

**Constitutionalism and the Challenges of Leadership  
in Africa:**

**An Evaluation of Tested Models**

**By**

His Excellency

**Senator Ike Ekweremadu, *PhD*, CFR**

Deputy President of the Senate

Federal Republic of Nigeria

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## **INTRODUCTION**

I congratulate the Centre for Media and Peace Initiative on its 10<sup>th</sup> anniversary and for its dedication to peace building, promotion of dialogue, democracy, non-violence, and conflict-resolving media practice around the globe. I appreciate your concern about the challenges of leadership in Africa and its far-reaching consequences on development and all the promises of democracy.

Therefore, I thank you immensely for availing me the platform to share my thoughts on an important topic that has agitated the minds of Africans. Your invitation and friendship are very well appreciated.

Truly, poverty, corruption, ethnicity, and ineffective leadership, among others, buffet Africa. The greatest challenge remains ineffective leadership. At the root of all these are structurally unworkable constitutions, arising mostly from the huge gap between constitutional models and the socio-cultural peculiarities of most African States. Therefore, Africa is incessantly battling to establish social equilibrium and a durable social order. Inept leadership has triggered an avalanche of problems that undermine efforts to re-establish social equilibrium generally regarded as a vital precondition for political stability, economic development and social justice. Africa's problems include ethnic crisis, political instability, bad governance, weak economies spinning off the evils of crushing poverty and mounting unemployment, corruption, weak and ineffective public institutions and

erratic public services. These problems, individually or in complex intersecting ways, account for the current state of unrest in Africa and diminish citizens' hopes for a better life under democracy.

Africans, like their counterparts in mature democracies, recognize that constitutionalism offers the pathway to progress. A constitution that creditably lays the framework for citizens to live their lives shorn of undue interference, injustice and abuse will eliminate or significantly reduce most of Africa's problems. Unfortunately, however, Africa's search for progress through the constitution has been beset by difficulties and anxieties chiefly because of the absence of a truly peoples' constitution and sometimes leaders' inability or unwillingness to obey the constitution.

Constitutional models and the challenges of leadership and development in Africa, are easily traced back to the Berlin Conference where the big nations of Europe, on the arrangement of the German Chancellor, Otto von Bismarck, came with long knives and practically shared Africa in their own economic, social, political, and administrative interests. The interests of the locals were never part of the considerations.

Great Britain got in her hunting bag the territories known today as Nigeria, South Africa, Sudan, Botswana, Zimbabwe, Uganda, Kenya, Zambia, Ghana, etc. France got control of a lion share of West Africa extending its control to, Benin Republic, Cote d' Ivoire, Mali,

Mauritania, Chad, Togo, Gabon, etc., while Belgium, got the Democratic Republic of Congo. Spain got Equatorial Guinea, while Mozambique and Angola went to the Portuguese. Namibia and Tanzania went to Germany. Namibia was retrieved from Germany by the League of Nations and administered by South Africa after World War I, while Tanzania became a British mandate.

The constitutions of African nations, therefore, bear to a large extent the imprimaturs of their colonial history. In fact, the constitutions were either imposed on countries by the departing colonial administration or the ruling military junta who came after the colonial masters left. The departing colonial and military authorities may have meant well in imposing a constitution on the country, but they painfully ignored two important factors: first, the impact of environmental factors on the efficacy of a constitution. A constitution that works well in a country may not be as effective in another country with dramatically different cultural, social and political assumptions. Second, imposing a document as fundamental as a constitution on a people without seeking input from citizens whose lives and affairs the constitution was supposed to govern was bound to inspire resistance, opposition, and perhaps even downright rejection. African citizens feeling disempowered and excluded from the constitution making process approach the nation's constitution with varying degrees of negative emotions. After several decades of experimenting with different constitutional

models, it is becoming increasingly clear that seeking to build a democracy on a constitution imposed on citizens has been problematic and accounts for Africa's woes.

This paper examines how Africa can resolve current leadership and development challenges through constitutionalism. Though Nigeria is used as a case study, reference will be made to experiences and practices in other African countries to enhance understanding of the issues under review. This paper is divided into three broad parts. **Part I** examines how Africa got to this stage and the implications of the current crisis for the present and the future. It is difficult, especially for non-Africans, to appreciate Africa's challenges without understanding the events and circumstances that led to the present state of dissatisfaction in Africa.

**Part II** examines African countries' experience with three dominant constitutional models: presidential system, parliamentary system, and the hybrid/semi-presidential Model. It will also examine leadership challenges and expectations of citizens.

**Part III** examines how African countries can design constitutions that reflect the aspirations of their people and enthrone appropriate leadership and thus lay a framework for durable social order in Africa.

I argue that trying to consolidate democracy, using constitutions imposed on the continent has become an untenable, perhaps risky proposition. African nations need to go back to the drawing board and write constitutions that truly reflect their wishes and unique circumstances. Africa's unique and peculiar circumstances counsel against uncritical adoption of any constitutional model. A constitution native to Africa, written by people for the people, that takes into account Africa's peculiar circumstances will significantly aid Africa's search for a durable social order. Other problems will lend themselves to easy solution once African nations write constitutions that reflect their wishes and aspirations.

I also argue that even the best constitution unaccompanied by behavioural and attitudinal changes by both leaders and citizens will not accomplish very much. Often, the fault is not in the constitution, but in us. Leaders and citizens must learn to see and treat the constitution as an article of faith and wholeheartedly submit to its imperatives, dictates and restraints. Only then will the hopes of promoting a better society through the constitution be realized.

## **PART 1**

### **AFRICA IN PERSPECTIVE**

The constitution left by the departing colonial administration proved incapable of sustaining democracy. More disturbing, most of the constitutions uncritically adopted foreign models without efforts to tailor them to suit the realities of African countries with dramatically different cultural and social assumptions. Very few, if any, African country can boast of having a constitution that truly reflects the wishes, aspirations and values of the people. It is no secret that upon independence, “departing colonial powers hastily imposed on newly independent African states carbon copies of their own documents which evolved from different cultural and historical backgrounds.”<sup>1</sup>

The British Parliamentary or Westminster model with little modifications was the predominant constitutional system in most post independent African nations. Imposition of a constitution without genuine efforts to involve citizens proved deleterious for Africa. <sup>2</sup> Citizens felt no allegiance to the constitution and generally regarded it with indifference and disinterest. <sup>3</sup>

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<sup>1</sup> Iis Wiwehl, *Constitution Anyone? A New Cottage Industry*, N.Y. Times, Feb. 2, 1990, at B3.

<sup>2</sup> Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT’L & COMP. L 155. 158 (1993) (noting that “one significant reason for the failure of constitutions in the third world was the tendency to copy constitutional structure from preexisting models, regardless of their applicability to the particular situation.”)

<sup>3</sup> Richard Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C.J. INT’L L. & COM REG. 263, 275 (1999). (noting that Africa was littered with constitutions, which “turned out to have little more value than the wallpaper on the houses of politicians and generals who have ignored them.”)

African leaders blatantly and audaciously ignored the constitution and engaged in devious schemes to advance their hegemonic ambitions. For most of them, the constitution became a major irritant to be ignored or circumvented. For others, the constitution served as an instrument of oppression to punish political opponents and those considered insufficiently loyal to the party in power. Charles Manga Fombad, appropriately summarized African leaders' attitude toward post independent constitutions:

Many writers agree that post-independence African constitutions, most of which were imposed by the departing colonial masters, were quickly transformed into instruments of oppression under the pretext of pursuing the coveted but elusive goals of national unity and economic development.<sup>4</sup>

After independence, Africans for the most part believed in their governments, or at least considered their problems as part of growing pains, which could be overcome with time. Unfortunately, citizens' good faith was not reciprocated by leaders. Leaders focused obsessively on power and cared very little about citizens and the nation. They acted with reckless disregard for national interest and engaged in monumental abuses and violations of the constitution and processes that safeguarded the rights of citizens. The failures of leadership led ethnic groups to battle for power and access to the national resources, fracturing in the process the nations' fragile unity and the

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<sup>4</sup> Charles Manga Fombad, *Constitutional Reforms and Constitutionalism*, 59 *Buff. L. Rev.* 1007, 1012 (2011).



fledgling democratic process. Ethnic agitations and demands for fairness and inclusion, discontent and dissatisfaction with leaders' unprincipled and capricious exercise of power grew precipitously and uncontrollably, leading to military coups and in some cases civil war.

Military rulers who assumed office promising to correct the ills of civilian leaders ended up being worse than the civilian leaders they condemned and replaced. Military rulers upon assuming office, quickly suspended the constitution and ruled by decrees and edicts. Consumed by the desire to secure their power base, military rulers severely curtailed civil rights and imposed martial law on the country. After decades of military rule, Africans quickly realized that military rule was no panacea for Africa's woes and demanded the restoration of civilian rule. After years of relentless struggles waged at great cost, military rulers relinquished power and handed over power to civilian leaders.

The restoration of civilian rule afforded African nations an opportunity to correct the errors of the past and find creative ways of dealing with problems that prevent Africans from enjoying the benefits of self-rule. The constitution was seen as the chief vehicle for fashioning the country of their dreams. Regrettably, the military, for a variety of reasons, just like the departing colonial masters, interfered in the constitution making process and imposed its preferences on bodies charged with drafting and approving the new constitution.

The constitution that emerged following the end of military rule suffered the same debilities as those imposed by the departing colonial masters. Citizens did not actively and effectively participate in the constitution making process and so the constitution did not truly reflect the wishes and aspirations of the people. The restoration of civilian rule after decades of military rule brought with it the resurgence of problems suppressed by the ruling military hierarchy. As Okechukwu Oko rightly predicted “freed from the pangs of despotism and emboldened by the freedoms conferred by the democratic process, ethnic groups will renew their age long rivalries and agitation for increased access to the machinery of government.”<sup>5</sup> Ethnic agitations held in check by the military resurfaced and thrust Africa into turmoil from which it has yet to recover. Some citizens believe that restructuring their country is the only way for them to live out their potentials.

After years of civilian rule, it became clear that most of the problems afflicting Africa can be traced to the defects in the constitution and inappropriate leadership. Some African countries face threats by restless militaries that insist on changing the nation’s social order. Several others remain hobbled by problems that frustrate and impede national development and citizens’ aspirations for a better life under democracy. Elections continue to be conducted under dubious circumstances, ethnic agitations for better treatment are growing louder and more

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<sup>5</sup> Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria Through Reconfiguration*, 8 *Indiana International & Comparative Law Review*, 317, 372 (1998)

tenacious and violent. Corruption, leadership excesses, civil rights violations are becoming disturbingly high as Africa remains a seedbed of turmoil, political instability and social disequilibrium.

Despite years of uninterrupted democracy, Africa continues to witness the resurgence of conditions, circumstances, habits and attitudes that in the past led to disaster. Leaders adopt self-interest as their lodestar and seem resolved to impose their views and preferences on citizens by intimidation and coercion. They reprove any criticisms or questions as illegitimate and traitorous and go to extraordinary, even illegal measures to squelch good faith efforts to invite attention to their misdeeds. They remain impervious to contrary views or reason and are unperturbed by the consequences of their excesses on both the nation and the citizens. Amid the chaos in Africa, an encouraging feature stands out: Africans believe that democracy is the best form of government. Africans who have experienced the downside of tyranny and dictatorship truly believe that a constitution that addresses the ills of the past offers the pathway to a peaceful and more secure society. The problem, however is that Africa countries do not have constitutions that truly reflect the wishes of the people. Lamenting the inability of African countries to find the right constitutional model that adequately address the realities of the continent, Professor Reginald Green stated:

Many African constitutions are simply irrelevant. They do not in any meaningful sense represent the goals or operating principles of any significant interest groups. ...are not seen as relevant to constitutional orders and exist because it is believed that like national anthems, coat of arms and flags, constitutions and "development plans" are something that states have to have for ceremonial and symbolic purposes.<sup>6</sup>

Africans react in unprecedented and diverse ways to constitutions that do not reflect their wishes. Some are indifferent, some boisterously and sometimes violently demand changes to the way they are governed. Others, especially those who benefit from the system prefer the status quo and make no efforts to demand changes in the way leaders operate. Loyalty to the constitution, a key asset in any democratic nation, is often palpably missing in African nations. Unlike the United States where citizens' commitment to the constitution is deep, genuine and upfront, most African citizens feel no allegiance to either the country or the constitution; they consider the constitution alien to them and imposed by the departing colonial masters or military dictators. It is therefore not surprising that the level of commitment and fidelity to the constitution displayed by citizens in mature democracies, notably the United States, do not exist in Africa most times.

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<sup>6</sup> Reginald Green, Participatory Pluralism and Pervasive Poverty: Some Reflections, 1989 THIRD WORLD LEGAL STUD. 21, 47.

## **PART II**

### **Africa's Experimentations with Constitutional Models**

A Constitution is essentially the autobiography of a nation.<sup>7</sup> It, therefore, becomes problematic when the autobiography is written by another person without the consent or even knowledge of the subject. Upon attaining independence, many African countries shifted from or modified what was inherited from their colonial masters.

For instance, Nigeria adopted or had the Westminster system imposed on it at independence. The military intervention in politics, however, changed Nigeria's constitutional development most dramatically, moving the nation from a true federal state to quasi federalism. Importantly, by the time it handed over power in 1979, the military imposed the American presidential system on the country. With the hindsight of the crisis and fall of the First Republic that eventually degenerated to the thirty-month civil war, the military believed that a strong central government built around a president, who is both the head of government and the Commander-in-Chief of the Armed Forces better served the needs of a multi ethnic society like Nigeria.

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<sup>7</sup> Justice Albie Sachs of South Africa (I-IDEA, 2000).

The US Constitution typically delineates the powers and spheres of influence of each branch of government and also contains elaborate provisions designed to check and balance different branches of government. The doctrine of separation powers clearly enunciated in the Constitution leaves no branch in doubt as to its powers and sphere of influence. The Constitution also contains a built-in system of checks and balances, deliberately giving the legislature and the executive branch the power to check each other so as to avoid either executive or legislative tyranny. The American system is attractive because it curtails arbitrary acts through a system of checks and balances.

Professor Eugene Rostow states:

The separation of powers under the constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizens and the various parts of the state itself against encroachment from any source. The root idea of the constitution is that man can be free because the state is not.<sup>8</sup>

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<sup>8</sup> Eugene V. Rostow, The Democratic character of judicial review, 66 Harv. L. Rev. 193, 195 (1952)

Nigeria, Ghana, Cote d'Ivoire, The Gambia, Guinea, Liberia, Togo, Benin Republic, Sudan, South Sudan, Tanzania, Central African Republic, and Cameroon are all countries practicing the presidential system in Africa. Others include, Congo Brazzaville, Mozambique, Zimbabwe, Zambia, Rwanda, Burundi, Seychelles, etc. Even though some constitutional provisions and principle differ from the American constitution, it is clear that they were inspired by American constitutional theory and practice.

South Africa, Lesotho, Ethiopia, and Botswana practice the parliamentary system while Gabon, Cape Verde, Chad, Niger, Senegal, Tunisia, and indeed most of the former French territories practice the semi-presidential system (Hybrid), taking after their colonial masters. Time and space will not permit me to discuss the problems faced by African countries despite the adoption of different constitutional models all aimed at enthroning democracy.

The bottom line, though, is that the hood does not make the monk. Otherwise, democracy would be flourishing in Africa the same way it is flushing in nations that inspired the systems. The British parliamentary system functions smoothly without a written constitution. But, African nations, such as Nigeria, that has a written constitution has not faired near as good as the British system. Therefore, there must be a cultural content to constitutionalism.

Democracy remains in Africa, but the substance is, in most part, disappearing, hollowed out by defects in both the constitution and its operation. There is a sense that democracy in Africa is fragile, vulnerable and under severe attack. The scope, magnitude and complexity of these problems vary from country to country but they all draw from the same well: failures of leadership. The crisis in Africa is caused and in some cases exacerbated by leaders who govern with neither restraint nor respect for the limitations on their powers. Many African leaders are shedding or perhaps never acquired the habits and restraints that make democracy the best form of government. A major undercurrent of unease is gathering in Africa, propelled by what citizens consider contempt for their rights and welfare by leaders. This has led to agitations for restructuring of government and mounting demands for better treatment in Nigeria, Zimbabwe, Togo, and Cameroon, etc.



Democracy thrives when the judiciary is exceptionally effective in acting as a brake upon abuse of power, protecting the rights and liberties of citizens and curtailing the excesses of government. Political elites must consistently show themselves to be committed to constitutional democracy. They must respect the limitations and restraint on power and the constitutionally guaranteed rights and liberties of citizens. Citizens, on their part, must support the constitution and feel vested in the process. They must abide by the dictates and imperatives of constitutional democracy, secure in the conviction that the system will serve and protect their interests. Their patriotism and respect for the constitution are bolstered by the sense of possibilities and optimism expressed by political elites whose rhetoric and activities demonstrate the value and benefits of fidelity to the constitution. Their confidence in the system move them to cultivate and display habits and the capacity to make adjustments, concessions and compromises necessary to overcome threats and challenges to the system. Citizens must understand and internalize the ethos and values that sustain democracy and be willing to discharge their civic obligations.

More importantly, citizens must have faith and confidence in the system and believe that the system will protect their rights and interests against encroachment or abuse by government and powerful private individuals. Citizens' commitment to constitutional ideals derives from the understanding that at difficult and challenging times, the system will protect and prioritize their interests over everything else. The firm and unshakable belief that benefits accrue to those who respect the constitution will inspire and challenge citizens to show respect and commitment to the constitution.

### **PART III**

#### **THE WAY FORWARD**

Africans' wishes for good governance, an end to leadership excesses and abuses, fair and equitable distribution of national resources, and respect for their rights have not materialized. It would be naïve to pretend that all is well in Africa. Increasingly, agitations for partitioning, restructuring, ethnic irredentism, systemic injustices and inequities, weak, ineffective and overbearing leaders have become salient features in Africa.

There is a palpable weakening of commitment to, and in some cases, the evisceration of, values that sustain constitutional democracy. Citizens who grudgingly gave their support and allegiance to the nation are demanding better treatment. A constitutional reform seems to be the only alternative to the violence and upheaval that will inevitably flow from agitations for justice by dissatisfied citizens and ethnic groups.

So many Africans identify the constitution as the origin of the problems that undermine national unity and social equilibrium. Therefore, clinging on to the status quo is unwarranted and unwise. Rather than treating the constitution as an instrument of compromise, a vehicle for reconciling differences, or a means for peacefully resolving problems, some citizens view the constitution as a vehicle for legitimizing their exclusion and domination by some ethnic irredentists. Some citizens believe that the current constitutional arrangement has confined them to the margins of national life and deprived them of the benefits of belonging to the nation. Efforts to sell the status quo by some leaders have been met with calculated coldness by citizens reeling under the inequities and excesses of the system.

African leaders recognize the problems with their constitutions and have tried with varying degrees of seriousness and commitment to amend existing constitutions to reflect the aspirations of the people. In Nigeria, we have spent significant time and resources reviewing the constitution. Several amendments have been made, while some worthy proposals succumbed to the interplay of politics and ethnic consideration and could not pass. The constitutional review process is still ongoing and hopefully more amendments will be possible.

I doubt whether the issues that plague Africa can be meaningfully addressed, in most cases, through amending existing constitutions. Colonialism and military rule ended decades ago, but they left residues of bitterness, suspicion and resentment that undermine efforts to promote national unity in most African nations. The fears, anxieties, and concerns that distort and deform Africa are in part traceable to citizens' views and feelings about the constitution. Africans, in most cases, have never really engaged in substantive deliberations and dialogue about the constitutional format for governing themselves. It may well be time for such a dialogue. The outcome and result of such dialogue and discussions will be a constitution acceptable to all.

The encouraging thing is that citizens' disappointment with their leaders has not dampened their ardour for democracy. Leaders must ensure that disappointment with them does not mutate into disdain for the system. The bridge to a peaceful Africa is a constitution that ensures that freedom of individuals and groups is safeguarded not only by the courts but also by a structure of government that checks the excesses of leaders, ensures inclusivity in opportunities, and makes citizens to feel vested in the system. Separation of powers that enables branches of government to check and balance one another effectively is also critical. Based on my experience as the Chairman of the Senate Constitution Review Committee for the last twelve years, I can state that African constitutions face the following major challenges:

- (a) Devising an appropriate governmental structure that can address the unique problems and challenges in multi ethnic societies;
- (b) a constitutional framework that will check the excesses of leaders and promote accountability in government;

- (c) a framework – governmental and institutional – that will allay fears of marginalization, exclusion and domination widely prevalent among minority ethnic groups in Africa;
- (d) a system for addressing systemic injustices and ethnic inequities that fray the bonds of national unity and sense of patriotism.

Africans want governance based on respect and restraint, an end to excesses and abuses, a fair and equitable distribution of national resources, respect for their rights and liberties, fair representation and inclusion of all ethnic groups in the governance process.

The challenge for Africa is to imaginatively design constitutions that can address the peculiarities and unique concerns of their nations. The process is as important as the substance, so efforts must be made to create avenues and opportunities for public participation. Thus, Africans must go back to the drawing board and embark on a genuine and credible constitution drafting process. The overarching goal of constitution making is to produce a constitution that will be “legitimate, credible and enduring, that guarantees rights and freedoms perceived to be fundamental, and that provides a

structure for the effective conduct of the nation's business, for the achievement of its economic development and for the welfare of its citizens."<sup>9</sup> African nations need constitutions "they can use to define, defend and promote widely shared social interests – as a law empowering the people to demand protections against recurrence of the abuses of the past."<sup>10</sup>

Everyone agrees that democracy is out of kilter in Africa and that African constitutions largely do not reflect the wishes of the people. From here, however, opinions differ as to how to address the problems. The pertinent questions are: can Africa's problems be fixed? And if so, how? To revitalize democracy and enhance the prospects of a durable social order through the constitution, I proffer the following solutions:

### **i. Structure of Government**

Many African leaders have developed a reputation – not entirely undeserved – as despotic, arrogant and imperialistic. Some African leaders conduct themselves

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<sup>9</sup> Muna Ndulo & Robert B. Kent, *Constitutionalism in Zambia: Past, Present and Future*, 40 *J. Afr. L.* 256 (1996)

<sup>10</sup> James C.N. Paul, *Human Rights and the Structure of Security Forces in Constitutional Orders: The Case of Ethiopia*, 3 *WM. & MARY BILL RTS J.* 235 (1994).

with stunning indifference to the restraints and limitations on their powers. A system of government that can check the tendencies, inclinations and opportunities for leadership excesses will serve Africa very well. It has become increasingly obvious that presidential system of government and the winner-takes-all, which it mandates is problematic in multi-ethnic societies with long history of mutual suspicion and reciprocal distrust. The presidential system is often criticized for its concentration of powers in political chief executives, encouragement of divisive, zero-sum factional and sectional competition for political offices, expensiveness, and promotion of the politics of strong men, rather than strong institutions. Would parliamentary system be a better option?

Parliamentary system may be a more effective system for containing fears and concerns of ethnic groups that comprise the nation in Africa. But supporters of the current presidential system point to the failures of parliamentary rule in the First Republic, claiming that the trouble with Nigeria is not the choice of governmental systems per se, but the warped implementation or corrupt operation of these systems. I suggest a



modification of the present presidential system. Like Nigeria, African nations need the presidential system to hold together the contending forces of our federation. Such modification includes the introduction of Question Time in the parliament to hold the ministers consistently accountable and replacement of impeachment with a procedure for vote of no confidence, among others that I will still highlight.

## **ii. Single Term**

A more modest proposal seeks not the abandonment of the presidential system per se, but the redesigning of term limits for political chief executives in order to reduce the acrimonious conflict, divisiveness, and instability arising from partisan or factional competition for executive offices in the federation. I support the proposals to transform the current tenure of two four-year terms into a single term of five or six years. Among other advertised benefits, single-terms would avoid the distractions, manipulations and divisiveness of re-election campaigns, while facilitating a more rapid circulation or rotation of power among the various groups. But critics contend that such a change in term limits could remove

electoral incentives for good governance, while further entrenching corrupt ethnocentric politics.

However, we must learn from the failures and successes of older democracies. For instance, it is a fact that the Latin American democracies faced the same challenges we are facing today up to the 1970s. As many of them transited from military and autocratic regimes to democratic regimes, they discovered that the politics of succession, including incumbents' penchant for self-perpetuation, was overheating the system, thus threatening their democracy. As a solution, they adopted the single term presidency until such a time their respective democracies matured and stabilized. Some of the countries even fixed the period of time, which the single tenure system would last. And indeed, now that they appear to have a stable democracy, virtually all of them have returned to two terms of office for executives. Mexico still practices a single term of six years known as *sexinio*.

It is for this reason that the Senate Committee on the Review of the 1999 Constitution, which I chair, felt, in 2014, that single term would serve the ends of our current democracy. Unfortunately, the recommendation

failed because ethnic suspicions and parochial interests prevented reasonable and good faith evaluation of our worthy proposal.

### **iii. Rotational Presidency**

African countries operate semi socialistic economies where government is the dominant player in the economy. Access to power or lack thereof affects public attitude to both governance and democracy. Thus, a single term presidency that rotates among the ethnic groups or geographical zones, even if for a defined period, may prove reassuring to ethnic groups and promote loyalty to the nation because every constituent part will be reassured that power will come their way at a given interval. Therefore, it may well be time to revisit the idea of rotational presidency that was first muted in Nigeria by late military Head of State, General Sani Abacha. He addressed the issue in his 1995 Independence Anniversary speech:

The Provisional Ruling Council decided that in the higher and long-term national interest, the

proposal of rotational power sharing should be accepted. This option will apply to all levels of government. The Provisional Ruling Council has also endorsed a modified presidential system in which six key executive and legislative offices will be zoned and rotated between identifiable geographical groupings. In the implementation of this provision, the country has been divided into six zones: North-east, North-west, Middle Belt, South-west, East Central and Southern minorities. The national political offices, which will be filled by candidates on rotational basis are: the president, the Vice President, Prime Minister, Deputy Prime Minister, Senate President and Speaker of the House. The power sharing arrangement, which will be entrenched in the constitution shall be at the federal level and applicable for an experimental period of thirty years<sup>11</sup>

Although this decision did not eventually materialize, the six geopolitical zones of North East, North West, North Central, South East, South-South, and South-West have become a veritable formula for sharing positions and opportunities. It is an idea African nations should consider including in their constitutions, possibly with sunset provisions.

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<sup>11</sup> W. Afr., Oct. 9, 1995, at 1556 (General Sanni Abacha, 1995 Independence Anniversary Broadcast).

To further safeguard such arrangements, they can be locked as entrenched constitutional provisions. For instance, Article 60 of the Constitution of Brazil prohibits amendments that would abolish individual rights or alter the basic frameworks of the nation such as separation of powers or the Federal Republic. Also, Article 5 of the United States Constitution forbids any amendments that may affect equal representation of the states in the Senate without their consent.

#### **iv. Checking the Excesses of the Executive/Imperial presidency**

One of the greatest threats to constitutional democracy in Africa is imperial presidency. The challenge is how to check the excesses of many civilian leaders who are just as tyrannical and abusive as the military and civilian despots they criticized and replaced. Imperialist tendencies of many African leaders must be checked and disciplined if Africa is to make progress. Improvement depends on insisting that African leaders govern like democrats and imposing consequences on those unable or unwilling to do so. That is what a country's constitution and the democratic process are designed to accomplish. The civil societies and organised media must

take the lead here to always put leaders in check in addition to the inherent checks and balances that come with constitutionally guaranteed separation of power.

### **a. Hybrid Model of Presidential and Parliamentary System:**

The 3<sup>rd</sup> President of the US, Thomas Jefferson, probably foresaw the future of presidential democracy in Africa when he advised that “In question of Power, let no more be heard of confidence in men, but bind him down from mischief by the chains of the Constitution”.<sup>12</sup>

The American presidential system is, no doubt, ideal for welding the pluralism inherent in African nations together. However, as I have equally pointed out in other fora, there is need to modify our presidential system to curtail presidential excesses, and importantly, create greater overlap and affinity between the executive and the legislative arms of government. To this end, a hybrid of both the presidential and parliamentary systems will go a long way in keeping the presidency in check, while also reaping the benefits inherent in presidential system.

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<sup>12</sup> *The Kentucky's Resolutions of 1798*, Constitution Society, available at <http://www.constitution.org/cons/kent1798.htm>

For instance, presidential excesses thrive because there are no consequences for bad behaviours. Although the United States-styled constitutions in Africa provide for impeachment, it is usually exceedingly difficult, if not impossible to carry out. The impeachment process should be replaced with a *Vote of No Confidence*, which should pass by a simple majority of both Houses in cases of bicameral legislatures. That way, it will be easier to remove non-performing and autocratic presidents and call for early elections.

The president should also appoint all or a predetermined number of his/her ministers from the parliament and partly from outside the parliament, especially technocrats. Ghana and Kenya are good examples.

In Kenya, the President is bound by the constitution to appoint Ministers of the Government of Kenya from among Members of the National Assembly.<sup>13</sup>

Similarly, in Ghana the President appoints the Ministers from among the national parliament, although he is also constitutionally empowered to appoint a fewer number of

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<sup>13</sup> Section 16 (1) (2) of the Constitution of the Republic of Kenya, 2010

Ministers from outside the parliament, but who must also be qualified to contest as national parliamentarians.

The Constitution of the Republic of Ghana provides:

Ministers of State shall be appointed by the President 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.<sup>14</sup>

This, in addition to providing for Question Time, will drastically reduce the cost of governance and help create greater overlap and affinity between the executive and legislative arms of government. With both provisions, legislative-executive gridlock that has become a notorious feature of the presidential system has been largely eliminated. Also the ugly instances where members of the executive refuse to honour parliamentary invitations or brazenly flout legislative resolutions and directives would also be curtailed.

**b. Reducing Presidential Discretion:** South Africa provides additional good approach to managing the excesses of the president. Article 85 of the South African

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<sup>14</sup> Section 78 (1) of the Constitution of the Republic of Ghana, 1992



Constitution expressly prescribes how the President of South Africa can exercise presidential powers, thus limiting discretionary exercise of powers. It states:

The President exercises 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) coordinating the functions of state departments and administrations; preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or national legislation.<sup>15</sup>

**c. Vote of No Confidence:** The very cumbersome, windy nature of the impeachment process as a way of kicking out a chief executive is another reason leaders disregard the constitution and even shun clear orders of the court, among other excesses. This process should be replaced with or backed up with a Vote of No Confidence. That way, early elections could be called to test the popularity of the government, as is the case in France and South Africa.

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<sup>15</sup> Article 85 of the Constitution of the Republic of South Africa, 1996

Although Section 87 of the Constitution of South Africa makes provisions for the impeachment of the President on grounds of serious violation of the constitution or laws of the land or a serious misconduct or inability to perform the functions of the office, Section 93 also provides for the compulsory resignation of the President at any time the parliament indicates that it no longer has confidence in him. It also allows the parliament to sack the President's cabinet.

Section 93 (1) provides that "If Parliament passes a vote of no confidence in the Cabinet, including the President, the President shall, unless he or she resigns, dissolve Parliament and call an election in accordance with section 39".

Section 93 (2) provides that "If Parliament passes a Vote of No Confidence in the President, but not in the other members of the Cabinet, the President shall resign".

Senegal operates a quasi-presidential system in which a legislative majority in opposition to the president can remove the prime minister and cabinet through a Vote of No Confidence.

### **c. Presidential Assent to Constitution Amendment**

**Bills:** Importantly, the idea of presidential assent and signing of a constitutional amendment are unnecessary and an aberration. The decision of the United States Supreme Court in *Hollingsworth V. Virginia* in 1798 on the question of presidential assent to constitution amendment as prescribed by Article V should be the standard for African states. The apex court held that “while it is permissible, a Presidential signature is unnecessary”.<sup>16</sup>

Related to this is the presidential veto of conventional legislations. While in some African presidential systems, such as Nigeria and Uganda, the presidential veto can be overridden by two-thirds of the parliament, after which it becomes law automatically. However, there is need for the equivalents of Article I Section 7 of the United States Constitution on the timeline for presidential assent failing which it becomes a law. In most parts of Africa, Nigeria inclusive, presidents can leave a Bill they are not interested in or consider inimical to their personal interests to gather dust on the shelf for as long as they

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<sup>16</sup> Mike Rappaport, *Does the Constitution Require Constitution Amendments to be Presented to the President*, Library of Law and Liberty, Jan. 17, 2013

want or until the expiration of the parliament that passed it. This way, great initiatives have been buried and public resources expended on processing such Bills wasted.

The Constitution of United States of America provides an antidote for this:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress, by their Adjournment prevent its Return, in which Case it shall not be a Law.<sup>17</sup>

The Nigerian National Assembly recently passed a constitutional amendment to provide for a 30-day mandatory period for the president to sign or return a Bill, failing which it becomes a Law just like the United States system. It is a provision I recommend that African democracies should endeavour to include in their constitutions.

## **v. Restructuring**

Military rule enlarged the influence of the federal government at the expense of the federating units. Citizens feel that the federal government is too big, too

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<sup>17</sup> Article I Section 7 of the Constitution of the United States of America

powerful and out of control. The central government that once appeared necessary and beneficent has compromised, even jeopardized its standing by highhandedness, unfair treatment of some ethnic groups and abuse of power. The powerful central government has made citizens vulnerable to bureaucratic manipulation and control and left them powerless, and reminded them at every turn that the promise of self-government has been eroded.

Nigeria, and indeed African constitutions should espouse federalism characterized by weak centres and strong federating units. Currently, Nigeria has a very powerful centre, hence the need for devolution of powers. At independence, the Exclusive Legislative List contained about 44 items, while the Concurrent Legislative List at independence had 28 items. But in the 1999 Nigerian Constitution, forty years down the line, the Exclusive List swallowed up 16 items or about 57 percent of the items on the Concurrent Legislative List. No argument that is both coherent and respectable can be made to support the continued emasculation of the component states that make up Nigeria.

Efforts in the current (8<sup>th</sup>) National Assembly to alter the Second Schedule, Part I & II of the Constitution of the Federal Republic of Nigeria, 1999, to move certain items, such as Railway, Aviation and Power to the Concurrent Legislative List to give more legislative powers to States and boost socio-economic infrastructural development was defeated. Indeed a restructured Nigeria will be in the best interest of everyone as each geo-political zone will maximize its potentials. For example, the North will be a net exporter of solar energy and agricultural products, the West the hub of banking and information technology, the East the hub of industrial manufacturing and scientific innovations, the Middle Belt the hub of solid minerals development and tourism while the South-South will be the Oil and Gas hub as well as shipping. When this happens, there will be less pressure on the Federal Government and the zones will be the centres of development. The rush to Abuja will cease and the country will be able to realize its potentials.

African constitutions should espouse a federal structure characterized by:

- a. Weaker centres and stronger federating units;

- b. Fiscal federalism to catalyse competitive development, industry, and creative governance;
- c. Well-defined tiers of government to make local government the business of component states;
- d. Decentralized policing to enhance security; and
- e. Fewer numbers of federating units to address structural imbalances, reduce cost of governance, free resources for development, and take advantage of the economy of scale.

#### **vi. Proportional Representation:**

Existing knowledge on electoral systems has focused principally on the comparative advantages of the majoritarian and proportional systems and different modifications of the two systems. The most popular type of plurality-majority genre is the First-Past-the-Post, which provides for a win of simple majority. Minority groups in Africa have a common complaint: exclusion from the democratic process. Constitutional democracy emphasizes supremacy of the majority, which in most cases adversely affects the rights of minorities.

The Proportional Representation system is increasingly becoming popular around the world, suggesting an

increasing movement away from pure Plurality-Majority system. This may not be un-connected with the value rendition of fairness, depth of representation and inclusiveness as well as availability of more adaptable variants in the system. By this system parties are represented in Parliament on the percentage of the votes they secure in election. In Nigeria, the Supreme Court in the case of Rotimi Amechi v INEC held that it is the parties that contest elections and not individuals. This must be complemented by a system of proportional representation as it is in Niger, Cape Verde, and Senegal etc.

Broadening the electoral choices of the electorate in elections in Africa can further be achieved through provisions for Independent candidates to contest elections. Currently, by the provisions of the Constitution of Nigeria, only political parties can stand for elections. There is currently no provision for independent candidacy. The National Assembly has however in the current Constitution Review exercise provided for independent candidacy. The amendment, among others, will have to be supported by 24 out of the 36 states in Nigeria before it receives the assent of the President.



## **vii. Amendment or Replacement of Constitutions in Africa**

Sadly, most African constitutions provide only for amendments, but have no provisions for establishing a new constitution. Therefore, the first step should be to amend the constitutions to make such provisions. Kenya replaced her 1969 Constitution in 2010 by first amending the former constitution to provide the legal authority to establish the present Constitution. Zimbabwe and Brazil have also replaced their old constitutions through the same process as well.

What Kenya did after the 1997 general election was to pass the Constitution of Kenya Review Act (CKRC) to provide the legal framework and needed enlightenment for a new constitution. Although the final document failed amid political turmoil at the 2007 referendum, but succeeded in 2010.

In 2015, Nigeria tried to amend Section 9 of the 1999 Constitution to provide for how a new constitution may come into place, but it was unfortunately shut down by ethno-sectional suspicions. Nevertheless, providing for

this procedure will bolster quests for a truly people's constitution.

## **CONCLUSION**

As Africa grapples with the challenges of deepening democracy, leaders must think creatively about how to use the constitution to create a durable democratic order. Africa must devise a constitutional model that can effectively constrain leadership excesses before anger, frustration and disappointment with leaders congeal into apathy for the democratic process. Constitution drafters in Africa must remember that it is unhelpful to copy constitutions from other countries without efforts to understand the continent's peculiar problems and challenges and what they want the constitution to accomplish. Professor Yash Ghai's suggestions bear repeating:

In the developing countries constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration.<sup>18</sup>

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<sup>18</sup> Yash Ghai, *The Theory of the State in the Third World and the Problem of Constitutionalism*, 6 Conn J. Int'l L.

I am an optimist, but I must acknowledge that most African nations will not on their own undertake the writing of a new constitution. Political elites are too comfortable and too invested in the status quo and would not risk abandoning their comfort zones for what in their view seems to be the doubtful benefits of a new constitution. I believe that until African countries truly have a people's constitution, the practice of constitutionalism will remain unsatisfactory. That is where the international community can help. One of my main goals in this address is to sensitize the international community to the seriousness of Africa's problems and provide the information that will promote better decisions about how to address Africa's problems. The international community has enough cachet and resources to prod Africans to engage in reform that will prevent the coming disorder and protect future generations of Africans from the easily correctable errors and mistakes of the past. Africa will truly be a remarkable continent if African nations embark on genuine constitution writing exercises that will lead to the emergence of constitutions that reflect the wishes and aspirations of the people.

Africa's problems and challenges summon us to seek solutions with energy, care and deliberation, guided by the best interests of our nations. And we must answer the charge. Africa is not beyond redemption. Despite the challenges, there is hope. This hope will be realized with new constitutions that are modern and reflective of our local peculiarities, positive attitude of citizens to the system but most importantly by visionary and just leaders which we must all seek and enthrone from South to North of Africa and from the West, Central and to the East of Africa. May God help us to find and enthrone these leaders in our time.

Thank you for your attention.