

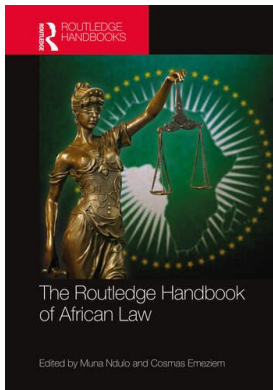
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Muna Ndulo, Cosmas Emeziem

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ONE NATION, MULTIPLE IDENTITIES

Ethnicity, inclusivity, and constitution-making

Muna Ndulo

Introduction

The degree of ethnic, religious, or cultural fragmentation may shape the tasks the constitution must assume and the kinds of procedures that are helpful in achieving those tasks. For example, the violence that followed a disputed election result in Kenya in early 2008 shattered the country's record of peace and stability and threatened to redraw Kenya's once cosmopolitan ethnic map in several areas of the country (Hourel 2008). Over a thousand people were killed and hundreds of thousands were internally displaced in the violence that ensued. The speed with which the violence took on ethnic dimensions reminded us that two of the major challenges that continue to plague African states are national integration and the management of diversity in the governance of the states. Most African states comprise multiethnic societies with low levels of ethnic integration. If not managed properly, ethnic diversity can be a curse and source of instability. Yet ethnic diversity, properly handled, can be a source of celebration and a national resource as valuable as any natural resource—consider copper, gold, or timber—that enriches a country's culture and is harnessed to support development. The difficulty is often that many African states have yet to achieve clarity on what political framework will best manage diversity and enable their people to live together in peace and harmony.

Although there is no one easy solution to the problem of ethnic conflict in Africa, constitutional design can offer significant progress toward resolving the matter. To achieve real progress, measures that address questions of inclusiveness, economic development, equitable access to resources, and inclusiveness in the governance of the state must be a part of the constitution-making process. Inclusiveness is a core value of democratic governance, especially in ethnically diverse societies, in terms of equal participation in the political process and economy, equal treatment before the law, and equal rights. This implies that all people—including the poor, women, ethnic and religious minorities, Indigenous peoples, and other disadvantaged groups—have the right to participate meaningfully in governance processes and influence decisions that affect their lives. It also means that all groups should have equal access to economic activities, including jobs and business opportunities. It further means that governance institutions and policies should be accessible, accountable, and responsive to disadvantaged groups, protecting their interests and providing diverse populations with equal opportunities to access public services such as justice, health, and education.

The peace agreement reached in Kenya after the 2007 elections identified poor constitutional design as one of the major causes of the Kenyan crisis. This chapter contends that a poorly designed constitution can hinder inclusiveness and thereby promote ethnic grievances and conflict. It further seeks to identify key issues that must be addressed in the constitution-making process to address diversity and inclusiveness and promote a sense of citizenship and citizen-ownership of the political process in a nation-state that is made up of diverse groups of people. Unless African states manage diversity in their respective nation-states and build institutions that are inclusive, promote economic development, stability, and enfranchisement, as well as consolidate political harmony, the threat of disintegration will always persist, and many of these states will continue to face demands for self-determination by minority groups who feel marginalized and wish to have greater management of their own affairs (*Economist* 2000, 17).

Africa has been strife-torn for most of the postcolonial era and has been the scene of some of the most intractable conflicts in modern times. Rwanda, for example, was the scene of the world's largest genocidal massacre in half a century (HRW 1999b; see, also, Anglin 2002). Liberia, Sierra Leone, Côte d'Ivoire, Sudan, and Somalia have all been embroiled in conflict (UN 1998). Indeed, a number of African countries have experienced conflicts that have pitted one ethnic group against another, for example: the Darfur tribes (the Fur, the Massalit and the Zaghawa) in the South against the Arabized northerners in Sudan since 2002; the Hema against the Lendu, since 1999, in the Democratic Republic of the Congo (DRC); and the Tutsis against the Hutus during the 1994 genocide in Rwanda and during the 1993–2005 civil war in Burundi (Reyntjens 2013). In addition, the Gukurahundi massacres in Matebeleland in Zimbabwe in 1983 pitted the Shona against the Ndebele; in 1997, it was the Ijaw against the Itsekiri in the Delta Region of Nigeria; and the failed Caprivi strip secession attempt of 1999 in Namibia had ethnic overtones. In addition to all of these, conflicts flared between the Amhara and the Tigreans in Ethiopia, the Mahareens and the Isaaqs in Somalia, and the Luo and Kalenjin versus the Kikuyu after the 2007 presidential elections in Kenya. Such conflicts seriously undermine Africa's efforts to ensure long-term stability, prosperity, and peace for its peoples (UN 2014).

Conflicts in Africa have typically been rooted in struggles for political power, ethnic privilege, national prestige, and scarce resources (see UN 2014; Harris and Reilly 1998). It is the hallmark of all cultures to have internal dissent. Nathan (2001, 189) stated that conflicts are "inevitable, commonplace and ubiquitous in all societies that comprise diverse groups." The problem in Africa is the frequency and the destructive nature, in both human and economic terms, of such conflicts in already precarious states. The question that arises is what leads a people who have lived together as neighbors for hundreds of years, intermarried and faced challenges together, to begin to see each other as enemies and take up arms and kill each other? Underlying conflicts in Africa are a crisis of governance, marginalization, mismanagement of economies, and poverty leading to a scramble for resources (World Bank 1989). Constitution design and good governance could make a major contribution to national cohesion, economic development, a decrease in the rate of marginalization, and increased access to governance structures, thereby leading to reduction of conflicts. Development seeks to expand choices for all people—women, men, and children of both current and future generations. Development would promote the economic, social, civil, and political realization of human rights through the provision of jobs, elimination of poverty, promotion of human dignity and rights, and by providing equitable opportunities for all. Human rights and sustainable development are interdependent and mutually reinforcing. In conditions of prosperity, where individuals have equal access to resources and institutions that guarantee access to governance, conflicts are less likely

to arise and those that do can be resolved more quickly and peacefully. As the former Secretary-General of the United Nations, Kofi Annan, observed:

In a country where those who hold power are not accountable but can use their power to monopolize wealth, exploit their fellow citizens and repress peaceful dissent, conflict is all too predictable and investment will be scarce. But in a country where human rights and property rights are protected, where government is accountable, and where those affected by decisions play a part in the decision-making process, there is a real chance poverty can be reduced, conflict avoided, and capital mobilized both at home and from abroad.

Annan, Kofi 2000

The answer to Africa's conflict-and-development quagmire lies in establishing democratic *and inclusive* governance in African countries. This calls for a critical examination of governance in Africa, with a view toward identifying the obstacles to establishing good governance. It further calls for the identification of best practices and approaches to developing systems of governance that are inclusive and give political empowerment to all groups. The most important legal instrument in the scheme of good governance is the national constitution. Thus, a major part of the answer to managing diversity lies in the development of African constitutions that lay solid foundations of respect for inclusiveness and fundamental human rights, accommodate diversity, and promote equal access to governance structures. These constitutions, drawn up for the protection of and applied equally to all citizens, should encompass a willingness to coexist with differences and promote a culture of political tolerance and respect for the rule of law. Constitutions should also make provision for equal economic and social opportunity and the well-being of all citizens. The stability of the nation-state in Africa is predicated on the development of viable constitutional arrangements that set up practical institutions within which to conduct the business of governance and foster an environment where peace and development can flourish. Such arrangements will ensure that the exercise of governmental authority is conducted in a predictable, responsible, and legally regulated manner to the satisfaction of the diverse peoples who typically comprise the national state in Africa (Meyer 1995).

This chapter is organized into eight sections. The first section discusses the relationship between ethnicity and conflict and its implications for governance; the second looks at governance and the management of diversity; the third examines the colonial heritage of African states and how it has impacted present-day governance; the fourth section looks at constitution-making and the accommodation of diversity in constitutional arrangements; the fifth discusses the electoral system and the challenge of diversity and inclusion; section six examines best practices aimed at promoting inclusiveness in constitution making; section seven looks at devolution of power as a way of promoting inclusiveness; and section eight examines governance and traditional African authorities.

Ethnic diversity, conflict, and governance

Ethnic diversity

“Ethnicity” or “ethnic group” refers to a social group perceived as homogeneous, based on a conviction that the members of that group share a common ancestry or genealogy and a common language and culture. In addition, ethnicity is characterized by nonmembers' recognition of the distinctiveness of the ethnic group. Political scientists and sociologists disagree

as to what causes “ethnic” conflicts. Basically, political scientists and sociologists fall under three schools of thought. First, the *primordials* assume the truth of “ethnic” conflicts and use the concept of kinship to argue that identification in terms of kinship can create conflicts with other groups. Huntington (1996) argued that the fundamental source of conflict will not be primarily economic or ideological, but ethnic and cultural. The *instrumentalists*, on the other hand, argue that ethnic conflicts occur when community leaders use race and ethnicity (as opposed to social class, for example) to mobilize the masses in order to gain control over power and resources. Here, ethnicity is used as an instrument or a means to an end. Finally, the *constructivists* view ethnicity as a purely social construct that, by its nature, contributes to ethnic conflict. Horowitz (2000) maintained that colonialism strengthened ethnic division; the 1994 genocide in Rwanda is the obvious example. It is true that colonialism typically strengthened ethnic division, but that in itself does not fully explain the crisis of governance in Africa. Other regions of the world also lived through colonialism and do not experience ethnic strife to the degree that Africa does.

More recently, scholars have used a combination of these three schools of thought to explain the causes of ethnic conflict. At the same time, several scholars deny that there can be such a phenomenon as “ethnic” conflict, pointing instead to the fact that these conflicts dissimulate other political, social, and economic problems. Moreover, ethnicity is intimately connected to territoriality. Coakley (1993) observed that ethnicity, especially of a transborder nature, threatens territoriality, as shown by the failed secessions of Biafra in Nigeria (1967) and Katanga in Zaïre (1960). Whatever one’s school of thought, ethnicity is often a factor in conflict, either as a basis for mobilization or as a source of grievances that exacerbate the conflict. In the Kenyan conflict of January 2008, the Kikuyu were targeted in part because of the perception—whether true or false—that, as a group, they had monopolized power and access to economic opportunities in Kenya to the exclusion of others. In such a situation, clearly inclusion, equal access to resources, and governance structures are essential to overcoming deeply embedded perceptions.

The state and ethnic diversity in Africa

The modern African state has its roots in colonial history. At the 1885 Berlin Conference, the colonial powers partitioned Africa into territorial units by arbitrarily dividing kingdoms, states, and communities (Hall 1968, 52). Unrelated areas and peoples were joined together and united peoples were torn apart (Hall 1968). In the 1960s, the newly independent African states inherited the colonial boundaries, a legacy that posed a challenge to their territorial integrity and to their attempts to achieve national unity.¹ The territorial challenge was intensified in some new states by the colonial laws and institutions that were designed to exploit local divisions.² However, the era of serious conflict over state boundaries has largely passed, aided by the Organization of African Unity’s (OAU) 1963 decision to accept the colonial boundaries inherited at independence.³ Nevertheless, creating a genuine national identity among different ethnic groups remains a challenge in most African countries. Very few African state crises have been based on boundary disputes; rather, they are typically based on a failure of governance. Where threats to the territorial integrity of African states have arisen, they have primarily resulted from minority demands for internal self-determination, devolution, and participation.⁴ Secession is almost universally condemned by African states and, except in Biafra, Eritrea, and Cameroon, has not been the basis for many conflicts.⁵

Commercial relations under colonialism also created long-term distortions in Africa’s political economy. Transportation networks, especially railroads and related infrastructure, were designed specifically to satisfy the colonial state’s trade needs, not to support the economic

growth and integration of the Indigenous economy (Ndulo 1987, 3). Railway systems run from the sites of mines to ports and bypassed population settlements. Colonial powers imposed unfavorable trade terms and strongly skewed economic activities toward extractive industries and exportation of primary products (World Bank 1981), practices which continue into today. As a result of the distorted nature of African economies, the competition between political parties in many African states is guided not by competing national economic development strategies, but rather by the motivation to capture key economic sectors for factional advantage and elite accumulation (UN 2014). Sixty plus years after the end of colonial rule, little has changed; transportation networks remain largely the same. Various African initiatives, such as New Economic Partnership for African Development (NEPAD); regional economic groups, the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS); and the proposed Africa Free Trade Agreement, have not succeeded in transforming the inherited African states into modern, cohesive, and united states.

The existing conditions for capturing and maintaining political power in Africa are a key source of instability and political intolerance in many African states. Typically, political parties are dominated by one ethnic group. In African elections, the winning party frequently assumes a “winner-take-all” mentality with respect to patronage, access to wealth, and resources, as well as prestige and prerogative of office (Nwabueze 1989). A communal sense of advantage or disadvantage is often closely linked to this phenomenon, which is heightened in many cases by reliance on centralized and highly personalized forms of governance and the compromised state institutions (Nwabueze 1989). The domination of the ruling party by one ethnic group translates into jobs and economic opportunity, and especially, access to government contracts only for that group; whoever captures power can dispense the spoils of office to his or her followers. In such an environment, the stakes for political control become dangerously high. This is exacerbated by insufficient accountability of leaders, lack of regime transparency, inadequate checks and balances, corruption, competition nonadherence to the rule of law, absence of peaceful means to change or replace leadership, and lack of respect for human rights (Bentsi-Enchill 1969). The problem is further intensified when, as is often the case in Africa, the economic pie to be shared is small and the state is the major, if not the only, source of wealth accumulation.⁶ Given the multiethnic character of most African states, the tendency for political parties to have the dominant ethnic group as their base of support leads to a violent politicization of ethnicity (Matlosa 2001). In extreme cases, rival communities believe that they can ensure their survival and economic advancement only through control of state power, and thus, tension becomes virtually inevitable. Without an industrialized middle class to act as a buffer, there is usually no countervailing force to blunt the excesses of would-be warlords (or the state itself), and conflict results (Museveni 2000, 185).

During the Cold War, external interference in the internal affairs of African states was a familiar feature of superpower rivalry (Museveni 2000, 244). Today, external interests continue to play a significant and sometimes decisive role, both in suppressing and sustaining conflict (Afronet 1999), in the competition for oil, diamonds, timber, and other natural resources in Africa, and in pursuit of strategic interests such as the war against terrorism. With respect to the Liberia and Sierra Leone civil wars, the UN General Assembly, for instance, expressed concern over the role of diamonds in the conflict (UN 2001b). Intervention is not limited, however, to governments outside of Africa. In the case of the Congo, for instance, in the 1990s, neighboring states intervened for military and economic reasons (UN 2001b). The conflict in the Congo involved six African countries: Zimbabwe, Angola, Namibia, Rwanda, Uganda, and Burundi.⁷ Much of the conflict in the Congo was fueled by the economic interests of

Uganda and Rwanda in that country. A United Nations Panel of Experts, reporting on the exploitation of natural resources in the Congo, concluded:

The Panel has credible information that various actors, some based in South Africa and others outside, are using the territories and facilities of South Africa to conduct illicit commercial activities involving the natural resources of the Democratic Republic of the Congo. For example the Panel has evidence that coltan, diamonds, and gold from the Democratic Republic of the Congo are being smuggled into South Africa, either through its porous northern border or through its 4,000 unmonitored airstrips.

UN 2001a, 26

In Liberia, the control and exploitation of diamonds, timber, and other raw materials financed the war and was one of the principal objectives of the various warring factions (HRW 1999a). Similarly, in Sierra Leone, diamonds played a major role in the conflict. It has been argued that many of the conflicts in Guinea had little to do with the country's politics and much to do with Charles Taylor's (then President of Liberia) quest for economic control of the timber and diamonds in Guinea (Gberie 2001, 4).

A number of other factors are especially important in particular subregions. In Central Africa, these factors include the competition for scarce land and water resources in densely populated areas (UN 2014). In Rwanda, for example, several families claimed rights to the same piece of land, causing multiple waves of displacement (UN 2014). Land has been a contentious issue in Kenya for most of its history. In oil-producing areas, conflict often arises from local complaints that the communities where the resources are located do not adequately reap the benefits from oil exploitation, or do not receive adequate compensation for the environmental degradation and pollution that they have to endure during the course of said exploitation (HRW 1999c). In yet other African states, conflict results from tensions between different factions holding strongly opposing views of the nature of society and state. For instance, in the Sudan, a clash of vision between the Arab Islamic north and the culturally and religiously more diverse Black south led to the division of the two Sudans into separate states (Abdullahi and Deng 1996). Thus, the conflicts and state failure and collapse so endemic to Africa are not inevitable. They are caused by leaders who yield to the narrowest definition of self-interest and sacrifice the country's citizens to their own greed, ambition, and weakness, with the resultant bad governance, marginalization of ethnic minorities, and inequitable access to economic benefits and governance structures. In sum, these wars are sustained by the poor social and economic conditions in African countries and by leaders' use of ethnicity to mobilize and advance their own ambitions. Ethnicity becomes a political weapon to be used in the fight for political power and control of the state.

The management of diversity

McGarry and O'Leary (1993) have grouped the ways of regulating ethnic diversity into two broad categories, namely methods for *eliminating* ethnic differences and methods for *managing* ethnic differences. The illegal and unacceptable methods for eliminating ethnic differences include genocide, forced population transfer, partition or secession, and integration or forced assimilation. The methods for managing ethnic differences, on the other hand, include hegemonic control, arbitration (or third-party intervention), federalization or devolution, and power-sharing. The second group—managed differences—is obviously the only viable way to

both maintain the state as it exists and respect human rights. This kind of management can be advanced by strengthening democracy, governance, and the rule of law.

Democracy has a far better record for peacefully managing tensions in a nation-state than other, alternative systems (Harris and Reilly 1998, 22–3). Authoritarian or totalitarian systems simply do not have the institutions that allow societal conflict to be peacefully expressed and resolved. Dictatorships generally try to deal with conflict either by denial or suppression via the use of the state coercive apparatus. While some conflicts can indeed be controlled in this manner, albeit at a severe cost in most cases, the underlying tensions are not resolved, and conflict is only postponed and not resolved (Harris and Reilly 1998, 34). The existence of fundamental issues, such as identity and cultural integrity, in conflicts means that little short of mass expulsion or genocide will make them disappear. An authoritarian system can present an illusion of short-term stability through its use of coercive state power to suppress dissent, but is unlikely to sustain that stability over the long term.

In a democracy, by contrast, disputes that arise are likely to be processed, debated, and reacted to and resolved definitively (Harris and Reilly 1998, 135). In short, democracy operates as a conflict management system. As Harris and Reilly (1998, 19) have observed: “It is this ability to handle tensions and conflicts without having to suppress them or be engulfed by them which distinguishes democratic government from its major alternatives.” This does not suggest by any means that democracy is perfect, or that the mere establishment of democratic governance will lead to the settlement or prevention of conflicts. There are a number of cases in which democratic institutions have been hastily “transplanted” to post-conflict societies without then taking root, with a subsequent resumption of hostilities—for example, in Burundi, Cambodia, Liberia, and East Timor (UN 1996b). It is equally true, however, that these cases offer many lessons in terms of how deals are struck and how to institutionalize democratic practices and which choices are of crucial importance to building a sustainable outcome.⁸ Democracy is often messy and difficult, but it is also the best hope for building sustainable settlements to most conflicts in most communities. However, the democratic institutions have to be strong enough to function effectively and fairly. They can only be strong where an effort has been made to build these institutions in an economic environment that is strong enough to sustain them. The United Nations has observed that conflicts are most prevalent in poor countries (especially, those with significant economic inequalities) (UN 1998). Poverty and sustainable livelihoods are closely linked to human rights and the exercise of democratic rights (UN 1998, 3). Poverty and inequality undermine human rights by fueling social unrest and ethnic violence and increasing the precariousness of social, economic, and political rights (UN 1998, 4). Agbakwa (2002) argued that, as elsewhere, Africa’s wars are not driven by ethnic differences alone, but also by socioeconomic and political conflicts among ethnically differentiated peoples. Although there can be no doubt that the situation in many African countries is often made worse by the existence of sharp ethnic or religious cleavages, these are not the primary causes of unrest (Agbakwa 2002). To illustrate the point, HIV/AIDS and COVID-19 are not caused by poverty, but conditions of poverty facilitate their spread.

Almost invariably, when the rights of minority groups are insufficiently respected, the institutions of government are insufficiently inclusive, and the allocation of society’s resources favors and benefits a single dominant group, then conflict and tension thrive (Harris and Reilly 1998, 33). The solution is clear, even if difficult to achieve in practice, it is to *promote human rights, to protect minority rights, build strong and inclusive political and governmental institutions, and to institute democratic governance in which all groups participate and are represented*. It is essential, if men and women are not to be compelled to take recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law (UN 1948). It

has been correctly observed that one cannot successfully wage insurgency against a government that is inclusive, democratic, strong, and effective, and provides the basic social and economic needs of its people (Harris and Reilly 1998, 33). It stands to reason that recruitment to the cause of insurgency will be nearly impossible when people are happy, are accommodated in the political system, and perceive it as fair. Such people are likely to hold the view that warfare is not the only way to draw attention to their grievances or to effect change (Harris and Reilly 1998).

Good governance

A growing international consensus recognizes the central role that a good, efficient, and capable government plays in the economic and social development of the country.⁹ The UN General Assembly has recognized that democratic, transparent, and accountable governance in all sectors of society forms an indispensable foundation for the realization of social and people-centered sustainable economic development (UN 1996b, 3). The General Assembly called on all member states to respect and protect all human rights and fundamental freedoms, especially the right to development, while maintaining focus on the interdependent and mutually reinforcing relationships among democracy, development, and respect for human rights (UN 1996a). Although a huge gap exists between rhetoric and practice, the African states themselves have come to realize the importance of governance in the development process. The New Partnership for African Development (NEPAD), while recognizing the historical and colonial roots of African underdevelopment, recognized that Africa's future is in its own hands and that good governance is a precondition to development. The African Charter on Democracy, Elections and Governance states, in art. 2, as one of its main objectives: (a) to promote adherence, by each state to universal values and principles of democracy and respect for human rights; and (b) to promote and enhance adherence to the principle of the rule of law premised upon the respect for and the supremacy of the constitution and constitutional order in the political arrangements of the state (AU 2007).

The United Nations Development Program (UNDP) has defined good governance as “the responsible exercise of political, economic and administrative authority in the management of a country's affairs at all levels.”¹⁰ Good governance is, among many things, participatory, transparent, accountable, effective, equitable, and fair; good governance promotes the rule of law (Nsibambi 1977). *Participation* involves ensuring that members of the public participate in decision-making and implementation of public projects or other government activity. Going beyond the arena of consultation, participation implies the existence of opportunities to contribute through gainful employment in the economy, to move in the mainstream of political, economic, and cultural processes without suffering marginalization and discrimination, and freedom from poverty, deprivation, and vulnerability through a guaranteed system of social safety nets and social security systems. *Transparency* involves establishing appropriate lines or forms of accountability between the government and the people. This includes access to information, open decision-making, and rules of procedural fairness, such as the communication of decisions and the reasons on which they are based. *Fairness* is broken down into substantive and procedural elements, with substantive fairness requiring the actual fairness of results and procedural fairness holding that the process of representation, decision-making, and enforcement in an institution be clearly specified, non-discriminatory, and internally consistent with the law.

Good governance ensures that political, social, and economic priorities reflect broad consensus in society and that decision makers represent the voices of the poorest and the most vulnerable in allocating development resources. In short, good governance creates what may

be described as a capable state, as contrasted to a failed or failing state. In this context, a capable state is transparent, accountable in the conduct of national affairs, able to enforce law and order throughout the country, respectful of human rights, effective in providing infrastructure, limited in its involvement in the market economy, responsible for the creation of a favorable policy environment, and a partner with the private sector and civil society (Armstrong 1994). Other important characteristics of a capable state include: acceptance of opposition and competitive politics; predictable, open, and enlightened policymaking; a bureaucracy imbued with a professional ethos acting in furtherance of the public good; maintenance of fair terms of trade between the rural and urban sectors; and recognition and respect for the boundaries separating it from the private sector and civil society (Nsibambi 1977).

The colonial heritage and governance in Africa

Traditional African society had its own system of social and political organization (Colson and Gluckman 1959; Gluckman 1965; Dore 1997). The village was often the basic political unit, while the tribe acted as the larger unit of organization; therefore, questions of diversity did not arise. Gluckman, for instance, writing about the Lozi of Zambia, observed that the Lozi had a complex economy that required many people to cooperate in various productive activities (Gluckman 1967). The village comprised the basic unit of organization in the economic, political, and domestic system. A head man or woman was the political and administrative head of the village, took responsibility for the village to the King in Council, and represented the village at the chief-headed Council. The Chief governed with the assistance of councilors (Gluckman 1967; Mainga 1973). Such governance did not include jurisdiction over other tribes, who had their own head men or women and chiefs. Since the advent of colonialism, however, African societies have experienced fundamental and protracted economic and social changes.¹¹ The era of colonialism initiated—and the era of independence consummated—a dynamic process of disruption in tribal organization and tribal life. In contrast to precolonial times, the financial, political, and military security of African societies no longer depends on traditional organization and custom but rather on new political and economic institutions superimposed on the traditional organizations, without any efforts to relate the two to each other. African societies, formerly based on agrarian self-subsistence communities, now rely on a money economy driven by the capitalist economic system. With such fundamental changes, it was inevitable that the political institutions governing African societies had to be transformed. The foremost act of disruption was the unification of ethnic communities under the umbrella of sovereign states, created pursuant to the Berlin Conference of 1884, with overriding powers of political control within each state's area of jurisdiction (Rotberg 1965; Hall 1968; Ojwang 1975). Dislocation of African peoples from their lands and communities continued throughout the colonial period, as the needs of the colonial economy expanded, further undermining any tribal economy or social organization that might have been left in place after the initial establishment of colonial rule (Okoth-Ogendo 1982).¹² This is especially true in Southern Africa with the rapid development of the mining industry. Independence did not change the fundamental structure of the colonial society and, therefore, did not stop the decline of traditional institutions. In almost all cases, the leadership following African independence took over the colonial state as established by the departing colonial power. The structures continue to this day. Recreating the old tribal state has never been on the agenda, and in the face of the existing state structures created by colonial rule, is neither feasible nor an option.

Colonial rule was philosophically and organizationally elitist, centralist, and absolute. Lacking representative institutions, the colonial administration not only implemented but

created policies as well. Colonial officials were given almost unlimited discretion with no formal controls over their exercise of power (Okoth-Ogendo 1982). As colonial rulers sought expedient interlocutors, they distorted or destroyed precolonial governance systems by creating or encouraging arrangements, such as indirect rule that manipulated traditional forms of governance (Seidman 1987a). Such arrangements made existing local chiefs more despotic and created new ones (warrant chiefs) where none had existed before (Anthony 1953; Gann 1958, 1964). This was based on the erroneous assumption that all African tribes had chiefs.

During the colonial period, African societies became divided into the rural and the urban, with two distinct cultures. Traditional culture resided in the rural areas, with the great majority of people living there operating outside the framework of colonial elitism, while the urban areas housed the “modern culture” (Ojwang 1975, 65). The urban economy and culture served as the link between the metropolitan country and the colony in the export of raw materials, and, today, continues the link to western markets (Seidman 1987a). Colonial economic policies kept African economies small, excessively open, dependent, and poorly integrated (Seidman 1987b). The colonial state was characterized by a huge gap in the standards of living between the rural and urban areas. This rural/urban divide, dating from the colonial period, continues today and has arguably grown (UNDP 2001). The rural areas continue to be neglected, marginalized, and impoverished, as weak states fail to provide services or indeed any effective governance structures to rural areas. Furthermore, mounting evidence indicates that the International Monetary Fund (IMF) and World Bank stabilization and structural adjustment programs implemented in the 1980s in most African countries only widened the divide between urban and rural areas, while the impact of globalization has further exacerbated the situation (Seidman 1996). This divide is reinforced by the lack of popular participation in governance and the lack of effective devolution of power to local communities. In many countries, governments completely fail to reach rural areas.

Moreover, not only has the colonial legacy endured long after independence, but it has had a major influence on the style of governance prevalent in Africa (Nwabueze 1974, 19–38; Seidman 1987b). Colonial rule bequeathed to independent African states undemocratic governments and bureaucracies that emphasized hierarchy, loyalty, compliance, and discipline, without addressing other equally important concerns such as public accountability, responsiveness, participation, and respect for human rights and the rule of law (Gertzel et al. 1984).¹³

Many governments that emerged after independence quickly became undemocratic, overly centralized, authoritarian, and predatory. Predictably, political monopolies led to massive corruption, nepotism, abuse of power, and conflict. African presidents replaced their colonial governors in fact and in deed (Maina 1996).

Like their colonial predecessors, African presidents have become the sole embodiment of the social will and purposes of the countries they rule. In the 1980s, repressive single or no-party systems of government emerged (Gertzel et al. 1984; Yusuf 1994).¹⁴ With a one-party system, power came to be concentrated in one person. Dissent came to be viewed with ill-conceived hostility and punished severely, almost as if it were treason (Kimwanga 1996, 55). The criminal justice system is weaponized for use in dealing with political opponents. Multiple parties, even if originally formed around national agendas, generally evolved into ethnically based parties that made African states ungovernable.¹⁵ Single-party or military rule came to be regarded as a viable, sometimes desirable, solution to ethnically based parties in Africa’s new modern states (Mubako 1973). See, also, Republic of Zambia (1972). Ultimately, the single party supplanted the machinery of the state, blurring the differences between the two (Gertzel et al. 1984; Mwanakatwe 1984, 101). This continues today.

Thus, 50 years or so into independence, governance in Africa continues to be in crisis, with a litter of failed and dysfunctional states whose characteristics include:

- (1) highly centralized systems of governance;
- (2) excessive state control coupled with limited capacity to govern;
- (3) arbitrary policymaking and abuse of executive power;
- (4) weak institutions of both state and civil society, with few countervailing forces to check the executive branch of authority;
- (5) unaccountable bureaucracies;
- (6) widespread corruption;
- (7) widespread violation of human rights;
- (8) limited meaningful participation in governance by the general citizenry;
- (9) preferential access to power and resources often determined by religious, ethnic, or geographical considerations; and
- (10) periodic elections that are riddled with malpractice, manipulation, and violence and where incumbents invariably win the elections.

Ironically, the African Union (AU), regional intergovernmental organizations, and the international community always legitimize the elections as free and fair, thereby undermining the role of elections in democratic governance. The lack of democratic governance in Africa has resulted in unprecedented economic underperformance and mismanagement of national resources, causing unimaginable poverty and inequality. In fact, the dreams of post-independence prosperity and self-rule have become the nightmare of insecurity and poverty (Shaw 1982).

Constitution-making and the accommodation of diversity

The promotion of political stability in Africa must, therefore, begin with the acceptance of those values into the governance systems that are acknowledged worldwide to be the true foundations of democracy in every democratic society. These values are, in turn, the foundation of social creativity and human flourishing (Obasanjo 1988). African states must establish stable political and constitutional orders that promote inclusiveness and development and aid in the conquest of poverty, hunger, disease, and ignorance, while also guaranteeing their citizens human rights, the rule of law, equal protection under the law, and participation in the governance process regardless of the citizen's gender, color, or ethnic origin (Bentsi-Enchill 1969; Museveni 1997, 188). If African states are to respond successfully to the needs of their people and realize their dreams of rapid economic development and political stability, they will have to apply careful thought and inquiry to the proper organization of political, economic, and governance institutions to ensure the proper governance of the nation-state.¹⁶ The aim should be to achieve a constitutional order that is inclusive, legitimate, credible, and enduring, and which is structurally accessible to the people.

A serious search for a viable constitution that is inclusive and promotes political stability must begin with the frank identification and examination of the specific social, political, and economic conditions present in African countries. There are several conditions specific to the African situation, which, unless addressed, would impact negatively on good governance in an African context. First, there is a need to debate the type of society the country wishes to create. In 1993, before the South Africans developed their 1993 Constitution, they engaged in a serious debate as to what sort of society South Africa was to be.¹⁷ The 1993 Constitution formed the framework and basis of the final 1996 Constitution. A clear vision for the emergent state is

important, if questions of political system, citizenship, religion, and the status of minorities in the society are to be adequately protected.¹⁸ Second, there is a need in each country for sufficient national unity or cohesion to generate social and political power. This unity and cohesion must be strong enough to enable diverse peoples to achieve purposes of well-being and development that are beyond their reach as separate units. Third, African states need to accommodate the vast ethnic diversity that exists in each state and institutionally acknowledge the intensity of the attachment that Africans have to their ethnicity. Fourth, African states need to accommodate the significant racial minorities living in their countries. Constitutions must deal with this situation sensitively, not only consciously acknowledging the fears and apprehensions of racial minority groups, but also meeting their legitimate demands and involving them, in a meaningful and satisfying way, in the political systems that evolve, as well as in nation-building. Fifth, the search for viable constitutional arrangements must acknowledge the newness and artificiality of African states, which as we earlier observed, for the most part, were recently and arbitrarily created during the colonial period. This will require the implementation of national civic programs that are designed to promote nationhood and national cohesion.

Sixth, the quest for viable constitution models must anticipate and prepare for the general unfamiliarity that many Africans, especially those in rural areas, have with the philosophy and machinery of modern democratic governance. Seventh, a viable constitution must accommodate the general economic and social underdevelopment that exists in these countries and the consequentially urgent need for development on all fronts simultaneously. As each country pursues its development agenda, it must acknowledge the regional imbalances that often exist within its borders. Eighth, African constitutions cannot ignore the disproportionate economic and social importance of public office to individuals in the midst of widespread poverty and ignorance. Ninth, the constitution must recognize the temptations of arrogance, discrimination, abuse of power, and widespread corruption assailing persons in office (Mbeki 1995). Tenth, it must face the negative influence of money and ethnicity in the electoral process (see Ndulo 2000). This is worsened by the fact that most opposition parties in Africa lack resources to operate effectively and cannot raise money, as their members are not in a position to make meaningful donations. Thus, the funding of political parties should be addressed. The principle of government funding of political parties is well established across the democratic world (Pinto-Duschinsky 2000). In the absence of state funding arrangements, the party in power has an undue advantage as it has access to state resources and institutions to push its political agenda, while opposition parties remain grossly underfunded. Eleventh, there is the problem of cultural values and traditional roles assigned to women that perpetuates the inequality of the genders (see, generally, Simons [1968]; Ndulo [1984]; Nhlapo [1991]). The goal should be as the Beijing Conference declared—to remove “all the obstacles to women’s active participation in all spheres of public life and private life” through an agenda that promotes “a full and equal share by men and women in economic, social, cultural, and political decision-making” (UN 1995, 7).

Twelfth, there is a need to build a free and vibrant press. One of the major problems that the opposition parties face in Africa is the absence of independent media. The opposition often receives practically no coverage from the government-owned media. Only a free press can provide citizens with a range of information and opinions on the actions of the government, including fiercely critical views. This enables citizens to choose their representatives in an informed manner and to force state officials to respond to the desires of the public (Fiss 1996, 142). In addition, a free press, by exposing wrongdoing, encourages accountability of public officials and politicians and discourages corruption. Further, a free flow of accurate information has economic implications in that a competitive market economy requires economic actors

who have access to relevant, timely, and reliable information. The less available or credible the information, the greater the uncertainty and risk to investments, and therefore, to committing capital or labor.

Fourteenth, there is the need to encourage the development of a viable civil society. Civil society in a democracy provides the checks and balances that assist in the regulation of governments. In Africa, years of one-party systems of governance and military regimes have hindered the development of powerful civic organizations that could act as countervailing forces to governments. The result is that civil society today in Africa is weak and fragmented. It lacks the capacity and resources to engage the government and work effectively. Additionally, due to resource constraints, most civil society operates almost exclusively in urban areas. Fifteenth, the role of traditional authorities in modern African political systems must be addressed, and their relationship to constitutional authorities must be defined. Finally, a serious search for viable constitutional arrangements must respond to the need to decentralize power as part of the agenda to deepen and consolidate democracy, ensure effective representation and participation, and develop capacities to better respect and promote good governance, human rights, and the rule of law.

A constitution that aspires to be inclusive, legitimate, and authoritative as the fundamental law of any state in Africa, if it is to succeed, must address the issues identified here. A constitution affects the lives of all citizens and should, therefore, address the concerns of all citizens regardless of their ethnicity, color, gender, and/or station in life. As the late Chief Justice of South Africa, Justice Ismail Mohammed, observed:

The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a “mirror reflecting the national soul,” the identification of the ideals and aspirations of a nation; the articulation of the values binding its people and disciplining its government.¹⁹

Justice Ismail Mohammed added that a constitution, therefore, should be an autobiography of the nation. It should reflect the lives of all its citizens, young or old, male or female, rich or poor, straight or gay, regardless of race or ethnicity. It should reflect the diversity of the state. People should be able to look at the constitution and see themselves and their lives within its pages and their protection within its words. The people must feel a sense of ownership of the document and see themselves and their history in it before they can respect, defend, and obey it.²⁰

Beyond the essential ingredients of a democracy, a democratic constitution should be seen as a liberating document, especially by minorities, which not only limits the powers of the state and its institutions but guarantees the kinds of liberties and freedoms that will make the pursuit of happiness and self-fulfillment a reality for all people. It should empower and liberate women and minority groups to take their rightful place in society. It should guarantee equality of economic and educational opportunity for all citizens irrespective of ethnicity, gender, race, religion, or ethnic background. It should guarantee access to government processes and economic opportunities. It should provide effective means of ensuring that the state is accountable to the people. For example, access to courts and the ability to enforce social and economic rights can ensure that the government of the day abides by the rule of law and is accountable for its policies and operations, as they impact the lives of people and the delivery of services. Equal opportunity for all is a mark of true liberation and eliminates the feeling of marginalization by minority groups and the poor. It ensures that benefits of economic development accrue to the

many and not to a few privileged elites, and that all citizens have a chance to live up to their potential and to achieve self-fulfillment.

The electoral system and the challenge of diversity

Free and fair elections are indispensable elements to democratic governance. In addition, they are the obvious and traditional way of ensuring accountability, providing an institutional framework for the peaceful transfer of power, a resolution of conflicts among competing political parties, and involving all the people in the governance of the state.²¹ However, when the rules of the game are not universally accepted or respected, or when they create permanent losers and facilitate the ethnic domination of one group over the others, the process becomes controversial, divisive, and a source of conflict rather than a mechanism for resolving strife (Anglin 2002). Elections must be organized in a manner that promotes inclusiveness and ensures maximum participation of all stakeholders in the political process. Unfortunately, many elections in Africa have been characterized by malpractice and violence, with election results disputed and an aftermath of sharpened ethnic divisions and conflict, as opposed to a strengthened democracy. This is largely because national elections are often manipulated by the party in power and therefore result in minorities being unrepresented in Parliament or feeling cheated by the process. The 2007 elections in Kenya and the 2008 elections in Zimbabwe are unfortunate examples of rigged and violent elections. As Chazon et al. (1992, 172) observed, in Africa, “elections provided ritual occasions for sanctioning the existing governing coalitions but allowed precious few opportunities for affecting the composition of the ruling circles or policy outcomes.”

The utility of elections is further undermined by the fact that the electoral process is often not accompanied by the building of institutions that foster accountability and greater transparency in the governance of the country.²² The challenge here is to make elections an effective tool for choosing representatives of the people, as well as an integrative force in the process of constructing a democratic and inclusive state. At a minimum, national elections must be organized in a manner that guarantees maximum participation of all sectors of the population, especially minority groups.²³ Regional organizations such as the AU, SADC, and ECOWAS need to play a more constructive role in promoting free and fair elections. Unfortunately, hitherto these organizations have tended to support incumbent regimes over opposition parties, even in the face of clear and convincing evidence that the electoral result was fixed in favor of the ruling party, thereby legitimizing stolen elections—hardly a way to encourage a culture of free and fair elections and constitutional change of government in Africa. Their actions are contrary to two key texts of AU. The Constitutive Act of the African Union, in arts. 3 and 4, emphasizes the significance of good governance, popular participation, the rule of law, and human rights on governance and elections, and calls on member states to take appropriate actions to promote these values (OHCHR 2000). Further, the African Charter on Democracy, Elections and Governance, in art. 5, states that parties to the treaty shall take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power (AU 2007). Article 23 declares illegal any attempt to maintain power or refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair, and regular elections.

The design of an electoral system is recognized as a key lever that can be used in the promotion of inclusiveness, political accommodation, and stability in ethnically divided societies. As Reynolds (1995, 86) has observed, “Although appropriate electoral laws are insufficient to ensure stability and good governance in divided societies, poorly designed laws can entrench societal divisions and exacerbate preexisting conflict.” In many African states, election results show the main political party as having overwhelming support in a core region (Nwabueze 1989).

The system of winner-take-all, which is applied in most African countries, tends to reinforce this kind of approach to politics, as it creates permanent losers and permanent winners, especially in situations where there are dominant and minority groups. The winner-take-all system is based on the principle of territorial representation, emphasizing the relationships among the voter, the representative, and the geographic delimitation of the constituency (de Villiers 1993, 29). The size of a party's representation is thus determined not only by the number of votes received, but also by the geographic concentration of those votes. Should a party's votes be too widely scattered over the country or too highly concentrated in one area of the country, at best, it could be underrepresented in parliament, and at worst, have no representation at all. In such a situation, groups that are numerically small can never win an election. They, therefore, remain permanently aggrieved. Such a system is unlikely to promote participation and inclusiveness in the governance process in deeply divided societies that are nonhomogeneous.²⁴

African countries need to examine the appropriateness of the proportional representation system to elections in their ethnically and racially divided societies in order to enhance democracy and promote inclusiveness (Nadais 1992).²⁵ In a proportional representation system, the political parties compete for support in multi-member constituencies, and the division of seats is determined by the actual support that a party receives. The main objective of proportional representation, in contrast to the winner-take-all system, is to ensure that there is a proportional relationship between the votes received and the seats allocated to a particular party. The net effect of proportional representation is that all political parties, not only the majority or larger parties, are represented in accordance with their support base.²⁶ If minorities are to accept and own legislatures elected in their jurisdictions, they need to be adequately represented in the legislatures. Winner-take-all elections do not sufficiently address the representation of minorities.²⁷ Without effective representation, and without any significant possibility of the minorities affecting the balance of power, a dominant majority has little incentive to address the grievances of the minority.

A major criticism of proportional representation is that it allows extremist parties to gain representation in parliament, thereby gaining legitimacy in society (Nadais 1992, 193). There is also the perception that the system leads to coalitions and, therefore, weak governments (Gloppen 1997, 100). These objections are far outweighed by the benefits that the system contributes to stability and the representation of all population groups in a country. No government, not even one with a large majority, would be able to work effectively if its society were perpetually on the verge of permanent breakdown, aggravated by threats of extraconstitutional action by underrepresented minorities. In any case, the question of proportional representation versus the winner-take-all approach does not require an either/or answer. A country that, for example, has two houses of parliament can employ one system in each house. Further, even in a single-house legislature, seats can be divided between the two systems. Moreover, it would appear that proportional representation, rather than the winner-take-all system, is more in line with traditional African political organization. Traditional African society insisted that major decisions affecting the whole community should not be made by a bare majority of the society. As Bentsi-Enchill (1969, 72) observed, "our ancestors insisted that everything should be done on achieving the consensus of all key sectors of the community before a decision was made."

Best practices: Constitution-making and diversity

As a multiethnic and multiracial society, South Africa has faced and still faces many of the issues identified in this article. As such, the South African Constitution provides a number of examples of best practices for accommodating diversity in constitution-making. In the apartheid era,

South Africa pursued a policy of separation of ethnic and racial groups, leading to instability, violence, and conflict. The post-apartheid democratic government introduced a constitution that is inclusive of all forms of diversity and promotes governance through transparency and accountability. Doctrines of separation of power and devolution of power to the provinces, the creation of institutions specifically designed to support democracy, protection of minorities and language groups, and the protection of human rights are all upheld in this Constitution. A key component of the South African approach to governance is the promotion of respect for the rule of law throughout its constitutional arrangements. The supremacy of the Constitution defines the commitment of South African society to this principle.

The South African Constitution provides checks and balances through a number of provisions. Sections 1(c) and 1(d) state that the Republic of South Africa is one sovereign democratic state founded on supremacy of the Constitution and the rule of law, and a multi-party system of democratic government “to ensure accountability, responsiveness and openness” (Republic of South Africa 1996). Chapter 3 of the Constitution, on cooperative government, provides for national, provincial, and local spheres of government that are “distinctive, interdependent and interrelated” (Republic of South Africa 1996, §40). Section 41 provides for principles of cooperative government and intergovernmental relations that define and implement checks and balances. Parliamentary oversight is provided for in the intervention powers of the legislature in §§44(2) and 55(2)(b). Section 55 states that the “National Assembly must provide for mechanisms—(b) to maintain oversight of—(i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state” (Republic of South Africa 1996). In §44(4), the National Assembly is bound only by the Constitution and must act in accordance with, and within the limits of, the Constitution. This gives the legislature some independence from other branches of the state, especially the executive. The executive’s responsibilities are prescribed in the Constitution, to which it is ultimately accountable. The judicial authority in South Africa vests in the courts, which must be independent and subject only to the Constitution and the law (Republic of South Africa 1996, art. 165). To consolidate a culture of accountability, the South African Constitution, in Chapter 9, provides for independent state institutions supporting constitutional democracy: the Human Rights Commission; Commission for Gender Equality; Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities; and Public Protector (Republic of South Africa, Articles 181, 182, 184, 185, 187). These “watchdog” institutions fulfill the role of keeping a further check on the state’s conduct and serve as guardians of the Constitution and its ideals.

In many African countries, language is closely bound to ethnic pride and, therefore, is tied to issues of marginalization. The South African approach to language has much to commend it. It is inclusive and regards language as a national resource to be harnessed for development. South Africa has 11 official languages, each of which is the mother tongue for a sizeable portion of the population. The 11 official languages are provided for in §6 of the South African Constitution (Afrikaans, English, isiNdebele, Sesotho, Sesotho sa Leboa, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa, and isiZulu). All official languages must enjoy parity of esteem and must be treated equitably (Republic of South Africa 1996). This has both a negative expression—the government cannot interfere with a person’s free exercise of language or the formation of associations with other speakers of that language—and a positive expression—the government must promote equality among the 11 official languages. To promote this equality, a Pan South African Language Board has been set up, which is charged with promoting the languages. The language board provides funds to language groups to develop and promote their

languages. This approach neutralizes a major source of grievance about perceived language domination by majority, in disregard for the language sensitivities of minority groups.

The federal character of the Constitution empowers regions and accommodates diversity. It ensures considerable autonomy for the various provinces in the country, thereby ensuring accommodation of local communities, which is a desirable approach to unity in diversity. Under the Constitution, Parliament has no legislative competence over matters within the functional areas of the Provincial legislature unless exceptional circumstances set out in §44 apply (Republic of South Africa 1996). Section 44 allows Parliament to legislate in matters under Provincial rule where necessary in order: to maintain national security, economic unity, and essential national standards; to establish minimum standards for the rendering of services; or to prevent unreasonable action taken by a province, which is prejudicial to other provinces or the country as a whole. The provinces have exclusive legislative competence over Sch. 4 matters, which include the following: agriculture, casinos, gambling and wagering, consumer protection, cultural affairs, education at all levels except tertiary education, the environment, health services, housing, Indigenous law and customary law, tourism, trade, traditional leadership, urban and rural development, and welfare services. This approach increases the chances of local communities participating in government structures. Devolution of power to local communities reflects the political evolution toward more democratic and participatory forms of government that seek to improve the responsiveness and accountability of political leaders to their electorates. It is premised on the fundamental belief that human beings can govern themselves in peace and dignity, in pursuit of their collective well-being, when they have been entrusted with control of their own destinies through the medium of popular local democratic institutions. In economic terms, devolution permits governments to match the provision of local public goods and services with the preferences of recipients. In political terms, devolution provides local minorities with greater opportunities to preserve their distinctive cultural and linguistic identities. It also reconciles diverse cultures, religions, and languages, particularly, in large countries where unitary and central administration is difficult. Further, by providing space in which ethnic and language groups can express themselves politically, devolution promotes tolerance—a core value that not only keeps the social structure together but also enables it to function smoothly. It permits the accommodation of local interests within the framework of a stable political system.

The right to participate is an important opportunity embedded within the framework of decentralization. Participation as a human right is an essential aspect in determining the democratic content of any political system. The multiple layers of activity at various levels of local councils, resulting from devolution, engender enormous community participation. Since locally elected leaders know their constituents better than authorities at the national level, they are better positioned to provide the public services that local communities need. When things go wrong, which they sometimes do, physical proximity also makes it easier for citizens to hold local officials accountable for their performance. Further, when a country finds itself deeply divided, especially along geographic or ethnic lines, which is the case in most African countries, devolution provides an institutional mechanism for bringing minority groups into formal, rule-bound bargaining processes. A regional system can provide channels for the expression of regional sentiments and allow national policies to become more sensitive to regional and local variations within the nation state. It can also provide scope for regional interests on the political stage, allowing minority parties, which might otherwise be excluded from political power, to exercise influence and make their voices heard. In short, a regional system can be more, rather than less, inclusive than a purely central system.

Another important political advantage of devolution is that subnational authorities reduce the concentration of power at the center and thus hinder its arbitrary exercise. In other words, they form an additional accountability mechanism that helps to prevent the “tyranny of the majority” or authoritarian rule. Clearly, an important point in making participation effective is ensuring that the community is empowered through the process (Simeon 1995). Inclusiveness is only meaningful when the participants are empowered to be capable of participating and contributing actively in the preparation, implementation, monitoring, and evaluating of policies and governance actions. There must be programs to ensure that capacity is developed among the people, thereby allowing for higher levels of more effective participation.

Many African countries fear decentralization and the potential dangers of separatism; there is an apprehension that devolution could very well be a prelude to secession. Certainly, there are political dangers in the devolution of power to sub-regional units. For example, wrongly structured subnational entities—such as regions—can provide an opportunity for political mobilization on the divisive basis of ethnicity or religion, with potential consequences of political oppression, intolerance, and, at the extreme, secessionist movements. A related danger is that a regional system might frustrate the task of “nation-building.” For instance, a study on Uganda showed that the power of the districts to employ staff led to a tendency by districts to employ people regarded as native to the district. Sentiments such as these find expression in the craving for new districts or for transfer to preferred neighboring districts (Ahikire 2002). The creation of a district has a multitier effect; each district created results in new demands from local communities who feel marginalized. It has been observed in Uganda that the notion of territoriality and homogeneity, embedded within the logic of decentralization, has tended to create an unending chain of marginalization and quests for autonomy (Ahikire 2002). There is a need to deconstruct the concept of devolution and focus on the content of the regional arrangements that are being put into place. While regions should build on identity, belonging, and sense of place, the overriding goal should be to avoid the creation of exclusive, ethnically homogeneous units that emphasize ethnic divisions.

Effective devolution of power to local authorities entails the existence of local communities endowed with democratically constituted decision-making bodies and possessed of a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised, and the financial resources required for their fulfillment. Devolution of power to local communities is not only one of the cornerstones of democracy but is also an effective way of empowering minority groups and local communities (Council of Europe 1985). The right of citizens to participate in the conduct of public affairs is more directly exercised at the local levels. The existence of local authorities who are given real responsibilities can provide an administrative set-up, which is both effective and close to the citizens. Unlike more centralized systems, local government provides for more flexible responses attuned to local needs. It opens opportunities for innovation and experimentation in policy formulation and delivery. It can alleviate the workload of overstretched central government, something that is especially important in Africa, in view of the numerous tasks of development and transformation that face a typical African government (Simeon 1995).

Very few current African political systems have made any serious efforts to devolve power to local communities. Even among those systems that profess commitment to it, there is a wide gap between political rhetoric and reality (Simeon 1995). African governments tend to co-opt or, in extreme cases, abolish institutions that they determine to be harmful to their interpretation of nation-building (McAuslan 1996). In reality, this includes anything that threatens the ruling party’s hold on power (McAuslan 1996). The results of the current arrangements are not only a waste of resources but also the encouragement of corruption in central government

institutions (Reyntjens 2015, 59). In addition, because power is not decentralized, the struggle to control the central government becomes a matter of life and death among the political leadership. In order to promote effective governance and the inclusion of the diverse peoples that typically make up an African state, it is not enough to have democracy at the national level; it must be complemented at the subnational and community levels. State structures must work with society-based organizations. Societal and state institutions must exist as partners in social engineering. They must seek to empower ordinary people at the local level in matters of governance.

African traditional authorities and devolution

In a typical African state, a large percentage of the people remain outside the formal structures of the state and rely on traditional institutions and authorities for law enforcement and dispute settlement. Rural communities especially tend to operate outside the formal structures of government; in times of conflict, such communities become easy to target for ethnic mobilization. To remedy this situation, there is a critical need for the devolution of power to local communities, which is a means of not only improving governance and enhancing the accountability of leaders, but also of making the state a participant in people's lives. This will be better achieved by including traditional institutions in governance structures. Involving traditional institutions in this manner will promote inclusiveness and lead to improvements in the delivery of services to poor rural communities.

Any examination of the modalities affecting the devolution of power in Africa must, therefore, address the place of traditional institutions of governance in modern political systems.²⁸ Traditional leaders could be accommodated in various ways. For instance, at the local government level, they could be incorporated to form the nucleus of that system. This could, quite conceivably, enhance the legitimacy of local government structures in rural areas, where traditional leaders could serve as a link for their people to the external world of the state government. Colonial authorities were fairly successful in using traditional institutions to their advantage, and perhaps, modern African leaders can learn from that experience (Lugard 1922, 149–50). Working with traditional leaders, modern government has at its disposal the means to reach out to small communities, thus working to build national consensus and cohesion (Nhlapo 1991).

The reality in many African countries is that the majority of the rural population lives in a traditional social and cultural context (Nhlapo 1991). In the absence of legitimate local institutions, rural peoples have been driven to rely on informal institutions for the day-to-day ordering of their affairs and of society, especially in the area of dispute resolution (Gluckman 1967, 1–35). It would, therefore, be a mistake to sideline traditional institutions and establish wholly modern institutions that would have to establish their legitimacy with the people over time. Since democracy means involving the various communities that make up a nation in the governance of their own affairs, it is imperative that rural communities not be ignored in any democratic arrangement. Every effort should be made to integrate traditional institutions into the modern political structure, so that all institutions are made accountable and responsive to the people. The accommodation of traditional governance within the modern political systems of governance would actually enhance rather than diminish the state's vital interests in national cohesion, public order, and stability, and would promote the establishment of an inclusive society.

While accommodating traditional structures in modern political systems, one should not ignore the fact that conditions in which traditional institutions operate today have changed from

those in which they were developed, and therefore, these institutions need adaptation. Further, these institutions, at times, can be oppressive, exploitative, discriminatory, and intolerant, especially to women and children (see Ndulo 1979; Nhlapo 1991; Andrews 2001). This means that as the institutions are integrated, they also need to be reformed. Since the goal is to establish a democratic order, the need to incorporate traditional institutions into the modern political system cannot take precedence over the needs of a democratic society and the need to protect and promote human rights (Mbeki 1995). With regard to aspects of these institutions that are gender discriminatory, governments must address the areas that need reform, discard the discriminatory aspects of traditional institutions, and confront the traditional values that underpin gender discrimination and authoritarianism.²⁹

Conclusion

The management and accommodation of diversity in a national state depends on the development of a political system that is inclusive, tolerant, rejects authoritarian rule, is based on the rule of law, and gives people a sense of ownership of the political process. The transition from authoritarianism to greater participation in political decision-making requires determined long-term efforts and a huge investment in the development of institutions that can promote greater participation in the state's governance processes and a culture of tolerance of diversity. As Seidman and Seidman have argued, after independence, African leaders failed to reshape the institutions because they did not realize that, to carry out development, institutional transformation was their first priority. African states have to engage in deliberate transformation of the societies inherited from colonial rule. In the transformation process, nostalgia for the African past has to be tempered with reality. It must be accepted that precolonial African societies and their institutions cannot be recreated to govern modern Africa. Africa has to work with existing conditions and move on from there. The past can only secure the future if understood and applied in the context of today. It must be remembered that stability in a nation-state can only be sustained if the government of that nation has a solid foundation of respect for fundamental human rights that encompasses a willingness to coexist with differences and a culture of respect for the rule of law—which must be drawn up for the protection of all and must act as a safeguard, assuring the economic and social well-being of all its people.

Notes

- 1 Zambia, Zimbabwe, and almost all African countries inhabit colonial boundaries. See Hall (1968).
- 2 Lord Frederick Lugard perfected the theory of indirect rule, a policy that used African institutions to the advantage of the British. See Lugard (1922); Hall (1968, 104.)
- 3 Resolution on the Intangibility of Frontiers, Assembly of Heads of States and Government, First Ordinary Session, Cairo, UAR, July 17–21, 1964 (AGH/RES.16 (1)). The resolution: “Solemnly declares that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence.”
- 4 An example of this is the 1999–2001 Ethiopia–Eritrea border war. See UN (2014).
- 5 Article 3, Organization of African Unity Charter, 479 U.N.T.S. 39/2ILM 766 (1963) [hereinafter, OAU Charter].
- 6 In the case of Lesotho, it has been observed that “the main problem confronting the resource poor and economically underdeveloped Lesotho is that the state is perceived as the main pillar of accumulation. The political elite constantly engage in fierce struggles over control and retention of state power in zero sum conflicts which often turn violent” (Matlosa 2001, 19).
- 7 UN SCOR Mission Visit to the Democratic Republic of the Congo, May 4–8, UN Doc.S/2000/416 (May 11, 2000). See, also, Wren (2001).

- 8 See UN (1996). One learns from the mistakes made in earlier efforts.
- 9 Addis Ababa, Deliberations of African Governance Forum, Organized in the context of the United Nations System-Wide Special Initiative on Africa (UNISA), July 11–13, 1997. See, also, World Bank (1997).
- 10 Aide Memoire, International Conference on Governance for Sustainable Growth and Equity, UN Development Program, NY (July 28–30, 1997). See, also, UNDP (1997).
- 11 For example, in 1890, the British Prime Minister Lord Salisbury remarked at a dinner that followed the conclusion of the Anglo-French Convention, which established spheres of influence in West Africa, that “[w]e have been engaged in drawing lines upon maps where no white man’s foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never really knew exactly where the mountains and rivers and lakes were” (quoting Anene 1970) (Mutua 1995, 1135).
- 12 See, also, Bentsi-Enchil (1965) for a discussion of the colonial heritage in land issues.
- 13 In the analysis of factors that led to the introduction of the one party system in Zambia, the authors noted that the influences of the colonial legacy of bureaucratic authoritarianism continue in many parts of Africa. See, also Dore (1997), observing that the imperfections of postcolonial constitutions were, in part, a reflection of the fact that those who prepared the colonies for independence were themselves not democratic and ignorant or insensitive to the prevailing social and cultural dynamics of the societies that they had colonized.
- 14 See, also, *Nkumbula v. Attorney General* [1972] Supreme Court of Zambia, Z.R. p.3.
- 15 Museveni’s main justification for his movement system in Uganda is that political parties form on the basis of ethnicity (Museveni 2000, 42), observing that one of Africa’s biggest weaknesses is how tribalism and other forms of sectarianism are always emphasized in African politics. The Secretary-General of the United Nations has observed that this problem is compounded by the fact that the framework of colonial laws and institutions that most states inherited had been designed to exploit local divisions, not to overcome them (UN 1998).
- 16 As Gloppen has observed, however, “neither ethnic conflict, nor (and even less so) problems of poverty, inequality, and violence—are solved by enacting a constitution, not even if the ideal constitution could be found. Some constitutional structures provide more adequate frameworks, however, within which these problems may be addressed” (Gloppen 1997, 264–5). This is what is critical in this whole matter of constitution making.
- 17 See the Foreword by Nelson Mandela in Andrews and Ellmann (2001).
- 18 Part of the land issue in Zimbabwe seems to arise because of the lack of clarity as to whether the country accepts white Zimbabweans as nationals, entitled to the same rights as Black Zimbabweans.
- 19 *State v. Acheson*, 2 SA 805 (NM, 1991), at 813 A–B.
- 20 When India launched its constitution-making exercise in the wake of the advent of independence, India’s leader Jawaharlal Nehru described it as India’s “tryst with destiny.” See Singhvi (1995).
- 21 See, for example, OAS (1948, art. XX); UN (1948, note 7, at art. 21); Council of Europe (1950, First Protocol, art. 3); OHCHR (1966, art. 25); OAS (1969, art. 16); ACHPR (1981, art. 13); OSCE (1990).
- 22 For more on its 1996 elections, see “Zambia: Elections and Human Rights in the Third Republic” (HRW 1996). The May 1998 elections in Lesotho, which had been pronounced as free and fair by international observers and in which the opposition won only one seat, were later found to have been riddled with irregularities by the Langa Commission of Inquiry. See, also, “The Two Versions of the Langa Report,” *Mail and Guardian* (Johannesburg), September 25, 1998 (<https://mg.co.za/article/1998-09-25-the-two-versions-of-the-langareport/>). The elections led to a crisis, which in turn led to a complete collapse of law and order in Lesotho and to military intervention by the SADC.
- 23 Center for Development Studies (CDS) and the National Democratic Institute for International Affairs (NDI), Conference on Free and Fair Elections, March 12–14, 1993, Cape Town, South Africa.
- 24 Bogdanor (1987) argued that it seems that a national culture unified both ideologically and ethnically may be a precondition for the successful working of the plurality and majority methods.
- 25 See, also, Guinier (1998), who noted how proportional representation can be less polarizing than conventional race-conscious districting. The author gives examples where not only Blacks and women but Republicans had been elected for the first time when Chilton County, Alabama, adopted cumulative voting, a strategy also used in corporate board rooms in America.
- 26 There are many variations of both winner-take-all and proportional representation systems. See de Villiers (1993, 33).

- 27 See Lewis (1965), who observed that the surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American system of first-past-the post, wherein the candidate with the plurality of votes is the winner. The author further observes that the vagaries of plurality elections would produce racially exclusive and geographically parochial governments, which would exploit a mandate from a plurality of the electorate in order to discriminate systematically against minorities.
- 28 See Ampem II (1995). At various points, some African countries have abolished chieftaincy only to reinstate it. Tanzania and Uganda are cases in point. In the South African constitutional negotiations, the question of what to do with traditional institutions was a major point of discussion. In the end, the South African Constitution provides for the recognition of traditional institutions but leaves it to national legislation to provide for the role of traditional leadership as an institution. This does not really integrate them into the mainstream South African post-apartheid political system. See Republic of South Africa (1996, art. 211(1)(2)(3), art. 212(1)(2)) The South African Government recently announced the appointment of a commission to look into the role of traditional leaders. (“The South African Government, Commission into Traditional Leadership,” *Mail and Guardian* (Johannesburg), October 23, 1998). The Ugandan Constitution takes the same approach, stating: “Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies” Republic of Uganda 1995, Art. 246 (1).
- 29 Customary law is the source for much of this discrimination. South Africa and Namibia have provisions in their constitutions that render invalid any customary law that conflicts with the constitutions. This practice should be emulated. It gives the courts the ability to declare gender-insensitive customs and practices illegal and unenforceable. See Republic of South Africa 1996, art. 211 (3); Republic of Namibia 2010, art. 66 (1).

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