition.[17] Here then, a revolutionary movement decided to entrench its revolutionary principles in a constitution, protected by a newly created constitutional court in a new state headed by the former revolutionaries (and soon without any participation by the NP, the former insiders). Yet, the South African case is rather unusual in this regard in sub-Saharan Africa.

Though public participation played a significant role in a number of recent African constitutions including the Kenyan and Benin constitutional processes, their insider–outsider dynamic is very different to the South African case.[18] In most places, old (insider) elites have stayed on. Even where constitutions have been enacted after the death or removal of a previous authoritarian ruler, those who have given the impetus have more often than not been part of the old regime. Unsurprisingly, democratic elections in these countries routinely feature the reappearance of former military rulers as new democratic leaders. The recent Nigerian elections are a case in point, but other cases where former military leaders have stayed on or indeed consolidated power under new constitutions include countries as different as Ghana and Angola.[19] And even in Namibia, whose history is closely linked to South Africa's, the story unfolds somewhat differently: Though revolutionary outsiders, the resistance movement against South African occupation, the South West African Peoples' Organisation (SWAPO), came to power after considerable foreign intervention and a freely elected Constituent Assembly was responsible for the drafting of the Namibian constitution, that constitution was heavily based on the 1982 Constitutional Principles, proposed by UN diplomat Martti Ahtisaari to the different parties in the conflict and never put to a referendum.[20] As a result, the new Namibian constitution is in important respects a product of international elites and as such not to the same degree rooted in the revolutionary commitment to a new society as the South African constitution.

[16] James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in South Africa Since 1994* (forthcoming Cambridge University Press 2016); also James Fowkes, 'More Power than Pact: The Over-emphasis on the Negotiated Origins of South Africa's Constitution' (forthcoming).

[17] See also for a categorization of the South African case as 'revolutionary' Gardbaum (n 10) and Ackerman (n 12).

[18] On the role of public participation in constitution-making processes in Anglophone Africa see Coel Kirkby and Christina Murray, 'Constitution-Making in Anglophone Africa: We the People?' Draft paper (May 2015) <http://www.academia.edu/6026889/Constitution-Making_in_Anglophone_Africa_We_the_People_From_Imposition_to_Participation_in_Constitution-Making> accessed 22 August 2015. The broader debate on the relevance of the constitution-making process and political outcomes (see especially Tom Ginsberg, Zachary Elkins, and Justin Blount, 'Does the Process of Constitution-Making Matter?' (2009) 5 *Annual Review of Law and Social Sciences* 1) is beyond the scope of this chapter.

[19] See for an overview of the Angolan case ch 7 (André Thomashausen, 'Super-Presidentialism in Angola and the Angolan Judiciary') and for Ghana ch 9 (Kofi Quashigah, 'Defying Assumptions about the Nature of Power Relations between the Executive and Judiciary: An Overview of Approaches to Judicial and Executive Relations in Ghana') in this volume.

[20] Gerhard Erasmus, 'The Constitution: Its Impact on Namibian Statehood and Politics' in Christiaan Keulder (ed), *State, Society and Democracy: A Reader in Namibian Politics* (Macmillan 2010) 77–105.

These different pathways to constitutionalism influence the legitimacy of constitutional courts. The Namibian story illustrates the problems of 'authenticity'[21] a constitutional court can encounter, when it is asked to enforce a constitution, which is largely the product of elites, in a counter-majoritarian fashion. This becomes especially clear in the Namibian Supreme Court's judgment in the *Frank* case where it was asked to strike down a deportation order for Ms Frank who was in a lesbian relationship with a Namibian woman.[22] Ms Frank argued that she would have been able to marry her Namibian partner and thereby acquire a right to stay in the country if she were a man and that she should therefore enjoy the same protection under immigration law. As Nico Horn points out, there were good reasons to think her claim was well-founded as a matter of law:[23] While the Namibian constitution does not explicitly protect sexual orientation as a prohibited ground for discrimination, other important statutes at the time did and much suggested that the constitution drafters did not intentionally exclude sexual orientation from the constitutional list. Yet, the Namibian Supreme Court declined to protect Ms Frank and upheld the deportation order. What is remarkable about the decision, however, is not so much the fact that the Court did not protect Ms Frank in the context of strong political rhetoric against homosexuals, but its particular reasoning in doing so. It emphasized the key role of parliament under the Namibian constitution and invoked the customs and beliefs of the Namibian people:

> [T]he Namibian courts have from the very beginning determined that in interpreting and applying the fundamental rights in Namibia, the value judgment that it has to make must take cognisance in the first place of the traditions, values, aspirations, expectations and sensitivities of the people of Namibia. There can be no doubt about the need to apply this principle of interpretation in Namibia. A refusal or failure to do so, would strengthen the perception that the Courts are imposing foreign values on the Namibian people. This will bring the Courts as well as the Constitution into disrepute and undermine the positive role it has played in the past and must continue to play in the future in regard to the maintenance and development of democratic values and fundamental human rights.

An explicit comparison with the South African constitution precedes this passage, which, so the Justices argue, assumes a different, considerably stronger status. Whatever the merits of this line of argument, the explicit comparison to South Africa makes it clear that the Namibian Justices understand their own authority more weakly than do their South African colleagues—as the comparison with the later South African litigation on same-sex marriage and its court's rather bolder conception of the judicial role confirms.[24]

[21] Ackerman (n 12).

[22] *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and another* 2001 NR 107 (SCA).

[23] See ch 13 (Nico Horn, 'Judicial and Executive Relations in Namibia: A Review of Four Cases') in this volume.

[24] See especially, *Fourie v Minister of Home Affairs* [2005] 1 All SA 273 (SCA) paras 23–5; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) paras 115–53, 165–73; see further ch 8 (J Fowkes, 'Relationships with Power: Re-imagining Judicial Roles in Africa') in this volume.

Unsurprisingly, the past decades of authoritarian rule and human rights abuses largely rule out another traditional path to constitutionalism described by Ackerman, the path of insider reforms, which nevertheless preserve key achievements and traditions of the past.[25] For even where insiders have stayed on and enacted reforms, this hasn't been accompanied by the urge to preserve long-lived traditions along the lines of the British constitutional conventions or entrenched principles of common law. Insofar as old principles are preserved and still applied, this represents more of an acknowledgment of certain established international standards, sometimes accompanied by appeals to take these more seriously, rather than a celebration of a tradition that has truly become one's own.

However, the turn against the past can itself serve as a powerful basis for constitutional legitimacy and the authority of constitutional courts, even in the absence of a revolutionary shift of the sort described earlier.[26] And this, too, casts courts in a particular role: Not as guardians of the revolutionary principles adopted by the mobilized people, but as guardians against a shared grievous past or, as Kim Scheppele has called this, against past 'regimes of horror'.[27] This turn against the past can of course, as noted above, be reinforced by other factors. But again, such other factors are not limited to its reinforcement through revolutionary mass movements akin to what has happened in the United States. Nor does such a lack of a grounding of African constitutions in revolutionary mass movements imply that there can be no basis for constitutional supremacy in popular sovereignty. A number of African states such as Benin or Kenya, and to a lesser extent Ghana, have drafted constitutions with broad public participation and submitted them to referenda, thus using popular sovereignty to further entrench the constitutional appeal for change.[28] This can matter for the authority of constitutional courts in these systems.

Much suggests, for example, that Benin's Constitutional Court, one of the most successful courts on the continent, can build its authority on its constitution's strong and publicly entrenched stance against past dictatorships and oppression. Besides developing a significant human rights record, the Constitutional Court of Benin has declared attempts to revise the constitution so as to allow the incumbent president Yayi to stand for a third term, as well as public calls for the president to do so, as unconstitutional.[29] Invoking the preamble to Benin's constitution and its explicit

[25] Ackerman (n 12).

[26] There are obviously other potential foundations for constitutional legitimacy; I merely focus on some of the most obvious candidates in the African context here.

[27] Scheppele (n 7).

[28] See Kirkby and Murray (n 18); on Benin see Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Enforcing Human Rights' (12 November 2003) *Bepress Legal Series* Working Paper 104. <http://law.bepress.com/cgi/viewcontent.cgi?article=1238&context=expresso> accessed 22 August 2015; see also for a more detailed theoretical analysis of public participation in the Kenyan drafting process, Richard Stacey, 'Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process' (2011) 9 *International Journal of Constitutional Law* 587.

[29] See Constitutional Court of Benin, DCC 11-067 (20 October 2011), DCC 14-156 (19 August 2014) and DCC 14-199 (20 November 2014); see also for further discussion, André M Mangu, 'Inconstitutionnalité d'un troisième mandat présidentiel: Leçons de la Cour constitutionnelle du Bénin à d'autres Cours constitutionnelles africaines' (2015) 4 *African Journal of Democracy and Governance* <http://www.idgpa.org/downloads/African-Journal-of-Democracy-and-Governance-(AJDG)/Issue-4/AJDG,%20Vol%201,%

opposition to arbitrary personal rule and dictatorship, in limiting constitutional amendments the Court adopted a conception akin to a 'militant democracy'[30]—a bold step for any constitutional court and a successful one in Benin: As of July 2015, it seems that President Yayi has indeed renounced his claims to stand for a third term.

The Ghanaian Court's decision to invalidate the declaration of a public holiday for the celebration of the 1981 coup by Jerry Rawlings provides another example for the role courts can play as guardians against past dictatorships.[31] Invoking the new constitution's explicit turn towards constitutionalism and its incompatibility and break with past military rule, the Ghanaian Court could make a powerful argument for the invalidation of a national holiday celebrating the coup—otherwise hardly a subject that invites expansive judicial oversight. As a result, the government did not dare to challenge the Court on this important matter of political symbolism.

And Kenyan courts, too, have occasionally taken the high road of preventing the repetition of past mistakes the new Kenyan constitution explicitly seeks to avoid. The widely discussed decision of the High Court at Nairobi to disqualify Mumo Matemu from his appointment as Chairman of the Ethics and Anti-Corruption Commission (EACC) on grounds of personal integrity reads along these lines. Drawing on the 2010 Kenyan constitution's explicit turn against corruption ('... Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office'),[32] the High Court invalidated the appointment of Matemu. Though this decision was not upheld on appeal, the matter went to the Supreme Court and the public attention attracted by the case eventually led to the resignation of Matemu from the appointment. This, too, represents judicial success.

But, and this is of course not surprising, in other cases and other courts the basis for judicial authority will be less strong. Threats and backlash against courts that take decisions uncomfortable for those in power are still a real possibility in many African states, as we see in events ranging from court packing in Zimbabwe to rhetorical attacks on individual judges in Namibia and the ousting of jurisdiction in favour of other institutions in Ethiopia to the straightforward defiance of certain judgments in Nigeria.[33] Whatever their differences, these countries share a lack of a strong independent basis for constitutional authority.

20No%204,%20Article%20Mbata%20Mangu%20sur%20Inconstitutionnalite%20d'un%203eme%20mandat%20presidentiel.pdf> accessed 20 August 2015.

[30] The term originates from the debates on how to prevent the rise of undemocratic forces in a democracy following Hitler's rise to power in Germany; it was originally coined by Karl Loewenstein, 'Militant Democracy and Fundamental Rights' reprinted in András Sájo (ed), *Militant Democracy* (Eleven International Publishing 2004) 231ff.

[31] *New Patriotic Party v Attorney-General* (1993) 2 GLR 35; see for a broader discussion ch 9 (Quashigah) in this volume.

[32] *Trusted Society of Human Rights Alliance v Attorney General* High Court of Kenya at Nairobi, Petition No 229 of 2012 37 <http://www.kenyalaw.org/Downloads_FreeCases/88833.pdf> accessed 20 August 2015.

[33] See, for examples, ch 8 on Zimbabwe (James Fowkes, 'Relationships with Power: Re-imagining Judicial Roles in Africa'), ch 10 (Ameze Guobadia, 'Judicial–Executive Relations in Nigeria's Constitutional Development: Clear Patterns or Confusing Signals?'), ch 11 (Assefa Fiseha, 'Relations Between the Legislature and the Judiciary in Ethiopia'), and ch 13 (Nico Horn, 'An Overview of the Diverse Approaches to Judicial and Executive Relations: A Namibian Study of Four Cases) in this volume.

## 3. Separation of Powers and Socio-economic Rights

As we attempt to better understand constitutional legitimacy in Africa, it is also important to pay attention to the precise things current African constitutions are entrenching, which courts can therefore claim special authority to enforce. In this regard, it is important to note that nearly all authors in this volume understand the separation of powers primarily as a tool of restraint, checking powerful executives and ultimately preventing abuse of power and tyranny: 'Its main goal, the prevention of tyranny, is as potent today as it was many centuries ago' concludes Fombad in Chapter 2.[34] That the separation of powers must be understood in this traditional, reactive way, however, is not a foregone conclusion—another prominent understanding of that concept, as it emerges in nineteenth-century German constitutionalism[35] for example or as a consideration in Locke's famous early conception of separation of powers,[36] is the rational ordering of the state and ultimately governmental efficiency.

This negative conception of separation of powers influences what and how much courts can do.[37] As we have seen, the strong focus on restraining concentrations of executive power and preventing dictatorships makes claims to third presidential terms or the celebration of military coups particularly appropriate subjects for quite expansive judicial intervention, and the same might apply to the strengthening of executive power in other contexts. This firm core of what constitutions are for does not, however, necessarily encompass the much more comprehensive set of rights many African constitutions today incorporate, and this seems important.

The inclusion of second- and third-generation rights has generally become a hallmark of African constitutionalism in the recent decades. Not only internationally renowned constitutions like the South African constitution incorporate long lists of socio-economic rights, but so do the African Charter of Human and Peoples' Rights and many other African constitutions such as the Ghanaian and the Kenyan constitutions, both of which include a considerable list of positive, social rights. Moreover, even if explicit social rights are not mentioned in the text, there is often a catalogue of directive principles such as in the Nigerian constitution, which have served in other jurisdictions around the world, such as Germany[38] or India,[39] as a basis for expansive

[34] Ch 1 (Charles M Fombad, 'The Evolution of Modern African Constitutions: A Retrospective Perspective'); similarly ch 3 (Francois Venter, 'Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa') in this volume.

[35] This goes back to Hegel, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Zweiter Band 1800–1914* (CH Beck 1992) 136.

[36] See, for example, Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59.

[37] For a broader discussion of the role of public entrenchment of constitutional ideas see James Fowkes and Michaela Hailbronner, 'Courts as the Nation's Conscience: Empirically Testing the Intuitions behind Ethicalization' in Silja Vöneky et al (eds), *Ethics and Law: The Ethicalization of Law/Ethik und Recht: Ethisierung des Rechts* (Springer 2013).

[38] See, for example, the *Hartz IV* decision of the German Constitutional Court where the Court deduces a right to welfare from human dignity and the social state principle, which is a directive principle (Staatszielbestimmung) in the German Basic Law, BVerfGE 125, 175.

[39] Constitution of India, Part IV. See also for an overview of the Indian developments Madhav Khosla 'Making Social Rights Conditional: Lessons from India' (2010) 8 *International Journal of Constitutional Law* 739.

judicial action and the judicial enforcement of socio-economic interests. This fits into a broader global trend towards an understanding of constitutions as 'transformative' or 'post-liberal',[40] in other words as tools for broader social changes, going beyond the traditional model of Western constitutionalism, represented most famously in the nineteenth-century US understanding of constitutionalism and the separation of powers as tools to prevent a concentration of powers and protect individual freedom (understood in negative, formal terms).[41]

The prevailing negative or traditional understanding of separation of powers in this volume therefore ill fits this broader, aspirational character of many African constitutions. Of course, the broken promises of many authoritarian rulers in the past and their failure to deliver on them have painfully demonstrated that unified executive power is no road to economic success, and some may invoke Amartya Sen's famous, if contested claim that famines do not happen in democracies.[42] The strong suspicion directed towards powerful presidents hence makes sense not only to those who view government as a threat to freedom, but equally to those who seek a state which has the power to efficiently pursue social and economic change. Yet, accepting this does not necessarily imply a turn to the purely negative conception of separation of powers prevalent in this volume. The adoption of broad, aspirational constitutions in many African states suggests that we may need to pay more attention to efficiency and good organization rather than merely avoiding concentrations of power, particularly in the executive branch. Such a more positive understanding of the separation of powers would then not only address the question what must *not* be done under any circumstances, in particular by the executive, but also *what* governments must do and *how* they might realistically go about achieving it. The principle of separation of powers would then less be a device to draw boundaries between state and individual than a guideline for governments (including the executive) on how to build a new state.

As it is, the prevailing negative conception of powers suggests that courts may have a harder time justifying judicial action in safeguarding socio-economic rights than with regard to more classic civil political rights and when it comes to policing executive power. Yet, much will depend on the political context, both at the time of constitutional drafting and when courts have to adjudicate claims. The South African case demonstrates that socio-economic rights may well be part of a strong public consensus about what constitutionalism must mean, too, and that socio-economic rights are not necessarily lesser rights.[43] Yet, where judicial authority is weaker and such rights less entrenched such as in Nigeria, courts tend to do much less.[44] It thus remains to be seen

[40] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[41] See for a fuller argument Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015), ch 1 with further references.

[42] Amartya Sen, 'Democracy as a Universal Value' (1999) 10 *Journal of Democracy* 3. For a recent discussion of Sen's argument and critical responses to it, see Rubin Olivier, *Democracy and Famine* (Routledge 2011).

[43] See Fowkes, *Building the Constitution* (n 16) ch 8.

[44] See Chidi A Odinkalu, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008).

how aggressively African courts will come to enforce their transformative constitutions—the trend is clearly going in the direction of stronger judicial involvement, but setbacks are to be expected and in many states recovering from past dictatorships, socio-economic rights may not yet be at the forefront of what courts are publicly expected to be doing. Still, examples like India suggest that this could change rapidly.[45]

## 4. A Political Question Doctrine?

In line with the international development, one example for the increasing rise of judicial power is the trend in African courts towards the rejection of a political question doctrine. While some in Kenya or Nigeria still advocate the use of a political question doctrine,[46] the concept has become increasingly contested. Already in 1993, the Ghanaian Supreme Court rejected its application in its above-mentioned case on the declaration of a public holiday: '. . . by articles 1 and 2 of the Constitution, 1992, that doctrine cannot have any application to us here in Ghana.'[47] Similarly, the South African Constitutional Court has so far not explicitly applied a political question doctrine and former Constitutional Court Justice, Ackerman J, has publicly argued against its adoption on the grounds that '[i]n a substantive constitutional state such as ours, there can be no so-called "political question" doctrine leading to a conclusion different to that dictated by the Constitution'.[48]

There are some reasons to consider this disappearance of the political question doctrine not as an unequivocal progress, at least insofar as it represents a lack of attention to doctrines of judicial deference that are not merely about cowardice or politically prudent retreat. As James Fowkes points out, constitutional courts are often dependent on the support of other actors if they want to achieve real change and there are therefore good arguments for a more coordinated, dialogic understanding of executive/legislative–judicial relations in Africa.[49] If one adopts this view, much suggests that there is a need for a jurisprudential tool that enables courts to take a principled stance on the question in which areas and when they should defer to other institutions. This does not have to take the form of the political question doctrine in its classical form, in the sense of exempting certain questions entirely from judicial scrutiny, but could entail softer standards for more lenient or exceptional (rather than no) judicial control. What matters is that there is a recognized set of arguments and the political question doctrine in its classical form is one standard tool in this regard. Abandoning the doctrine is therefore troublesome as long as it is not accompanied by the development of alternative standards of principled deference. The German case

[45] For a classic discussion, see, for example, Satyaranjan P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd edn, Oxford University Press 2002).

[46] See the discussion in ch 8 (Fowkes, 'Re-imagining Judicial Roles in Africa') in this volume.

[47] *New Patriotic Party* (n 31) 64.

[48] Lourens WH Ackermann, 'Opening Remarks on the Conference Theme' in Jonathan Klaaren (ed), *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (SiberInk 2006), quoted in Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, fn 160.

[49] Ch 8 (Fowkes, 'Re-imagining Judicial Roles in Africa') in this volume.

illustrates the consequences of rejecting a political question doctrine without replacing it by some other well-recognized set of arguments to assess when judicial deference is appropriate and when it is not: The German Constitutional Court decides largely on a case-by-case basis when deference is appropriate and often lacks convincing and well-established doctrinal concepts to justify what it is doing.[50]

This is not only problematic in Germany with its powerful constitutional court. African courts in particular need a good sense of strategy if they are to build up and preserve their hard-won authority and make a real impact on society. But strategy without any theoretical legal underpinnings can endanger a court's public standing: Adjusting their understanding of constitutional law to the political context and pressures of the moment makes courts look weak and unprincipled, even though good 'situation-sense'[51] is key not only to common law judging.[52] A set of institutional principles when to exercise deference, such as a political question doctrine, therefore fulfil an important function by offering courts that play strategic games[53] publicly acceptable reasons for principled withdrawal and constitutional avoidance. In their best form, they can offer a set of institutional arguments that are not always part of the vocabulary of interpretation in 'a substantive constitutional state' because such considerations don't naturally enter an interpretation of individual rights. And principled withdrawal not only looks better for courts seeking to preserve their public authority, it also can offer means to distinguish good reasons to defer to another branch from bad reasons. For all these reasons, African courts might want to be careful in discarding political question doctrines too readily where there is no other set of principled arguments for judicial deference in place.

## 5. Final Remarks

Assessing constitutionalism in Africa remains therefore very much an unfinished task. As Francois Venter argues in his chapter, understanding African constitutionalism along the lines of the US and British models in many ways doesn't fit the realities on the ground.[54] Yet, this should perhaps trouble us less. For one thing, it is not clear how useful US constitutionalism is as a model to aspire to and use as a point of comparison. Working constitutionalism is not predicated on the existence of a 200-year old document as hard to amend as the US constitution is nor on its grounding in a constitutional moment of heightened mass mobilization and public deliberation. Constitutions like the German Basic Law or the Canadian Charter lack a similar basis in a popular sovereignty and may still become, after some time, a basis for strong

[50] Hailbronner (n 41) ch 5.

[51] Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960).

[52] For a recent account of the challenges of balancing the need for political strategy with the imperative to maintain judicial legitimacy as a principled institution deciding according to law, see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press 2013), esp chs 1–2.

[53] Alexander Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986) esp ch 3.

[54] Ch 3 (Venter, 'Parliamentary Sovereignty or Presidential Imperialism? The Difficulties of Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa') in this volume.

constitutionalism. This is not to say that public deliberation and participation in the drafting and confirmation per referendum are not good things that may help strengthen the public commitment to the constitutional commitments undertaken. They *are*; they are just not the *only* path to successful constitutionalism.

Furthermore, the value of the US constitution as a model and comparative counterpoint for African countries seems increasingly doubtful for various reasons. Not only is the US constitution in many ways outdated and fails to provide guidance on such important features of modern democratic systems as political parties, it is also mired in a reactive conception of the federal state that understands itself primarily in terms of restraint on state power rather than a more comprehensive roadmap to a better society. This fits with the understanding of separation of powers of many of the authors represented in this volume, but it no longer fits with the forward-looking spirit of many African constitutional texts.

Something similar applies to the British or French systems, both of which are frequently referenced in this volume and African legal writing more broadly (as indeed holds for former colonies of other states such as Portugal). Though the colonial roots of most African states in British and French law continue to shape their understanding of law and the judicial role, both systems are in different ways idiosyncratic. The lack of a written constitution in Britain and the embeddedness of the French Conseil Constitutionnel in the very particular bureaucratic culture of French professional elites make both systems unusual; insofar as they work, this has much to do with their particular traditions and institutional cultures that have not always migrated well to their African colonies, as the discussion about the role of the public prosecutor in this volume demonstrates.[55] There are better examples to look at elsewhere for the kind of comprehensive conception of constitutionalism characteristic of many contemporary African constitutions. In particular South–South comparisons with countries such as India, Brazil, or Colombia as well as other African countries will therefore today often be more useful than yet another reference to Montesquieu, Madison, or the Federalist Papers. This volume only begins to lay the kind of foundation necessary for that work.

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[55] I am referring in particular to the discretion public prosecutors are frequently accorded in European systems which has proved much more troublesome in the African than the European context, see ch 15 (Jeffrey Jowell, 'The Public Prosecutor and the Rule of Law in Anglophone Africa') and ch 16 (Horace Adjolohoun and Charles M. Fombad, 'Separation of Powers and the Role of the Public Prosecutor in Francophone Africa') in this volume.

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# Index


**abuse of power**
administration and 279
constitutional guarantees 114, 212
courts and 212
global concerns 339
hybrid institutions 340, 341
hybrid institutions, as smokescreens for 330–1
Nigerian legislature 148
post-1990 constitutions 22
public prosecutor, Francophone Africa 374–6
separation of powers 58, 269, 326, 392
weak judiciaries 18
Zimbabwe constitutional provisions 71–2
**accountability**
Attorney-General 351–2
Burundi and 328
constitutions and 48, 138
democratic 277
enforcement of 146–7
governance and 296
hallmarks of 247
hybrid institutions and 89, 90, 325, 326–8, 329–40, 340–3
judiciary 262, 282, 291, 320
military culture and 150
Nigerian legislative assemblies 138
promoting 68
public prosecutor 359
separation of powers 69, 359
traditional measures 89
transparency *see* **transparency**
**adaptive legislation**
judicial response to 259–62
**administrative tribunals**
discretionary powers of 318
executive and 76
ouster clauses *see* **ouster clauses**
**African Charter on Human and Peoples' Rights**
constitutions, influence on 42–5
regional instrument, as 2
socio-economic rights 392
violation of 378, 379
**African constitutionalism** *see* **constitutionalism**
**African constitutions** *see* **constitutions, evolution of modern African**
**African National Congress (ANC)**
constitutionalism and 388
death penalty 80
founding members 35
**African presidentialism** 4, 104–5
**African socialism** 25–6
**African Union**
constitutions, influence on 43, 44
**Al-Azhar** 32
**Al-Qaeda** 33
**Al-Shabaab** 30, 31
**Ali, Ben** 22
**American presidential system**
Anglophone Africa, features adopted by 64
check and balances 63
constitution, expressed in 62
executive 62–3
judicial power 63
legislative power 63
president 62–3
separation of powers model, as 62
Vice President 63
**Anglo-American model**
dictatorship, risks of 70
judicial/executive relationship 69, 73–8
judicial/legislative relationship 69, 78–81
legislative/executive fusion 62, 69, 70–3
**Anglophone Africa, judicial/executive relations**
Anglo-American influence 73–8
Attorney-General 73
Director of Public Prosecutions 73
executive exercising judicial powers 75–6
judicial appointments 73
judicial salaries 74
judiciary exercising executive powers 76–8
Kenyan *see* **Kenyan judicial/executive relations**
Namibia *see* **Namibian judicial/executive relations**
political interference, judicial protection from 74
prerogative of mercy 75
South Africa 74, 77, 211–12
**Anglophone Africa, judicial/legislative relations**
Anglo-American influence 78–81
binding precedent, doctrine of 79
judicial salaries 79
Judicial Service Commission, role of 78
legislative control of judiciary 78–81
legislative powers exercised by judiciary 79–80
legislative supremacy 79
**Anglophone Africa, legislative/executive relations**
Anglo-American influence 70–3
conclusions to be drawn 113–15
constitutional power, identifying sources of 95–100
executive authority 105–8
hybrid institutions 342
Kenya *see* **Kenyan legislative/executive relations**
legislatures 109, 114
monistic/dualistic systems 97–100, 113
Nigeria *see* **Nigerian legislative/executive relations**
parliamentary sovereignty/presidential imperialism 95–100
parliaments 109–11
patterns of interaction 111–113
presidents 102–5, 111
**Anglophone African constitutionalism** 96–7, 114, 115
**Anglophone African constitutions**
American traditions 47–8
Anglo-American influence 69

**Anglophone African constitutions** (*cont.*)
colonial influence 23–4, 98
common law tradition 47, 48–51, 52
constitutional disputes 50
customary law 38
executives 105–8
Ghana *see* **Ghana**
interventionist approach 49
judicial/executive relations *see* **Anglophone Africa, judicial/executive relations**
judicial/legislative relations *see* **Anglophone Africa, judicial/legislative relations**
Kenya *see* **Kenya**
legislative/executive relations *see* **Anglophone Africa, legislative/executive relations**
length of 48
multi-party democracy 184
Namibia *see* **Namibia**
parliaments 109–11
post 1960 48, 114
presidents 100–5, 111
public participation in 21, 388, 390
public prosecutor *see* **public prosecutor, Anglophone Africa**
religion 30
separation of powers *see* **separation of powers, Anglophone Africa**
single hierarchy of courts 49
South Africa *see* **South Africa**
transparency, promotion of 50
Westminster-type *see* **Westminster constitutional system**
**Angola**
anti-corruption agencies 331
Attorney-General 166, 190
conflict resolution, traditional mechanisms 163–4
constitution, historical development of 182–7
constitution, socialist-style 26
consitutional court *see* **Angolan consitutional court**
constitutional principles 188
constitutional reforms 1991/92 184
constitutional status, pre-independence 182–4
courts, independence of 171–2
customary law 163
democratic constitution-making process 184–7
dual vote, obligatory 189–91
hybrid institutions 328
'hyper-presidentialist' 190
international human rights 42
judges, appointment of 177–8
judicial/executive, relations *see* **Angolan judicial/executive relations**
judicial independence 173–4
judicial supervisory bodies, appointments to 177–8
legal system, Portuguese influence on 161–3, 169
liberation movements 173, 182
Marxism–Leninism ideology 19
multi-party democracy 184, 198
municipal courts 164
National Assembly 173, 177–8, 184–7, 189–92, 194–6
pardon and commute, power to 179
parliamentary powers 196
president, impeachment of 4, 189, 191
presidential absolutism 191–201
presidential powers 177, 190, 199, 200, 201
presidential tradition 182
'presidentialist' system of government 189
rule of law 22, 170, 182, 186–9
separation of powers 170, 187–9, 197
super-presidentialism *see* **super-presidentialism**
UNITA *See* **UNITA**
**Angolan constitutional court**
composition of court 192–4
conflict between parliament/president 182
constitutional clause, disallowing 189
constitutionality challenge 192–3
generic jurisdiction of 191–2
justices of the court 190, 192, 197, 198
*Parliamentary Oversight* judgment 195, 197, 199, 201
pre-emptive review jurisdiction 186–7
**Angolan judicial/executive relations**
constitution, Portuguese influenced 161
constitutional court *see* **Angolan constitutional court**
courts, independence of 171–4
customary law, recognition of 163–5
judicial appointment 177–8
judicial/executive power, distribution of 165–6
judiciary, subordinate in political system 168
pardon/commute sentences 179
rule of law constitutionally based 170
separation of power constitutionally based 170
*see also* **Lusophone Africa, judicial/executive relations**
*and* **super-presidentialism**
**anti-corruption agencies** 59, 89, 328, 331, 333
**apartheid**
death penalty 79
judges 208, 211, 305, 306–7
Namibia 302
South Africa 7, 35, 208, 311–12, 340, 342, 353
**Arab Spring** 22, 30–1, 387
**Arabophone Africa** 22
**Attorney-General**
appointments, political influence over 103, 120, 190, 347
decision not to prosecute 351–2
Director of Public Prosecutions and 347
executive/judicial branch, as part of both 73
**Attorney-General, by country**
Anglophone Africa 73, 345, 348
Angola 166, 190
Cape Verde 166
Ghana 347
Guinea-Bissau 166
Kenya 103, 120, 123, 291
Lusophone Africa 168, 171, 176–9
Mozambique 174
Namibia 103, 300, 310, 311, 312, 315, 316, 320
Nigeria 347
Príncipe 179
São Tomé 179
Sierra Leone 347

Uganda 347
United Kingdom 347, 348, 350
Zambia 347
Zimbabwe 209
**Auditor-General** 50, 59, 103, 146, 151, 190, 326–9
**authoritarianism**
abuse of powers 52
benevolent 96
colonial 1, 16, 20, 28
executive 95, 96, 213
resurgence of 382
separation of powers and 52

***Bashingantahe* institution** 37
**Benin**
access to justice 214
anti-corruption agencies 331
coalitions 220
executive/judicial relations *see* **Francophone Africa, executive/judicial relations**
executive/legislative relations *see* **Francophone Africa, executive/legislative relations**
Francophone influence 29, 82
international human rights 42
judicial/legislative relations *see* **Francophone Africa, judicial/legislative relations**
judicial review of executive action 366
judiciary, role of 220
Marxism–Leninism ideology 19
'militant democracy' 390–1
politics, responsible/irresponsible 220–1
public prosecutor 364, 372–3, 375, 376–7
socialist-styled constitution 29
**bicameral system** 3, 123, 126, 133, 145, 287
**Bicesse Accords** 184
**bill of rights**
Botswana 38
duties and 45
Ghana 16
international 42, 43
Kenya 38, 288, 290, 291, 293
Namibia 301, 303–4, 306, 312
Nigeria 16
South Africa 39, 302, 306, 338
violations of rights 18
**blasphemy** 31
**Boko Haram** 30–1
**Botswana**
Anglophone constitution 79, 218
bill of rights 38
corruption and 333, 341
courts 218–19, 222
customary law rules 38
dual system of courts 36
executive functions exercised by judiciary 76
governance 218
judicial appointments 73, 74
judicial/executive relations 74, 76–7
judiciary 218–19
legislative/executive relations 71, 72
multi-partyism 18
National Assembly 79
*Ntlo ya Dikgosi* (House of Chiefs) 36
prerogative of mercy 75
presidential assents to bills 72
rule of law, compliance with 218
second chamber of parliament 36
traditional courts 35
traditional rulers 36
**British parliamentary system**
constitution, lack of written 65–6, 98
fusion of powers 62, 64
judicial/executive relationship 65
judicial/legislative relationship 65
legislative/executive relationship 64
parliamentary sovereignty and 3, 95, 109, 114, 227
separation of powers model, as 64
prime minister 64
Queen, the 64
*see also* **Westminster constitutional system**
**Burkina Faso**
Marxism–Leninism ideology 19
prosecution/executive relationship 378, 379, 380
**Burundi**
*Bashingantahe* institution 37
hybrid institutions 328
traditional courts 35, 37

**cabinet members**
appointment of 105–6
**Cameroon**
constitution, length of 49
executive/judicial relations *see* **Francophone Africa, executive/judicial relations**
executive/legislative relations *see* **Francophone Africa, executive/legislative relations**
Francophone influence 82
fundamental freedoms, constitutional affirmation 42
judicial/legislative relations *see* **Francophone Africa, judicial/legislative relations**
public prosecutor 364, 370, 371, 374, 377
**Cape Verde**
constitution 29
judiciary/executive relations *see* **Cape Verde, judicial/executive relations**
**Cape Verde, judicial/executive relations**
Attorney-General 166, 178
constitution, Portuguese influenced 162
courts, independence of 171, 173, 174
executive power/judicial power, distribution of 166
judicial appointment 178
judicial supervisory bodies, appointments to 178
judiciary, subordinate 168
pardon and commute sentences 179
rule of law 170
separation of power 170
*see also* **Lusophone Africa, judicial/executive relations**
**checks and balances**
Angola 190, 191, 193
expansion of 88
French system 67, 86
hybrid institutions 89, 325, 330, 333, 340, 341
Kenyan 117, 119, 130

**checks and balances** (*cont.*)
Kenyan judicial/executive relations 286, 288, 294
legislative/executive branches 70, 122, 124, 125, 141
Montesquieu/Locke 60
Nigeria, constitutional system 135, 136, 138, 141, 149, 153
Nigerian judicial/executive relations 239, 240, 242
public prosecutor 366, 380, 381
separation of powers, as a system of 59, 244
traditional 39
United States system 63–4
**civil law**
binding precedent and 88
common law compared 49–51
dominant executive 89
Francophone Africa and 23–4, 52, 359
inquisitorial prosecutorial system 346
legality of prosecution principle 365
public interest principle 360
public prosecutors *see* **public prosecutor, Francophone Africa**
**colonial influences**
Anglophone Africa 24
autochthonous constitution 24
civil law influences 23, 24, 48–51
colonial administrators 14–15
colonial Africa 14–15
colonial legal systems 23, 24, 46–51
colonial powers 22–4
common law influences 23, 24, 48–51
constitutional systems 24
Francophone Africa 24
modern constitution, strong effect on 46–8
Westminster-type constitutions 24
**Commission for Gender Equality** 50, 327
**common law**
accusatorial prosecutorial system 362
civil law compared 49–51
discretion to prosecute 351
judicial legislation and 79
judicial precedent, doctrine of 65
judicial review and 76
Westminster constitutional system 52
**concentration of powers**
abuse of power 58
dangers inherent in 89, 99
excessive 1, 17, 18, 58–9, 90
post-colonial 2
presidential 165, 176
reducing 123
separation of powers and 59, 68, 89, 113, 393
**conflict resolution**
Lusophone Africa and 160, 165, 180
traditional mechanisms of 163–5
**Congo, Democratic Republic of**
anti-corruption agencies 331
Belgian rule 15
constitution *Loi Fondamentale* 1960 24
constitution 2006 30, 48, 49, 82, 86, 88
constitutionalism 17
judiciary, constitutional provisions 367, 376
legislative elections 17
Marxism–Leninism ideology 19
ruling party, constitutional provisions 27–8
***Conseil Supérieur de la Magistrature*** 50, 67, 366, 379
**constitutional courts**
authenticity, problem of 389
authority of 390
Francophone 87–8
Kenya 391
powers 51, 209
**constitutional systems**
monistic/dualistic 97–100, 113
Westminster *see* **Westminster-style constitution**
**constitutionalism**
absence of 205
American 60, 393, 395
Anglophone Africa 70, 96–100, 115
colonial Africa 14–15
competing notions of 115
constitutionalist thinking 96–9
credibility of 206
dangers of 99
dictatorships and 386
Francophone Africa 195
globalization and 96
hybrid institutions 325, 341
insider reforms 390
Islam, influence of 30
judicial supremacy 222
judicialism and 294
Lusophone Africa 190, 195
modern 34, 37, 68, 89, 326, 343
post-colonial 96
presidential imperialism and 99
presidentialism 104
promotion of 58, 328
revolutionary 386–7, 388
second-generation rights 392
separation of powers and 1, 59, 89, 113–15, 242
socialist constitutional model 29–30
socio-economic rights and 392
South African 219, 338, 339, 393
terminology 100
third-generation rights 392
transformative 49, 393, 394
virtuous alignment 222
Western 393, 395–6
**constitutions, Anglophone Africa** *see* **Anglophone African constitutions**
**constitutions, evolution of modern African**
Anglophone Africa *see* **Anglophone African constitutions**
colonialists *see* **colonial influences**
duties 45
elites, influence of 15–18, 20, 173, 387–9
emerging trends 46–51
Francophone Africa *see* **Francophone African constitutions**
first generation *see* **constitutions, post-colonial/ independence 1950s/1960s**
human rights *see* **human rights**
ideological influences *see* **ideological influences**
indigenous influences *see* **indigenous influences**
internationalization, impact of 41–5

Islam, influence of 31–3
legal traditions 46–51
public participation 21, 388, 390
'regimes of horror', safeguarding against 386, 390
religious influences *see* **religious influences**
second generation *see* **constitutions, post-independence 1960s/1989**
separation of powers *see* **separation of powers**
socialism, influence of *see* **socialist-styled constitutions**
third generation *see* **constitutions, post-1990 constitutions**
'third wave of democratization' 13, 20
**constitutions, post-colonial/independence 1950s/1960s**
bill of rights, provision of 16
constitution-building, first generation 14
constitutionalism, introduction of 15
European withdrawals 17
first generation of 15–16, 20, 51
Francophone Africa 17
fundamental rights, omission of 15–16
liberal democracy, introduction of 15
power transfer to elites 15, 16
Western experts crafting constitutions 15–16
**constitutions, post-independence 1960s/1989** 14
abuses of power 20
authoritarian rule 18, 20
constitution-building, second generation 14
constitutionalism, failure to promote 20
customary law 38
human rights violations 18, 20
independence constitutions 18
military dictatorship 18
one-party systems 18–19, 20
second generation of 18, 20, 392
**constitutions, post-1990**
abuse of powers 22
accountability, institutions to promote 21
colonial patterns
constitution-building, third generation 14
constitutional experts 21
constitutional standards, adoption of common 24
dictatorships 21, 22
entrenchment of core principles 21
human rights recognition/protection 21
multi-party democracy 21, 184, 387
new era of constitution building 21, 22
popular participation in 21, 22
power, deconcentration of 21
presidential powers, reinforcement of 22
reforms 184
separation of powers entrenchment 58
third generation of 20–1, 22, 392
transparency, institutions to promote 21
**constitutions, post-2010** 22
**corruption**
abuse of power *see* **abuse of power**
anti-corruption *see* **anti-corruption agencies**
Botswana and 341
global concern 339
hybrid institutions 333
judicial independence 171, 172
Nigeria 146–7
South Africa 330
**Côte d'Ivoire**
constitution of 367
judicial independence 370
public prosecutor 374–5
traditional dispute settlement systems 35
**courts**
constitutional *see* **constitutional courts**
hierarchy of 49–50
independence of *see* **judicial independence**
royal 66
subordination 206
surviving 206
traditional 34–8, 40
**'covering the field' doctrine** 138
***cumul des mandats* principle** 67
**customary law**
application of 34
codification of 164–5
entrenchment of 36
international 41, 43
Lusophone Africa 163–5
oral nature of 39
women/youth, discrimination against 38

**death penalty** 80, 219
**Director of Public Prosecutions**
appointments, political influence over 104, 346
executive/judicial branch, as part of both 73
Kenya and 346
models of 347
South Africa 104, 348
subordination to Attorney General 347
United Kingdom 354
'Victims Code' and 357
**doctrinaire socialism** 25, 26
**due process**
banks and 279
judicial check on executive action 63
non-adherence to 149–51
quasi-judicial bodies 278, 283
reputation of the judicary 266
**duties**
concept of 45
judges 171, 173–5
performance of by executive 63

**Egypt**
anti-corruption agencies 331
constitution, socialist-styled 26
constitutions, elements of 22, 31–3
Islamic influence 30–3
judicial/executive relationship 208, 210
judicial survival 208
judiciary, politicized by government 210
**elections**
Angolan parliamentary 4
electoral practices 333
general 61, 71
Kenyan 125
legislative 17
military rulers, reappearance of 153, 388
multi-party 21

**elections** (*cont.*)
Nigerian 248–50, 388
politicized 99
presidential 77, 105
**electoral commission**
appointments to 103, 124
Ghana 109
independent 76, 333, 341
South Africa 327
Zimbabwe 328
**Equatorial New Guinea** 47, 82
**Ethiopia**
legislative/judicial relations *see* **Ethiopian legislative/judicial relations**
rule of law 265, 272, 279, 281, 283
**Ethiopian legislative/judicial relations**
constitutional interpretation 269–71
decisional independence 271–2
Ethiopian People's Revolutionary Democratic Front (EPRDF) 266
federal/regional state courts 267
Federal Supreme Court 268
fused functions 266
historical background to 266–8
House of Federation 6, 269–71
House of Peoples' Representatives 267
human rights, constitutionally entrenched 271
introduction to 265
judgments, legislative reversal of 272–4
judicial autonomy *see* **judicial autonomy**
judiciary, independent 267
judiciary, reputation of 266–8
junta 266, 280
'jurisdiction stripping' 275
legislative/executive relationship 268–9
Marxism–Leninism ideology 19
ouster clauses 277–82, 283
parliamentary system of government 268–71
quasi-judical bodies 277–82, 283
separation of powers in 268–71, 283
structural autonomy 275–7
Supreme Court 265–8, 270, 276, 279, 280, 281, 283
**executive power**
abuse of 212, 221
adaptive legislation 259–60
American presidential system 62–3, 104
Angola 177
British parliamentary system 64
Ghana 101
dominance of 5
judicial power, independent of 86–7
judiciary, control of 177, 207
judiciary, virtuous alignment with 216–21
Kenya 6, 119–22, 291–4
limiting 3, 6, 8–9, 150, 151
Lusophone Africa 177
Namibia 106–7
Nigeria 135, 139–40, 150–1, 241–3
policing 393
public prosecutor 365
**executives**
authority of president 105–8
cabinet ministers, appointment of 105–6
censure by parliament 108
constitutional role 139–40
executive action, confirmation of 107–8
interference by 263, 291, 292
judicial checks on 221
judicial/executive relations *see* **judicial/executive relations**
judicial review of executive action 63, 85, 86, 104
Kenya 123–5
legislative/executive relations *see* **legislative/ executive relations**
Nigeria 139–41
power of *see* **executive power**
quasi-judicial bodies 277
responsibilities 106–7

***'faculté d'empécher',* concept of** 193
***'faculté de statuer'*, concept of** 193
**FNLA** *see* ***Frente Nacional de Libertação de Angola*** **(FNLA)**
**Francophone African constitutions**
civil law and common law compared 49–51
Congo Republic *see* **Congo, Democratic Republic of**
constitutional tradition 52
constitutions, length of 48, 49
Côte d'Ivoire *see* **Côte d'Ivoire**
French Fifth Republic constitution of 1958 *see under* **French Fifth Republic**
hybrid institutions, emergence of 88, 89–90
judicial/executive relations 85–7
judicial/legislative relations 87–8
judicial review over executive actions 366
legislative/executive relations 82–5
national conferences 21
public prosecutor *see* **public prosecutor, Francophone Africa**
separation of power *see* **separation of powers, Francophone Africa**
**Francophone Africa, judicial/executive relations** 85–7
**Francophone Africa, judicial/legislative relations** 87–8
**Francophone Africa, legislative/executive relations** 82–5
**Francophone constitutional courts**
review of legislation 87–8
**French Fifth Republic**
Benin constitutional model 29
constitution 1958 17, 24, 46, 48, 50, 52, 62, 66, 386
executive driven 2
**French hybrid system**
executive dominance 66–7
Francophone Africa, adoption by 62, 82
French Fifth Republic constitution of 1958 52, 66–7
Hispanophone Africa, adoption by 62
judicial/executive relations 85–7
judicial/legislative relations 87–8
judiciary, position of 66, 67
legislative/executive, collaborative relationship 66, 82–5

Lusophone Africa, adoption by 62
separation of powers model, as 66–7
***Frente Nacional de Libertação de Angola* (FNLA)** 184
**fundamental rights** *see* **human rights**

**Gabon**
executive/judicial relations *see* **Francophone Africa, executive/judicial relations**
executive/legislative relations *see* **Francophone Africa, executive/legislative relations**
francophone influence 82
judicial/legislative relations *see* **Francophone Africa, judicial/legislative relations**
**gacaca courts** 38
**Gadaffi, Muammar** 22
**Ghana**
Attorney General 73, 352
constitution, public participation in drafting 390
duties 45
Ghana 16
judicial/executive relations *see* **Ghanaian judicial/executive relations**
judicial review powers 227
judiciary/legislative relations 81
legislative/executive relations *see* **Ghanaian legislative/executive relations**
National Assembly 227
National House of Chiefs 36
National Liberation Council (NLC) 227
*nolle prosequi* 351–2
political question doctrine 394
prerogative of mercy 75
presidents 100–3
Regional House of Chiefs 36
socio-economic rights 392
speaker 111
traditional chiefs 37
**Ghanaian judicial/executive relations**
constitutional history of 226–7
defying assumptions, introduction to 226
factors influencing 238
judicial review powers 227, 231
judiciary, constitutional protection of 233, 238
judiciary, emasculation by executive 227–30
judiciary, self-assertion of 233–7
judiciary, self-restraint 237–8
mutual toleration 232–3, 237
nature of 227–37
rule of law, respect for 229
suspicion/minimal trust, period of 230–2
*see also* **Anglophone Africa, judicial/executive relations**
**Ghanaian judicial/legislative relations**
abuse of legislative power 81
*see also* **Anglophone Africa, judicial/legislative relations**
**Ghanaian legislative/executive relations**
cabinet ministers, appointment of 105
censure by parliament 108
executive action, confirmation of 107
executive responsibilities 106
parliament, democratic composition of 109
patterns of interaction 111
presidential assents to laws 111
presidential power, democratic legitimation 102
presidents 100–3
speaker 111
*see also* **Anglophone Africa, legislative/executive relations**
**good governance**
accountability *see* **accountability**
Botswana 218
concentration of powers and 58, 59
constitutions and 22, 52
financial resources, impact on 145
judiciary, duty to ensure 295
legislative/executive relationships 136, 138, 147, 152, 153
promotion of 1, 44, 328, 334, 339
separation of powers and 68, 89, 90
South Africa 340
transparency *see* **transparency**
**Guinea-Bissau**
conflict resolution 164–5
judicial/executive relations *see* **Guinea-Bissau, judicial/executive relations**
National Assembly 178
**Guinea-Bissau, judicial/executive relations**
Attorney-General 166, 178
constitution, Portuguese influenced 161
courts independence constitutionally guaranteed 174
courts, independence of 171
customary law, recognition of 163–5
judicial/executive power, distribution of 166
judicial appointment 178
judicial supervisory bodies, appointment to 178
judiciary, subordinate in political system 168
pardon/commute sentences 179
rule of law constitutionally based 170
separation of power constitutionally based 170
*see also* **Lusophone Africa, judicial/executive relations**

**Hispanophone Africa**
colonial patterns, reduction in 24
constitutional tradition 48, 52
Equatorial New Guinea 47
separation of powers, French model 61–2, 68, 82
Spanish civil law inheritors 2, 23, 24, 47
Western Sahara 47
**homosexuals** 317–20, 389
**House of Chiefs** 36, 103
**House of Federation** 6, 269–71
**House of Representatives**
Nigeria 135, 137, 142, 144, 151
United States 62
**human rights**
abusers 35
colonial administrators and 18
constitutions and 42
customary law and 38
hybrid institutions 333, 342
independence constitutions 15–16
international law impact 2
Namibia 389

**human rights** (*cont.*)
protection of 21
socialist-styled constitutions 27–8
violations of 18, 20, 333
*see also* **bill of rights**
**human rights commissions**
accountability and 76, 88–9, 333
South Africa 50, 327, 341
United Nations 175
Zimbabwe 328
**hybrid institutions**
abuse of powers, smokescreens for 330–1
accessibility to 333
accountability and 49–50, 59, 89–90, 325–7, 329–30, 334, 335–7, 340–3
Auditor-General *see* **Auditor-General**
constitutionally entrenched 327–8, 329, 330, 334–5
corruption 333
creation of 327
critical review of 330–4
decision implementation 332–3
elected officials compared 330
enhancing the role of 334
financial autonomy 336
fourth branch of government, as 88, 325, 343
funds shortage 332
history of 329
human rights commissions *see* **human rights commissions**
independent 325, 326, 338
influence/power roles 336
international law 339–40
judicial review 336
location within government 328–9
non-majoritarian argument 330
ombudsman *see* **ombudsman**
politicians, manipulation by 331, 335, 337
principles of 335–7
protection from government 334
Public Service Commission *see* **Public Service Commission**
regulatory nature 327
risks associated with 333
separation of powers and 88, 330, 342–3
South Africa and 327, 329–30, 332–8
terms used, variety of 326
transparency, promotion of 90
'watchdog' role 325
**'hyper-presidentialist'** 190

**ideological influences**
African socialism 25–6
anti-colonial 25
community land ownership 26
democratic centralism 27
doctrinaire socialism 26
father-capitalism 26
Marxist–Leninist 25
ruling party, constitutional entrenchment 27
social influences 25, 26
**impeachment**
chief executive 260
judges 275
presidents 4, 63, 112, 123, 125, 131, 191, 260
state governors 261
**indigenous influences**
constitutional institutions/principles 34
customary law 34, 36, 38
dual system of courts 36
'modernists' 35
*ordre public* 34
repugnancy test 34
traditional council 33
traditional courts 34–5, 36, 37, 38, 40
traditional institutions 36, 37, 40
traditional rulers 33–7, 40
'traditionalists' 35, 36
*ubuntu,* concept of 38–9
**internationalization influences**
global level 41–3
process of 41
regional 43–5
**Iran–Contra** 64
**Islam**
constitutions, influence on 30–3

**Jihadist groups** 30, 31
**judges** *see* **judiciary**
**judicial appointments**
Anglophone constitutions 73–4, 78
Botswana and 74, 218
Francophone systems 67
Lusophone systems 4
reducing executive influence 215
South Africa 74
Zimbabwe 73
**judicial authority**
backlash against decisions 209, 391
meaningfully independent 222
Ugandan challenge 210–11
**judicial autonomy**
decisional independence 271–2
judicial/legislative relationship 271
jurisdiction stripping 275
legislative reversal of judgments 272–4
ouster clauses 277–82
structural autonomy 275–7
**judicial independence**
judicial autonomy *see* **judicial autonomy**
branches of government and 169
*de jure/de facto* 169
meaning of 271–2
guaranteed in constitutions 173–6
Lusophone Africa 169, 173–6
protection of 247
right of pardon 87
salaries and 74, 255
threat to 87
undermining of 171, 172
**judicial/executive relations**
Anglo-American influence 69, 73–8
Anglophone Africa *see* **Anglophone Africa, judicial/executive relations**
Cape Verde *see under* **Cape Verde**
Francophone Africa *see* **Francophone Africa, judicial/executive relations**
French hybrid *see under* **French hybrid system**

Ghana *see* **Ghanaian judicial/executive relations**
Guinea-Bissau 166
judicial subordination 206, 207–12, 221–2
judicial supervisory bodies, appointments to 176–9
judicial supremacy 206
judicial survival 206, 212–16, 221–2
judiciary, appointment of 176–9, 180
judiciary, politicized by government 209–12
Kenya *see* **Kenyan judicial/executive relations**
Lusophone Africa *see* **Lusophone Africa, judicial/executive relations**
Mozambique 167
Namibia *see* **Namibian judicial/executive relations**
Nigeria *see* **Nigerian judicial/executive relations**
Príncipe 167
São Tomé 167
South Africa *see under* **South Africa**
virtuous alignment 207, 216–21
**judicial/legislative relations**
Anglophone Africa *see* **Anglophone Africa, judicial/legislative relations**
Francophone Africa *see* **Francophone Africa, judicial/legislative relations**
**judicial power**
American presidential system 62–3
constitutional amendment to restrain 210
excessive 215
executive exercise of 75–6
expansion of 209, 210, 212–14
indigenous influences 33, 34, 40
judicial review *see* **judicial review**
judicial subordination *see* **judicial subordination**
judicial supremacy *see* **judicial supremacy**
judicial survival *see* **judicial survival**
legislative powers, judicially exercised 79–80
Lusophone Africa and 159, 165
Nigeria 135, 136
political question doctrine 215, 394
Príncipe 179
credibly independent power 208–9
São Tomé 179
solution to separation of powers problems 205
South Africa 219
strategic assertion of 211–12
*see also* **virtuous alignment**
**judicial precedent, doctrine of** 65, 88
**judicial review**
Benin 2
constitution entrenchment 5
'double-edged sword' 212–13
Ethiopia 283
executive action and 63, 85, 86, 104
Francophone Africa 2, 366
Ghana 5, 77, 227, 231
Hispanophone Africa 52
hybrid institutions 336
Kenya 295, 298
'legality' 355
legislative acts, of 87–8
Lusophone Africa 52
Nigeria and 136, 215, 239, 243–5, 262, 263
power of 243, 244
prosecutorial decisions 353–6
public prosecutor, insulated from 345
South Africa 336
**Judicial Service Commission**
accountability function 327, 335
Anglophone Africa 50
constitutional entrenchment 327
hybrid institution 335
judicial appointments 73–4, 289
Kenyan 124, 289, 291–2, 298
Namibian 103, 311, 312, 315, 316
Nigerian 136, 250, 251, 256
South African 252
**judicial subordination**
courts, destruction of 207
executive power ignoring courts 207
fear and intimidation 206
puppets/pawns, placement of 206
**judicial supremacy**
access to justice as a constraint 214
appointment procedures 215
excessive power 215–16
extensive independent power 212–13, 214–15
political fragmentation 213–14
political question doctrine 215–16
social justice 214
**judicial survival**
apartheid-era judges 208
credibly independent authority/power 207–9
Egypt and 208, 210
executive, tolerance by 207
judicial power, roll back 209
Latin American dictatorial rule 207–8
strategic assertions 211–12
subordination 207
Zimbabwe, executive reprisals 209–10
**judiciary**
apartheid era 208
appointments *see* **judicial appointments**
binding precedent 79
control over executive 74
empowered 291
executive functions exercised by 76–8
executive power and 177–8, 180, 207
financing 239, 253
governments politicizing 209–10
independence of *see* **judicial independence**
judicial review 87
judicial subordination *see* **judicial subordination**
judicial supremacy *see* **judicial supremacy**
judicial survival *see* **judicial survival**
legislature, control and management by 78–9
moral ambiguity for 208
physical violence/imprisonment 209–10
political interference, protection from 74
power *see* **judicial power**
practice and procedure rules 80
salaries 78, 253, 255
weakest organ of government, as 226
western origin/traditional mechanisms 163–5
**jurists**
Lusophone Africa 159–60, 162

**Kenya**
Attorney General 73, 120–1, 124
bill of rights 291, 293
coalitions 106, 118–19, 125–6, 129, 130, 133
constitution *see* **Kenyan constitution**
constitutional courts 391
Director of Public Prosecutions 346
hybrid institutions 328, 333
judicial/executive relations *see* **Kenyan judicial/ executive relations**
'judicialization' 216
legislative/executive relations *see* **Kenyan legislative/executive relations**
National Assembly 103, 105, 110, 112, 118, 123–33, 292–3, 296, 346
political question doctrine 394
prerogative of mercy 75
president 3, 101–3, 123
presidentialism 3, 104–5
prosecutorial independence 346
Senate 116–18, 123–34
separation of powers 116, 122
socio-economic rights 392
speaker 111, 129
**Kenyan constitution**
constitutional framework 122–3
constitutional referendum 2005 121
constitutional review process 119–22
insider–outsider dynamic 388, 390
international human rights 42, 43
US/Westminster elements 3
**Kenyan judicial/executive relations**
Attorney-General 103, 123, 291
Attorney-General, redraft of constitution 120–1
Bill of Rights 291
checks and balances 286, 288, 294
constitution, enforcement of provisions 294–5
executive authority, judicially questioned 295–8
executive power over judiciary, post-2010 291–3
independence constitution 287–9
introduction 286–7
judges, appointment of 289, 292–3, 298
judges, removal of 293
'judicial activism', public criticism of 297–8
judicial independence 290, 291, 294
judicial oversight, post-2010 294–8
judicial review 295–8
Judicial Service Commission 291–3, 298
judiciary, emergence of emboldened 298
Judiciary Fund 293
pre-2010 287–90
rule of law, threat to 297–8
separation of power 76
**Kenyan legislative/executive relations**
American-style structure 117–18
assessment of 125–7
bicameral system 117, 123, 126
budget-making process 132–3
cabinet members, appointment of 105–6
censure by parliament 108
centralization of power 118
checks and balances 117, 119, 120, 122, 130
constitutional framework 122–3
constitutional referendum 2005 121
constitutional review process 119–22
elections 125–6
executive action, confirmation of 107
executive, oversight of the 122, 130–2
executive responsibilities 106
'extensions of colonial rule', dismissal of 116–17
governmental power, division of 123
law-making process 127–30
legislative deadlock 128
*majimbo* 116
National Constitutional Conference 120–1
national executive 123–4
national legislature 123, 124–5
parliament, democratic composition of 109–10
patterns of interaction 111–12
political parties 118–19
president 101
president as supreme executive 103
president, impeachment of 123, 131
presidential assent to laws 111
presidential power, democratic legitimation 102
presidential system of government 116, 119, 122–3, 133
prime minister 120
Senate 116–18, 123–34
speaker 111, 128, 129
separation of power 70, 72, 116, 120, 122
**Kenyatta, President Uhuru** 101, 129

**legislative/executive relations**
Anglo-American model *see under* **Anglo-American model**
Anglophone Africa *see* **Anglophone Africa, legislative/executive relations**
Francophone Africa *see* **Francophone Africa, legislative/executive relations**
Kenya *see* **Kenyan legislative/executive relations**
Namibia *see* **Namibian legislative/executive relations**
Nigeria *see* **Nigerian legislative/executive relations**
Zimbabwe *see under* **Zimbabwe**
**legislative/judicial relations**
Anglophone Africa *see* **Anglophone Africa, judicial/legislative relations**
Ethiopia *see* **Ethiopian legislative/judicial relations**
Francophone Africa *see* **Francophone Africa, judicial/legislative relations**
French hybrid *see under* **French hybrid system**
**legislature**
American presidential system 63
British parliamentary system 64–5, 68
constitutional role 136–9
French hybrid 66
Kenya 123–5
law-making powers 72
legislative/executive relations *see* **legislative/ executive relations**
legislative/judicial relations *see* **legislative/ judicial relations**
**lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights** 7, 219

**LGBTI rights** *see* **lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights**
**liberation movements**
Angolan 173, 182, 183, 186, 187, 192, 193
Mozambican 173
Namibian 300, 301, 302, 304, 306, 307, 388
South African 200, 201
**Locke, John** 59, 60, 88
**Lusophone Africa**
Angola *see* **Angola**
Cape Verde *see* **Cape Verde**
constitutional tradition 52
customary law 163–5
judicial/executive relations *see* **Lusophone Africa, judicial/executive relations**
Guinea-Bissau 166
Mozambique *see* **Mozambique**
Portuguese law, influence of 160–3, 180
Príncipe *see* **Príncipe**
rule of law 169–70
São Tomé *see* **São Tomé**
separation of powers 169–70
**Lusophone Africa, judicial/executive relations**
Angola *see* **Angolan judicial/executive relations**
Attorney-General, appointment of 168, 171, 176–9
Cape Verde *see* **Cape Verde, judicial/executive relations**
conflict resolution, traditional mechanisms 160, 163–5, 180
courts, independence of 171–3, 180
customary law 163–5
government power 172
Guinea-Bissau *see* **Guinea-Bissau, judicial/executive relations**
introduction 165–9
judges, appointment of 176–9, 180
judicial independence constitutionally guaranteed 173–6
judicial independence *de jure/de facto* 169
judicial supervisory bodies, appointments to 176–9
judiciary, politicized by government 209–10
judiciary, subordinate in political system 168
jurists beliefs 159–60, 162
magistrates' training 161, 162, 171, 175, 180
Mozambique *see* **Mozambican judicial/executive relations**
overview 159–60
pardon and commute, power to 179–80
Portuguese law, historical influence of 160–3, 180
Príncipe *see* **Príncipe, judicial/executive relations**
rule of law 168, 169–70, 173
São Tomé *see* **São Tomé, judicial/executive relations**
separation of powers in constitutions 169–70

**Madagascar**
constitution 19, 22, 27, 28
Marxism–Leninism ideology 19
right to private property 28
scientific socialism 26
***majimbo*** 116, 133
**Malawi**
anti-corruption agencies 331
human rights instruments 43
public prosecutor 347, 357
traditional courts 37, 38
**Marxism–Leninism**
Angola 19, 197
influence of ideology 25
**Mauritius**
multipartyism 18
prosecutorial decision, judicial review of 354
**Mbeki, President Thabo** 338
**mediation**
ceasefire agreement 184
legislative deadlock 127–9
public prosecutor and 365
**military coup**
Ethiopia 266, 280
Ghana 5, 227, 232, 235
Nigeria 6
**military court**
Lusophone Africa 166–7, 177, 190
**military culture**
entrenched in Nigeria 150–1, 153
**military government**
Ethiopia 266, 280
Ghana 232–6
Nigeria 239, 240, 245, 263
**military rulers**
reappearance of 388
***Ministère Public*** 360, 362–4, 368, 370, 374, 376
**Mobutu, President** 18, 20
**'modernists'** 35
**monarchy**
absence in Africa 3, 95
absolute 37
heads of states, monarchical 102
prerogatives and 104–5
public prosecutors of the 360, 361
**Montesquieu** 59, 60, 63, 66, 88, 193, 269
**Morocco**
constitution 22
hybrid institutions 328
Islamic influence 30, 32–3
**Morsi, Mohamed** 31
***Movimento Popular de Libertação de Angola* (MPLA)**
Angolan liberation movement 182, 183, 186, 187, 192, 193
**Mozambican judicial/executive relations**
Attorney General 174, 178
constitution, Portuguese influenced 161–2
courts, independence of 171, 172–3
courts independence constitutionally guaranteed 174–5
customary law, recognition of 163–5
judicial/executive power, distribution of 167
judicial appointment 178–9
judicial supervisory bodies, appointments to 178–9
judiciary, subordinate in political system 168
pardon and commute sentences 179
rule of law constitutional proclamation 170

**Mozambican judicial/executive relations** (*cont.*)
separation of power, constitutional proclamation of 170
*see also* **Lusophone Africa, judicial/executive relations**
**Mozambique**
conflict resolution, traditional mechanisms 163, 180
judiciary/executive relations *see* **Mozambican judicial/executive relations**
liberation movements 173
Lusophone system 82
**MPLA** *see* ***Movimento Popular de Libertação de Angola*** **(MPLA)**
**Mubarak, Hosni** 22, 31, 208
**Mugabe government** 209–10
**multi-party democracy**
Angola 184, 198
arguments against 19
emergence of 271
Ghana 109
ideological option 96
Kenya 287
reinstating 387
South Africa 198
**Museveni, President** 210–11
**Muslim Brotherhood** 31
**Muslims**
constitutions, influences on 30–3

**Namibia**
bill of rights 301, 303–4, 306, 312
judicial/executive relations *see* **Namibian judicial/executive relations**
judiciary, independence of 306–8
legislative/executive relations *see* **Namibian legislative/executive relations**
liberation movements 301, 302, 304, 306, 307, 388
National Assembly 105, 108, 111, 112, 317
ombudsman 103, 104
president 101–3
rule of law 306
separation of powers 320–1
speaker 111
**Namibian judicial/executive relations**
Attorney-General 100, 103, 310–12, 315–16, 320
bail denial 308
Bill of Rights 301–2
diverse approaches, introduction to 300–1
executive statements, interference by 317–20
homosexuals, constitutional rights of 317–20, 389
human rights issues 302–3, 318
judges, ethnic deconstruction of 306–8
judges, rhetorical attacks on 391, 320
judicial independence 306–8
judicial independence, threatened by conflicts 301
judiciary, disregard for 302–4, 308–10, 320–1
judiciary, distrust of 307–8
*Katofa* case 302–4
liberation movements 300–2, 304, 306–7, 388
magistracy, independence of 312–16, 320
Magistrates' Commission 315
prosecutions, manipulation of 304–6
Prosecutor-General, independence of 310–12, 320
*Shifidi* case 304–6
sodomy 317
South African influence 300, 303, 304–6
transitional government of national unity (TGNU) 301–6
**Namibian legislative/executive relations**
censure by Parliament 108
executive action, confirmation of 107–8
executive responsibilities 106–7
parliament, democratic composition of 110
patterns of interaction 112
presidential assent to laws 111
presidential power, democratic legitimation 102
presidents 101–2
presidents as supreme executives 103
speaker 111
**National Assembly, by country**
Angola 173, 177–8, 184–7, 189–92, 194–6
Botswana 79
Ghana 227
Guinea-Bissau 178
Kenya 103, 105, 110, 112, 118, 123–33, 292–3, 296, 346
Namibia 105, 108, 111, 112, 317
Nigeria 135, 137–47, 151–3, 241–4, 252, 254, 258–62
Príncipe 179
São Tomé 179
South Africa 70, 74, 76, 78, 102, 108, 110, 112–13, 335
**National Director of Public Prosecutions** 104, 348
**National House of Chiefs** 37
**National Judicial Council**
Chief Justice of Nigeria 247
composition of 247
judges' salaries 255
judiciary, funding for the 253–6
judiciary, support systems 256
President of the Court of Appeal, suspension of 248–50
State Chief Judges, appointment of 251–3
**Nigeria**
bill of rights 16
corruption 146–7
elections in 153, 388
judicial/executive relations *see* **Nigerian judicial/executive relations**
legislative/executive interaction *see* **Nigerian legislative/executive relations**
military rule 141, 147, 149, 152, 239, 385, 388
National Assembly 135, 137–47, 151–3, 241–4, 252, 254, 258–62
political question doctrine 215, 394
Senate 135, 137, 142–4, 246, 252, 260, 347
separation of powers 135, 140, 153, 244–6
socio-economic rights 392, 393–4
State Houses of Assembly 137, 153
traditional rulers 37
**Nigerian judicial/executive relations**
adaptive legislation 259–62

Attorney-General 347
checks and balances 239, 240, 242
Code of Conduct for Public Officers 247
collusion between executive/judiciary 250
Commonwealth (Latimer House) Principles 247
constitutional history 239–41
court orders, flouting of 263
executive action cases, judicial response to 256–9
executive power, constitutional provision 241
judges' appointment, discipline, and removal 246–7
judges' salaries 255
Judicial Code of Ethics 247
judicial independence, protection of 247, 254
judicial power, nature/scope of 135, 243–4
judicial review 136, 215, 245, 260, 263
judiciary, funding for the 253–6
judiciary, support systems 256
National Judicial Council *see* **National Judicial Council**
political questions, judicial review of 260–2
President of the Court of Appeal, suspension of 248–50
sensitive constitutional matters, judicial avoidance of 262, 263
separation of powers, meaning/scope of 244–6
State Chief Judges, appointment of 251–3
**Nigerian legislative/executive relations**
accountability, enforcement of 146–7
checks and balances 135, 136, 138, 153
conflict, causes of 147–53
corruption 146–7
'covering the field' doctrine 138
due process, non-adherence to 149–50
executive, constitutional role of 139–41
executive high-handedness 152–3
executive power 135, 241–3
judicial functionaries, appointments of 143–4
legislative lists 137
legislative oversight, unhealthy rivalry following 148–9
legislative powers 135
legislature, constitutional role of 136–9
military culture, entrenched 150–1, 153
political functionaries, appointment of 143–4
power to make laws 142–3
president 139–46
president, impeachment of 135, 241
presidential system, features of 136, 140–1, 148, 153
public expenditure powers 145–6
rule of law, non-adherence to 149
separation of powers 136, 140, 153
state of emergency, power to declare 144–5
transparency, enforcement of 146–7
war, power to declare 144–5
***nolle prosequi*** 351
***Ntlo ya Dikgosi*** (House of Chiefs) 36

**Obasanjo, General Olusegun** 151
**ombudsman**
Angola 172, 328
hybrid institution of accountability 59, 88, 89, 326–7, 333
Namibia 103, 104
South Africa 329, 335
**ouster clauses** 277–82

**pardon**
right of 87
power of, Lusophone Africa 179
**parliamentary sovereignty** 95, 109, 114, 227
**parliamentary systems**
American *see* **American presidential system**
Anglophone Africa 113
British *see* **British parliamentary system**
control and check 331
democratic composition 109–10
Francophone Africa 84
one-party 20
presidential assent to laws 111
speakers 111
sovereignty *see* **parliamentary sovereignty**
Westminster tradition 3, 111
**pledge of allegiance** 99
**political instability** 17, 20, 340
**political question doctrine**
Kenya 216, 394
Nigeria 6, 215, 394
rejection of 394–5
**Portuguese law**
Lusophone Africa, influence in 160–3, 180
**prerogative of mercy** 75, 244
**presidential powers**
absolutism 199–201
abuse of state power/resources 70, 116–17
appointment powers 103–4, 107, 120, 143
checks and balances on 240
court orders, flouting of 298
democratic legitimation of 102
executive power, control of 107
imperialism 342, 381
pardon and commute sentences 179
reduction of 3
reinforcement of 22
**presidential systems**
American *see* **American presidential system**
Nigerian, features of 140–1
**presidentialism**
aim of 3
American *see* **American presidential system**
Anglophone Africa 100–5
executive responsibility and 114
presidents *see* **presidents**
super-presidentialism *see* **super-presidentialism**
**presidents**
Anglophone Africa 100–5
executive authority of 105–8
head of state functions 103
immunity from proceedings 101–2
impeachment of 84, 88
imperialism 342, 381
judicial rulings 219
powers of *see* **presidential powers**
presidential assent to laws 111
presidentialism, uniqueness of African 104–5
powerful presidencies 100–2, 393
supreme executives, as 102–4

**Príncipe, judicial/executive relations**
Attorney General 179
constitution, Portuguese influence 161–2
courts, independence of 171
courts independence constitutionally guaranteed 176
judicial/executive power, distribution of 167
judicial appointment 179
judiciary, management of the 167
judiciary, subordinate in political system 168
National Assembly 179
pardon/commute sentences 179
public prosecutors 167
rule of law, constitutionally based 170
separation of powers, constitutionally based 170
*see also* **Lusophone Africa, judicial/executive relations**
**public expenditure**
appropriation/authorization of 141, 145–6
legislative/executive interaction 141, 145–6
budget-making process 132–3
Kenya 132–3
Nigeria 141, 145–6
**public interest concept**
broadness of 352–3
decision not to prosecute 351–2
national security 357
principle of 360
prosecutors and 346, 347, 351, 359
scope of 352
utilitarian attitude towards 356
**public prosecutor**
Anglophone Africa *see* **public prosecutor, Anglophone Africa**
Francophone Africa *see* **public prosecutor, Francophone Africa**
Lusophone Africa *see* **public prosecutor, Lusophone Africa**
**public prosecutor, Anglophone Africa**
adversarial systems 346
appointment of 346
Attorney-General 73, 345–7, 350
constitutional setting of 7, 345–8
decisions, disclosure of reasons 357
Director of Public Prosecutions 357
evidentiary test to justify a trial 351
Ghana 347, 351
independence of 347–8
international guidance on role of 349–50
judicial review of decisions 353–6
Kenya 346
Malawi 357
national security protocol 354–5, 357
Nigeria 347
*nolle prosequi* 351–2
opportunity principle 365
prosecutorial discretion 357, 358
prosecutorial guidelines, issue of 357
prosecutorial independence 358
public interest test 351–3, 357
reviews by 357
rule of law 345, 346, 349, 350–3
separation of powers and 345
Sierra Leone 347
South Africa 348, 352
United Kingdom model 347–8, 353–4
victims appeals, 357–8
Zambia 347
**public prosecutor, Francophone Africa**
abuse of power 374–6
anomalous status of 365–6
complex position of 345–6
*Conseil Supérieur de la Magistrature* (CSM) 50, 67, 366–7, 379
constitutional power to appoint/promote/transfer/discipline 366–8, 376
dictatorship era 360
European human rights system, influence of 378, 380
executive interference 371
executive power of instructions and recommendations 370, 375
fair trial rights 378
financial/logistical resources, executive control of 368–9
French civil law tradition 359
French reforms 371–3
functions of 363–5, 377
'high profile cases', prosecution of 379
historical origins of the French model 360–3
independence of office 361, 375
inquisitorial systems 346
*interest rei publicae ne maleficia remaneant impunita,* rule 360
judicial officers, trend to recruit early 369
judicial role of 377, 378
judicial system/organization, French model 362
judiciary, independence of 367
judiciary, relations with/independence from 376–80
*juge d'instruction* 364
legality of prosecution, principle of 365
*magistrate* 369
*Magistrature* 370, 376
mediation of sentences 365
*Ministère Public* 360, 362–4, 368, 370, 374, 376
Ministry of Justice, subordination to 368–76
multiple executive hierarchical systems, control by 369, 370
*non-lieu* 362
preliminary investigations 363
*premier magistrate* 369
*procuralores* 360
*Procureur Général* 364, 377
reform of system 381
*régalienne* 364
sharing functions 364, 365
subordination culture to executive 369
training 377–8
weakness of model 380–1
**public prosecutor, Lusophone Africa**
Angola 166
Cape Verde 166
generally 166–7
Guinea-Bissau 166
Mozambique 167
Príncipe 167
São Tomé 167

**Public Protector**
Nklanda scandal 332
South Africa 50, 327, 329, 336, 367
**Public Service Commission**
accountability function 103, 327
constitutional entrenchment 327–8
constitutional organ, as 315
Ghana 103
Kenya 295
Namibia 103
quasi-judicial role 76
South Africa 335

**quasi-judical bodies**
Ethiopian cases 279–82
examples of 278–9
*see also* **ouster clauses**

***régalienne***
public prosecutor, role in Francophone Africa 364
**religious influences**
blasphemy, prohibition of 31
constitutional provisions 30
freedom of worship 33
Islamic law 30–3
jihadist groups 30
Muslim Brotherhood 31
sharia law 30, 33
women, constitutional rights 31, 33
**repugnancy test** 34
**responsibility**
executive 114
individual and collective ministerial 71
**rule of law**
advancement of 298
Angola 182, 186, 187, 188–9
civil law tradition and 88
concentration of powers and 58
contemporary constitutions and 97
courts, independence of 74
Ethiopia 265, 272, 279, 281, 283
Ghanaian judicial/executive relations 229
hybrid institutions, role of 90
independent judiciary as guardian of 294
Kenyan judicial/executive relations 288, 294, 296, 297, 298
legislative/executive relations and 147, 149–50
Lusophone Africa 168, 169–70, 173
military culture and 150, 151
Namibia and 306
Nigerian judicial/executive relations 245, 259
non-adherence to 149–50
public prosecutions, Anglophone Africa 350–3, 356, 358
public prosecutions, Francophone Africa 371, 381
respect for 89, 101, 124, 146, 149, 343
threat to 297, 310
Uganda 211
Zimbabwe 209
**Rwanda** 17, 38, 49, 82, 341

**Sadat, President** 208
**same-sex marriage** 389
*see also* **LGBTI rights** *and* **homosexuals**
**São Tomé, Democratic Republic of**
judiciary/executive relations *see* **São Tomé, judicial/executive relations**
socialist-styled constitution 26
**São Tomé, judicial/executive relations**
Attorney General 179
constitution, Portuguese influence 161–2
courts, independence of 171–3, 176
judicial appointment 179
judiciary, subordinate in political system 168
National Assembly 179
pardon/commute sentences, power to 179
power, distribution of 167
rule of law, constitutionally based 170
separation of power, constitutionally based 170
*see also* **Lusophone Africa, judicial/executive relations**
**scientific socialism** 19, 26, 27
**Senate, by country**
Kenya 110, 116–18, 123–33
Nigeria 135, 137, 142–4, 246, 252, 260, 347
United States 62, 63, 118
**Senegal**
constitution, Muslim influence 30
executive/judicial relations *see* **Francophone Africa, executive/judicial relations**
executive/legislative relations *see* **Francophone Africa, executive/legislative relations**
francophone influence 82, 83
judicial/legislative relations *see* **Francophone Africa, judicial/legislative relations**
multi-partyism 18
public prosecutor 364, 365, 366, 368, 370, 371, 372, 376, 377, 381
traditional dispute settlement system 35
**separation of powers, Anglophone Africa**
Anglo-American influence 69
judicial/executive branches 73–8
judicial/legislative branches 78–81
legislative/executive branches 70–3
**separation of powers, doctrine of**
abuse of power, prevention of 58, 269
accountability 69, 359
American presidential system 62–4
Anglophone Africa *see* **Anglophone Africa, separation of powers**
Angolan 187–9
British parliamentary system 64–6
checks and balances *see* **checks and balances**
constitutional legitimacy 385–91
critical aspects of 58, 59, 67–9
entrenched in post-1990 constitutions 58, 89
Francophone Africa *see* **separation of powers, Francophone Africa**
hybrid institutions 342–3
Locke, John 59, 60, 88, 392
Lusophone Africa 169–70
models of 61–2
Montesquieu 59, 60, 63, 66, 269
negative perception of 9, 392, 393–4
origins and nature of 59–61

**separation of powers, doctrine of** (*cont.*)
political despotism, prevention of 269, 392
political question doctrine 394–5
'pure' theory of 60–1, 62
socio-economic rights and 392–4
triad division of power 59
tyranny, prevention of 58, 61, 89, 68, 330, 386, 392
**separation of powers, Francophone Africa**
French hybrid model 62, 66–7
French influence 82
judicial/executive branches 85–7
judicial/legislative branches 87–8
legislative/executive branches 82–5
**sharia law** 30–3
**Sierra Leone**
anti-corruption agencies 331
Attorney-General 347
public prosecutor 347
**socialism**
dependence on capitalism 25–6
**socialist-styled constitutions**
African socialism 25
Benin 29
communism 25, 26, 27
developmental formulation 26
doctrinaire socialism 25, 26
human rights and 27–8
language/style influence 26
Marxist–Leninist influences 25
ruling party, entrenchment of role 27
scientific socialism 26
single-party system 27
social transformation, designed for 25
whole society 26
**socio-economic rights** 392–4
**sodomy** 317
**Sokoto state governorship** 248–50
**Somalia**
Al-Shabaab and 31
new constitution 22
public administration collapse 197
third generation of constitution-building 22
traditional institutions 40–1, 197–8
**South Africa**
Attorney General 73
bill of rights 39, 302, 306, 338
'cadre deployment' 332
constitutionalism 219
corruption 330
death penalty 219
hybrid institutions 327, 329, 332–5
judicial appointments 73
judicial/executive relations 74, 77, 211–12
judicial rulings, acceptance of 219
judicial subordination to survival 211–12
legislative/executive interaction *see* **South African legislative/executive interaction**
lesbian, gay bisexual, transgender, and intersex (LGBTI) equality 219
liberation movements 200, 201
National Assembly 70, 74, 76, 78, 102, 108, 110, 112–13, 335
National Director of Public Prosecutions 104, 348
prerogative of mercy 75
revolutionary constitutionalism 388
same-sex marriage 389
socio-economic rights 392, 393–4
transparency, promotion of 50
**South African legislative/executive interaction**
cabinet members, appointment of 106
censure by parliament 108
executive action, confirmation of 108
executive responsibilities 107
parliament, democratic composition of 110
patterns of interaction 112–13
presidential assent to laws 111
presidents 101–2, 104
presidents as supreme executives 103
separation of powers 70
**South West Africa National Union (SWANU)** 300, 301
**South West Africa People's Organisation (SWAPO)** 300, 301, 302, 304, 306, 307, 388
**speakers** 111
**state of emergency**
power to declare, in Kenya 124
power to declare, in Nigeria 144–5, 262
**Sudan** 22, 40, 385
**super-presidentialism**
Angolan 189–201
constitution-making process, road to a democratic 184–7
constitutional principles 188
constitutional reforms 184
constitutional status, pre-independence 182–4
dual vote, obligatory 189–91
multi-party democracy 184
presidential absolutism 191–201
rule of law, constitutional and democratic 188–9
separation of powers 187–9
**Swaziland**
absolute monarchy 37
constitutionalism and 37
duties 45
religion, constitutional provision 30
traditional rulers, constitutional recognition 36

**'third wave' of democratization** 20–2
**traditional courts** 34–5, 36, 37, 38, 40
**traditional institutions** 36, 37, 40
**traditional rulers** 33–7, 40
**'traditionalists'** 35–6
**transparency**
Anglophone constitutions 50
enforcement of 146–7
hybrid institutions 59, 333, 336
public office appointments 296
public prosecutor 358, 359, 382
separation of powers and 68–9, 90, 141
**tribalism**
multi-partyism and 19
**Tunisia**
Arab uprisings 30
constitution of 22
dictators 22
hybrid institutions 51, 328

Islam, influence on constitution 31–3
socialist influence 26
***tutela***
Colombia and 214
**tyranny, prevention of**
separation of powers 61, 89, 330, 386, 392
Tunisian constitution 29

***ubuntu,* concept of** 38–9
**Uganda**
Attorney-General 347
judicial/executive relationship 210–11
rule of law 211
**UNITA** (União Nacional para a Independência Total de Angola) 184, 186, 193, 309, 310
**United Kingdom**
Attorney-General 347–8, 350, 352–4, 357
Director of Public Prosecutions 354
judicial review of prosecutorial decisions 353–6
*see also* **British parliamentary system**
**US Constitution** 60, 62, 63, 64, 99, 100, 104, 141, 386, 395–6

**Victims' Code** 357
**virtuous alignment** 207, 216–21, 222

**war**
power to declare 141, 144–5, 190
War on Terror 64
**watchdog**
function of parliament 98
institutions 50, 325
legislature 148
**Western Sahara** 47
**Westminster constitutional system**
Anglophone Africa and 2–3, 24, 95, 111
Botswana 69
common law tradition 52
constitutional institutions 95
dualism 114
Kenya 116
legislative/executive interaction 109, 111, 114
monism 99
presidents and 100, 196
prime-ministerial model 101, 107
separation of power model 62
South Africa 200
written constitution, absence of 98
**women**
constitutional rights of 31
customary law and 38
Islam and 33
Kenyan National Assembly 110

**youth**
customary law and 38

**Zaire** *see* **Congo, Democratic Republic of**
**Zambia**
Attorney-General/DPP tensions 347
customary law 38
traditional courts 35
**Zimbabwe**
abuse of power, constitutional provisions 71–2
anti-corruption agencies 331
Attorney-General 73, 209
constitution 22, 49, 69
court packing 391
customary law 38
duties 45
homosexuals 317
hybrid institutions 50, 326, 328, 333, 337, 342
'independent commissions supporting democracy' 326, 328
international law 43
judicial/executive relations 76, 209–10
judiciary/legislative, separation of powers 81
judicial appointments 73
judiciary, independence of 50
judiciary, political interference protection 74
judiciary, politicized by government 209–10
legislative/executive, separation of powers 70
'peoples' rights' 44
prerogative of mercy 75
religion, constitutional provision 30
rule of law 209
traditional chiefs 37
traditional courts 36, 38
**Zuma, President** 329, 332, 338, 348