(p. 13) 1 The Evolution of Modern African Constitutions

A Retrospective Perspective

1. Introduction

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

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

The rest of this chapter is divided into four sections. Section 2 briefly examines the different generations of constitution-building that have taken place as African countries have attempted to adopt effective and durable home-made constitutions. Section 3 examines the different influences that have shaped the structure, scope, and content of (p. 14) African constitutions. Section 4 looks at the main patterns that are emerging. The last section provides some concluding remarks.

2. Generations of Constitution-building in Africa

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

It is worthwhile pointing out that the colonialists hardly pretended, or even attempted, to govern their colonial possessions under anything that is remotely close to a constitution. The goal of maintaining social peace at all cost in order to exploit the colonies to their fullest mattered more than the niceties of constitutional governance. Under no colonial system in Africa was political organization based on any principles of constitutionalism such as the separation of the branches of government or checks and balances.\(^6\) The powerful colonial administrators who ran the colonies like private farms, were given wide discretionary powers which they regularly abused with impunity. Much has been written about the atrocities that were committed in Africa during the colonial period under the guise of benevolent paternalism (mission civilisatrice).\(^7\) Although Belgium and France gained notoriety for the brutality of their colonial policies, the record of the former was notorious. For example, Joseph Conrad in his Heart of Darkness describes Belgian rule in today’s DR Congo as the vilest scramble for loot that had ever disfigured the history of human conscience.\(^8\) This is the background against which African colonies became independent.

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

The Western experts who crafted these first-generation constitutions had little knowledge of the local realities of Africa and were more concerned with maintaining the status quo ante in which the interests of the former colonial powers and the white settlers left behind were well-protected. For example, the early constitutions drafted by the British for their non-African colonial possessions initially reflected the traditional English scepticism towards the entrenchment of rights and did not contain any comprehensive statement of fundamental
It was therefore no surprise that (p. 16) as Ghana (then known as Gold Coast) was prepared for independence, the draft independence constitution which included seven articles for the protection of fundamental rights was rejected by the British government. As a result, the Ghanaian constitution of 1957 had no bill of rights. There was however a dramatic change at the dawn of the 1960s. It is not improbable that one of the reasons was the hope by the British government that a constitutional guarantee of fundamental rights, including the prohibition of discrimination would protect the British citizens who had settled in large numbers in certain African countries such as Kenya, Uganda, and Tanzania. In December 1959, Nigeria became the first former British colony in Africa to be provided with a constitutional bill of rights. Thereafter, it became standard for the constitutions of other British colonies in Africa to have a bill of rights based on the Nigerian model. The French by contrast refer to human rights parenthetically, by means of the preamble to the 1958 constitution, which in turn refers to the preamble of the 1946 constitution and the somewhat rhetorical 1789 Declaration of the Rights of Man and the Citizen. The recitations contained in these documents were interpreted by the French Constitutional Council as a bill of rights. The French legacy of not guaranteeing fundamental rights and freedoms in the substantive provisions of the constitution was, with a number of exceptions, replicated in the constitutions that it handed down to its former colonial territories in Africa. The effect of this was a weak and unpredictable system of human rights protection because unlike in France, the preambles to these constitutions were not regarded as a substantive part of the constitution.

Generally, since the main aim of the independence constitutions was to transfer powers to the national elites, more attention was paid to the exercise of powers than to their limitations. There was thus no effort to ensure a smooth transition from the repressive and harsh colonial system of administration to constitutional rule subject to the rule of law in a state of freedom. Hence, notwithstanding the number of liberal principles on human rights and political freedom contained in these new constitutions, the new elites had learned the colonial lessons of repression and authoritarianism rather too well to change so suddenly. Besides this, for the inexperienced Africans assuming the role of leadership, these constitutional documents were simply too complex and perceived to be ill-adapted to address the immediate problems they (p. 17) were confronted with. This was exacerbated by the extreme haste with which many European powers withdrew without advance planning for a transition. For example, in Belgian Congo (today’s DR Congo), the first legislative elections in which the population as a whole participated were held in May 1960, barely one month before independence.

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

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

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

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

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

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

(p. 20) Be that as it may, the one-party system hardly delivered on any of its main goals, viz,
national unity and integration, political stability, and economic development. With weak and
ineffective judiciaries and one-party parliaments effectively controlled by the executive
there was hardly any means to check against abuses of powers and the human rights
violations that had become commonplace. Once again, ordinary citizens were hardly
involved in the reform processes that saw African leaders and the ruling elites consolidate
and centralize power whilst progressively closing all avenues for open debate. By the
1990s, this system of governance had not only bred some of the worst dictators and
repressive and authoritarian regimes that the continent has ever seen but had led to
political instability, severe economic crisis, unemployment, civil wars, famine, and other ills
from which Africa is yet to recover. Like the first generation of African constitution-building
processes, the second one also failed to provide constitutions which promoted
constitutionalism or a firm basis for the social peace, coercion, and stability which was
needed for development. By the end of the 1980s the second generation of constitutions had
done no more than perpetuate the authoritarian and paternalistic style of colonial rule and
resulted in what one writer rightly referred to as ‘constitutions without constitutionalism’.
It is little wonder that by the end of this period the continent was ripe for revolution. And it
must also be added that the process of constitutionalizing dictatorship and authoritarianism
in Africa was often done with the full complicity of some of the former colonial powers. They
had not limited themselves to imposing the independence constitutions but in some cases
supervised and controlled the process of its implementation and subsequent amendments.
For example, the French grip over its former colonies was so strong that until the late
1990s, it tolerated only such constitutional changes that did not threaten its economic and
other interests in these countries. It regularly intervened to depose and install leaders
according to how they protected these French interests regardless of the hardship this
inflicted on the local population.

The third generation of constitution-building coincided with the so-called ‘third wave’ of
democratization that reached the African shores in the early 1990s. This led (p. 21) to a
fever of constitutional changes that shows no sign of abating. It is supposed to have brought
Africa into a new age of constitutionalism through a process of constitution-building that is
informed by the hard lessons learnt from the failures of the first two generations of

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

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

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

3. Influences on African Constitutions

Constitutions are not written in a vacuum nor do they fall from the sky. They are often prepared in a particular political context and with particular social aims. In the late 1950s and early 1960s it was almost taken as axiomatic by African states clamouring for independence that a constitution was a condition or a concomitant of independence. In the absence of a dominant model constitution which could act as guide, it was understandable that the emerging independent states simply accepted and adapted the models prepared by the colonial powers based on their own legal systems. Therefore, the first main and perhaps dominant influence on African constitutions was the colonial legal system within which these constitutions were crafted. In framing these constitutions, the colonialists did not completely ignore the African social, legal, and political cultures that were in place. Several aspects of the indigenous political systems as well as religious beliefs, such as Islam, were incorporated in diverse ways in these constitutions. Since these constitutions were adopted, like all modern constitutions, their development has been influenced by the borrowing of ideas, concepts, principles, and institutions from other jurisdictions, especially the states with which they share a common legal heritage. At some stage, many African constitutions were influenced by socialist ideology. However, in the last two decades, regional and international influences have played a very significant role in the considerable strides that have been made to entrench constitutionalism in Africa. It is now necessary to see to what extent each of these diverse influences has shaped the form and structure of these constitutions over the last five decades.

3.1 The colonial influence

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

The diverse efforts over the years to group jurisdictions around the world into a handful of legal families, systems, or traditions have become a hotly contested issue amongst comparatists in recent years. In spite of the criticisms levelled against the different taxonomies it is argued that it would be a mistake to ignore the legal tradition in which a country’s constitution was crafted and within which it actually operates. Although some writers argue otherwise, a critical look at African constitutions will show that there is a strong correlation between the constitutional ‘system’ and the legal system from which it has emerged. This reality has not been diminished by the dramatic constitutional changes taking place, not only in Africa but globally, which show that there are many signs of convergence of national constitutional systems. There remain however many differences, sometimes quite significant, which can be explained only by the legal tradition from which the constitution was crafted and has evolved. In this respect, it is to be noted that two main legal traditions have taken hold on the continent, the common law tradition in Anglophone
Africa and the civil law tradition in Francophone, Lusophone, and Hispanophone Africa. But as we shall see later, it is not merely these two legal traditions but also others which have influenced the evolution of African constitutions.

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

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

### 3.2 Ideological influences

By the time African countries were being granted independence in the early 1960s, in many cases after armed struggle against the colonial powers, the former Soviet Union (p. 25) as a superpower and socialism as an alternative ideology were at the height of their appeal to Third World countries. In fact, by the end of the Second World War, China and the Soviet Union as the main promoters of the Marxist–Leninist ideologies, had thrown their weight behind all the different independence movements across Africa and became identified with anti-colonial ideologies, especially in the Portuguese colonial territories. As a result of this, at the time of independence or at some later stage, many African countries adopted constitutions that were influenced by socialist ideology, or what are sometimes referred to as ideological constitutions.

Ideological constitutions were influenced by the socialist constitutional models then in vogue in both China and the former Soviet Union. The socialist constitutional models were instruments that were supposed to be designed for social transformation and incorporated ideological goals intended to map the historical progress of society, charting its movement toward the final state of communism. It is however necessary to distinguish the ‘socialism’ espoused by some of these constitutions from the ‘African socialism’ that was promoted by some African leaders like Julius Nyerere and Leopold Sedar Senghor. Although the term is borrowed from Marxist–Leninist thinking, many forms of this so-called African socialism had more to do with populism and African communitarian traditions than socialism in its strict sense. In fact, attempts were made by the proponents of African socialism to distinguish it from non-African socialism. One of its most eminent promoters, Senghor, boasted thus: ‘We have rejected prefabricated models. We have not let ourselves be seduced by Russian, Chinese, or Scandinavian models.’ He then went further to describe the communist blueprint as a ‘soul-less monster’ whose ‘purely materialistic and deterministic postulates’ ill accords with the African environment and argued that the communist thesis of the class struggle would tend to produce and accentuate social divisions at a time when national unity was the key to national construction.
contemporary, Julius Nyerere rejected what he referred to as ‘European’ or ‘doctrinaire socialism’ for seeking to build a society on a philosophy of inevitable conflict between man and man and an illogical form of socialism which can only co-exist with its (p. 26) ‘father—capitalism’. Some of the main features of this African socialism included the ownership of land by the community rather than individuals, the sharing of the wealth of the community, and the recognition of the whole society as an extension of the basic family unit. One common feature which it shared with the so-called doctrinaire socialism was the primacy of the ruling party as the vanguard of the people. This led in most cases to a blurring of the distinction between party and government. Some countries even claimed to have evolved to a point where they had replaced African socialism with what they termed scientific socialism, which was a euphemism for the adoption of non-African socialism.

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

It will suffice to mention a few of those socialist ideological influences on African constitutional developments. The first feature was the language, the style, and the developmental and programmatic formulation of these constitutions. The texts often proceeded in the historicist mode by narrating the exploitative past, the socialist present, and the communist future of the country. A typical example of such an approach could be seen in the preamble to the independence constitution of Algeria of 1963 and articles 3 and 4 of the 1975 independence Constitution of Cape Verde. (p. 27) The idea behind this approach is to underscore the fact that the constitutions were to be used as instruments of transformation to guide the development of the country in accordance with socialist principles in order to eliminate the exploitation of one citizen by another and pave the way for a pure communist classless society in the future.

A second feature was the constitutional entrenchment of the dominant and all pervasive role of the ruling party based on the theory of democratic centralism. Although during this period, almost all African countries had adopted the single-party system either de facto or de jure, this was hardly spelt out in such clear and elaborate terms as was done in the constitutions adopted by those countries that had openly declared themselves as socialist.

For example, article 35 of the 1969 Constitution of Congo Republic had declared the new single party, the Congolese Labour Party to be the ‘vanguard organisation ... created in order to lead the Congolese people to national liberation and to the construction of scientific socialism ... ’ Articles 23 and 27 of the constitution of Algeria of 1963, declared the single party as the ‘vanguard party’ that would ensure stability and serve as the only ‘powerful organ of impulsion’. The duties of the party were also laid out: the party ‘will mobilize, form and educate the popular masses’, ‘perceive and reflect the aspirations of the masses’, and ‘draw up and define the policy of the nation and supervises its implementation’. The effect of this was that socialist-type constitutions were not so much intended to limit government as they were designed to express the idea that the constitution was, in a sense, limited by the ruling party. This effectively ensured that in all these countries the party controlled the executive and the government as a whole. Even under the Algerian socialist-style constitution which adopted a French-style presidential system, there were provisions in the constitution which gave the party, the National Council of the Algerian Revolution, full control over the National Assembly and the president: in

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fact, the party was given the powers to nominate Assembly candidates and presidential candidates and thus effectively dominate both branches of government.\footnote{60}

Another feature of socialist-styled constitutions was the approach to dealing with human rights. Many of them contained provisions that purported to recognize and protect fundamental human rights. They were however couched in heavily qualified language which allowed such rights to be enjoyed only if they did not, for example, ‘hinder the emergence of the socialist state’, ‘combat the revolution’, ‘encroach upon the interests of the collectivity’, or ‘threaten the interest of the state, the people or the (p. 28) revolution’.\footnote{61} The right to private property was also restricted in many of these constitutions. For example, the Benin constitution of 1975 did not recognize the right to private property whereas this was recognized, albeit subject to numerous qualifications under some constitutions like those of Congo and Madagascar.\footnote{62} Generally, most of these constitutions were either silent or contained very few provisions on economic, social, and cultural rights.\footnote{63}

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

In spite of the widespread flirtation with socialism in Africa, apart from what was stated in the constitutions and the addition of the symbolic phrase ‘People’s Republic’ to the country’s name, there was in substance little that could distinguish many socialist from other non-socialist states in pre-1990 Africa. In fact, the commitment of some countries who toyed around with socialism at one stage or another, such as Ghana and Benin, was palpably shallow and rhetorical, and was often contrived to play the West against the East for foreign aid. Even those countries, like Algeria, which adopted socialist constitutions right from independence, still incorporated some elements of their former colonial master’s system, France, by introducing a presidential system and a National Assembly elected by universal suffrage.\footnote{64} It was therefore no surprise that on the demise of the Soviet Union, the former socialist countries in Africa quickly and easily changed their constitutional ‘coats’ with hardly any of the hangovers that the (p. 29) former Soviet Republics experienced. For example, Benin, which from 1975 to 1990 operated under a typical socialist constitution, was at the forefront of the new wave of constitutionalism in Francophone Africa and today has one of the most liberal French Fifth Republic constitutional models in Francophone Africa. Nevertheless, although the socialist constitutional model seems to have substantially lost the influence it once had on African constitution-builders, there remain traces of socialist ideological influences in some of the former socialist states which have now apparently adopted the Western concept of liberal constitutionalism. For example, the constitutional entrenchment of lay judges, whose role is limited to dealing with issues of fact and not law, emanated from the socialist ideology of popular justice and citizens’ participation in the justice system.\footnote{65} In fact, the socialist orientation has remained a dominant feature of Mozambique’s post-independence legal landscape.\footnote{66} The historicist approach of formulating a preamble which bemoans the ills and
mistakes of the past and looks positively to the future has not only survived in some of the old socialist constitutions, such as the preamble to the 1992 constitution of Cape Verde, but also features in others such as the preamble to the 1996 constitution of South Africa. Whilst it is clear that the era of the theory of democratic centralism at the heart of which is a single party which is supposed to act as the vanguard and voice of the people is gone, the ghost of excessive centralization and one-party mentality lingers on, but this is so both in states that were once identified as socialist and, those that were not. Unlike other factors that have influenced modern African constitutionalism such as religion, to which we shall now turn, the socialist constitutional model appears to have suffered a fatal blow with the collapse of the Soviet Union and the increasing retreat of China from its rigid socialist ideological stance in the new globalized world. The socialist model has clearly lost whatever influence it once had, especially because of popular scepticism towards the concentration of powers and the dictatorship associated with it as African constitutionalism has increasingly come under the globalizing hegemony of neoliberal and Western democratic principles.

3.3 Religious influences

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

Although a detailed examination of the influence of Islam on modern African constitutions is beyond the scope of this chapter, the role it has played in shaping the evolution of constitutionalism in Africa, even if limited, cannot be ignored. This is particularly so since the rise of Islamic fundamentalism in the wake of the 11 September 2001 attacks in the United States. However, it is the Arab uprisings which began in Tunisia in December 2010 and quickly spread to other countries in the region that has made the inclusion or reinforcement of sharia in the constitutions of African countries with dominant or significant Muslim populations a cause célèbre. Militant groups have since sprung up both in countries with dominant Muslim majorities such as Algeria, Egypt, Morocco, and Tunisia and those with fairly significant Muslim populations such as Burkina Faso, Mali, Niger, Nigeria, and Senegal advocating for Muslim states based entirely on the Koran and sharia law. Some of the continent’s longest serving dictators in Northern Africa, most of whom had gone to great lengths to reduce the influence of Islam on the constitution and their societies in general, were swept aside and the opportunity was provided for the numerous Islamic political groups that had been at the forefront of this revolution to reshape the constitutions of these countries. Other extremist Jihadist groups who have sought to achieve their ends through terror have sprung up elsewhere. Two of the most notorious ones, Boko Haram and Al-Shabaab, have actually taken control of large territories in certain countries and brought them under their rule. Boko Haram is based in northeast Nigeria but also operates in Cameroon, Chad, and Niger. It controls some territory in north eastern Nigeria where it has established a so-called ‘Islamic caliphate’. The other Jihadist group, Al-Shabaab, has at various stages controlled large parts of central and southern Somalia where it rules under strict sharia law. In spite of the resurgence of Islamic fundamentalism and the efforts of these militant groups to establish Islamic states through coercion and terror, the influence of Islam on modern African constitutions has not changed fundamentally from what it was before 2010. In fact, the new Egyptian and Tunisian constitutions of 2014 underscore this point.
During the drafting of the Tunisian constitution, three main topics created tension between the Islamic political groups, who dominated the Constituent Assembly and secular movements. These were: the role of Islamic law in the constitution and in domestic legislation; the prohibition of blasphemy in both the constitution and in the Penal Code; and the constitutional rights of women. Proposals that provisions should be included in the constitution which made Islam the main source of legislation, criminalized blasphemy, and stated that women had a complementary role to men in family life rather than being their equal, were rejected after fierce opposition in the Assembly supported by protests in the streets. A comparison of the influence of Islam in Tunisia’s 1959 independence constitution and its 2014 constitution will give an idea of what appears to be happening. The preambles to both constitutions are fairly similar in their references to Islam. Article 1 of both constitutions declares Islam to be the state religion. The only difference is the addition to the 2014 constitution provision stating that ‘this article cannot be amended’. In the 1959 constitution, article 37 declared that the religion of the president of the Republic is Islam. In similar but perhaps more emphatic language, article 74 of the 2014 constitution declares that only Tunisian nationals ‘whose religion is Islam shall have the right to stand for election to the position of President of the Republic’. There is therefore no practical difference insofar as Islamic provisions in the two constitutions are concerned.

By way of contrast, in Egypt, after the ousting of Mubarak and the election of Mohamed Morsi of the Muslim Brotherhood as president in December 2012, the latter proceeded to replace the 1971 Egyptian constitution with one based on Islam with the support of a parliament which was dominated by the Muslim Brotherhood. Concern over the role Islam was going to play in the political life of Egyptians was one of the reasons for the overthrow of Morsi and the replacement of the 2012 constitution with a new one in 2013 but which was approved by a referendum and took effect in 2014. A brief comparison of the influence of Islam in the two constitutions is indicative of the impact Islam is having in the content of present constitutions. First, the 2014 constitution removed one of the most radical and controversial changes introduced by the 2012 constitution viz, the legislative role reserved for Al-Azhar. The 2012 constitution made it imperative that the Al-Azhar, one of the Islamic world’s most venerable institutions, had to be consulted in all matters pertaining to Islamic law. There were concerns because although the courts retained the power to interpret and apply the law, it was unclear what weight was to be given to the opinions of the Al-Azhar; especially where the courts disagreed with them. Second, the 2014 constitution removed an article in the 2012 constitution which made it a crime to ‘insult any messengers or prophets’. Third, both constitutions recognize Islamic law as the principal source of legislation but the 2014 constitution eliminated an article which sought to define Islamic law in language which many feared could be used to impose a specific vision of Islamic law. Fourth, the preamble to the 2012 constitution called women ‘the sisters of men’, but the 2014 constitution is more explicit and states that women are equal to men and commits the state to the ‘protection of women against all forms of violence’. Finally, the 2014 constitution explicitly forbids the establishment of political parties ‘formed on the basis of religion’. This latter approach is similar to that adopted in the earlier Moroccan constitution of 2012 which declares Islam a state religion and also includes a provision which prohibits political parties founded on a religious basis.

Generally, the role given to Islam in present African constitutions, especially the new ones adopted since the beginning of the Arab uprisings differs according to whether the country has a dominant Muslim population or not. In most countries with a dominant Muslim majority, the preamble to the constitutions often refers to Allah and principles of sharia law. The constitutions also usually have an explicit reference to Islam as the official state religion. Some of the more tolerant states in this category expressly allow (p. 33) for freedom of worship. In some of these countries, believers sometimes do not have the same rights as non-believers. In addition to this, some of these constitutions also directly...
or indirectly refer to Islam as the main source of law. By way of contrast, the main constitutional concession made by countries with a significant or minority Muslim population has been with respect to the recognition of sharia law in regulating matters of personal status such as marriage, divorce, and inheritance, and the establishment of Islamic courts. The possible reason for the absence of any references to Islamic courts in the constitutions of countries with dominant Muslim constitutions could be that such courts are assumed to be part and parcel of the Muslim way of life that need not be expressly spelt out.

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

### 3.4 Indigenous influences

Before colonial rule, African indigenous institutions of administration in which the traditional ruler and his traditional council exercised executive, legislative, and judicial powers were firmly in place to ensure peace, security, and stability. These were however quickly dismantled by the colonial powers. Although written constitutions were introduced into Africa only during the colonial period, not every aspect of their content was based only on Western ideas. A number of constitutional institutions and principles which have their roots in African indigenous culture and traditions found their way into some of the early constitutions and have now become a common feature of modern African constitutionalism. There is however considerable variety in how these institutions look and what effective role they play today and are likely to continue to play in the future.

With respect to institutions, the limited powers that the colonialist allowed traditional rulers to exercise was not out of any particular desire to protect the cultural heritage of the people but rather because it was consistent with the general colonial policy of indirect rule. By collaborating with the traditional rulers, the exploitation of the colonies was made cheaper and more effective. Besides some limited powers of administration, traditional rulers retained much of their judicial powers which were exercised through the traditional dispute settlement agencies. Many aspects of the traditional dispute settlement institutions and processes survived the ravages of colonial rule. The traditional courts had jurisdiction only over Africans and their powers during the colonial period were progressively reduced. As such, by the end of this period, these traditional courts hardly had any jurisdiction over criminal offences. Furthermore, the scope of application of customary law was restricted to the local population but by the end of the colonial period, the traditional courts were in most instances relegated to mere informal and optional methods of settling disputes because the imposed European-style formal court system had become completely dominant. Besides this, customary law was recognized and lawfully enforced only if it was not repugnant to natural justice, equity, and good conscience or incompatible directly or indirectly with any written law in Anglophone Africa (the so-called repugnancy test) or contrary to ordre public (public order and good morals) in Francophone Africa. Post-colonial African states for a long time retained the colonial attitude towards traditional African institutions, especially customary courts. Some states for a short while abolished these traditional courts shortly after independence whilst many retained them as an inferior system to the imposed colonial justice system, very much as it had been (p. 35) during the colonial period. For example, in Burundi and Zambia, the traditional courts for a long time
had no official links with the formal judicial system and were merely tolerated. In Botswana, some of the traditional courts are officially recognized and integrated into the formal judicial system whilst others operate outside this system.\(^92\)

The issue of whether and to what extent traditional institutions should be incorporated into modern African constitutions has generated intense and sometimes acrimonious debate between the so-called ‘traditionalists’ and the ‘modernists’, or sceptics as they are sometimes referred to.\(^93\) After decades of manipulation by the colonial and post-colonial governments and their complicity in the repression of the local population, some of the modernists feel that there are too many questions about what is really ‘traditional’ and how historically rooted these traditional institutions are. To the modernists, the traditional African institutions are an historical relic that belongs to antiquity because in many instances they act as a hindrance to the development and transformation of the continent. In many instances, they are undemocratic, divisive, and costly. For example, in South Africa, the collaboration of many traditional rulers with the apartheid regime\(^94\) and elsewhere in Africa, their collaboration with some of the worst dictators and human rights abusers today has profoundly discredited them and paved the way for their loss of legitimacy, loyalty, and support amongst the younger generation. Many now wonder whether they have any place in a modern (p. 36) Africa still grappling with the challenges of entrenching an ethos of constitutionalism and respect for the rule of law.\(^95\)

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

Generally, many contemporary constitutions specifically recognize and entrench the role of customary law and traditional courts as well as that of some of the pre-colonial traditional institutions. Some constitutions have retained the pre-colonial dual system of courts but formally integrated the traditional courts with the formal modern courts in a hierarchy which sees the former as the lowest courts.\(^97\) Some have in addition given constitutional recognition to traditional rulers and specified inter alia, the principles under which they will operate, their functions, and the basis for their appointment and removal as well as their remuneration.\(^98\) Botswana is one of the few African countries that have provided for a second chamber of parliament, called the Ntlo ya Dikgosi (House of Chiefs), composed only of traditional rulers. It is not and does not however play the role normally associated with a second chamber of parliament and is consulted only on issues pertaining to customary law,\(^99\) and bills relating to tribal land and chieftainship.\(^100\) Like Botswana, Ghana in its 1992 constitution also provided for the establishment of a National House of Chiefs and Regional Houses of Chiefs.\(^101\) Although they have more powers than the Botswana House of Chiefs, they also do (p. 37) not act as a legislative body.\(^102\) Perhaps the most significant aspect of the Ghanaian approach is that the constitution expressly insulates traditional chiefs from partisan politics but allows any chief who wants to take part in active politics to abdicate from his position.\(^103\) Swaziland illustrates an example of the failure to reconcile certain fundamental institutions of Swazi indigenous constitutional practices and customs with modern African constitutionalism. Its 2005 constitution, despite all appearances, does no
more than give a veneer of constitutional legitimacy to what is at best a system of absolute monarchy supposedly based on Swazi culture.\textsuperscript{104}

However, the absence of formal constitutional recognition of traditional institutions in any African constitution does not necessarily mean that they have no role to play in the governance of the country. A typical example of this is Nigeria. Although the 1999 Nigerian constitution, unlike previous constitutions, does not formally recognize the institution of traditional rulers, they nevertheless exercise enormous influence over the lives and well-being of millions of Nigerians.\textsuperscript{105} It can be said that the role of traditional rulers in constitutional governance has been treated in a pragmatic manner that gives them some \textit{de jure} or \textit{de facto} recognition depending on the possible influence that the particular traditional ruler has over his local community. Nevertheless, one of the few traditional institutions that appear to be experiencing a resurgence or revival is the traditional dispute settlement process. When considered as a part of the informal justice system, a recent study has indicated that they constitute a ‘cornerstone of dispute resolution and access to justice for the majority of the populations in developing countries because they usually resolve between 80 to 90\% of disputes.’\textsuperscript{106} For example, in Malawi, it is estimated that between 80 to 90 per cent of disputes are processed through traditional courts, and in the case of Burundi, the figure is about 80 per cent which goes through its \textit{Bashingantahe} institution as a court of first or sometimes only instance.\textsuperscript{107} The growing popularity of the traditional justice system is not surprising; it is more easily accessible (especially to the poor, uneducated, and marginalized), quicker, and provides affordable remedies. Although some recent African constitutions have retained and formally recognized the dual legal system\textsuperscript{108} others have been silent. As in the case with traditional governance institutions, the non-constitutionalization of the role of traditional courts in a country does not necessarily mean that such courts are not in operation.

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

Turning now to the indigenous African contribution to constitutional law principles, doctrines, and theory, this is more often than not, reflected in constitutional interpretation and application rather than the constitutional texts. One of the best examples of this appeared in the South African interim constitution of 1993. It is one of the first to use an important African constitutional concept, \textit{ubuntu}, in the constitution.\textsuperscript{112} It is (p. 39) not clear why this concept was excluded from the final constitution;\textsuperscript{113} nevertheless, the courts have repeatedly underscored its relevance not just in the interpretation and application of the constitution but also in dealing with South African law in general.\textsuperscript{114} Thus, in \textit{Port Elizabeth Municipality v Various Occupiers}, the Constitutional Court said:
We are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.\textsuperscript{115}

The exact meaning and scope of the concept of ubuntu remains a matter of considerable debate but its application as an important constitutional principle deeply rooted in African practice and culture is no longer in doubt. For example, ubuntu has frequently been invoked as an analogous concept to dignity.\textsuperscript{116} Besides this, several studies have shown that there were traditional checks and balances to ensure that African traditional rulers do not abuse their powers.\textsuperscript{117} Most of the traditional mechanisms for disciplining errant rulers were removed or curtailed by the colonial powers through the (p. 40) arbitrary removal and appointment of traditional rulers under appointment letters spelling out their powers and functions. The letters made these rulers serve at the pleasure of the colonial authorities and depend on them rather than on the wishes of their subjects.\textsuperscript{118} Generally, the colonial authorities deposed and executed traditional rulers when the latter failed to serve the need of the colonial government.\textsuperscript{119}

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

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

Another problem is that traditional institutions were suited to the rural and agrarian communities of the past not the modern communities where the chiefs hardly have any effective administrative powers. For the foreseeable future, and with perhaps the exception of traditional courts, the role that will be formally and expressly reserved for indigenous traditional institutions in modern African constitutions will be very limited. However, it must also be acknowledged that there are still many far-flung remote rural communities in Africa who have little access to government administrative and judicial services and thus by default still have to depend on their traditional administrative and dispute settlement systems.\textsuperscript{122} This is also the case in some conflict ridden countries, such as Somalia, South Sudan, and parts of DR Congo and Uganda where traditional institutions still dominate due to limited or no access to central (p. 41) government services.\textsuperscript{123} In the absence of such exceptional circumstances, indigenous African influence on the form and content of modern constitutions is reducing at a time when the influence of external factors, through the process of internationalization, to which we must now turn, is increasing.
3.5 The impact of the process of internationalization

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

3.5.1 Internationalization at the global level

Numerous international instruments, both global and regional, have since 1945 prescribed certain minimum standards of human rights protection which states must comply with. The most important and influential of these instruments is the Universal Declaration of Human Rights (UDHR). Although merely a ‘Declaration’, and thus not binding, its provisions have over the years been so extensively incorporated into other international and regional instruments as well as national constitutions that its provisions are now considered to express principles of customary international law.\[125] Four (p. 42) other international instruments which have been similarly influential and, together with the UDHR, constitute the international bill of rights are: the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; the International Covenant on Civil and Political Rights (ICCPR) 1966; the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights. Most of the provisions recognizing and protecting human rights in modern African constitutions have been substantially influenced by these international human rights instruments and standards, especially the UDHR. Some of the constitutional provisions go even further and expressly make reference to international human rights instruments. This is done in several ways.

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

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

\[26(1)\] The fundamental rights established in this constitution shall not exclude others contained in the laws and applicable rules of international law.

\[\text{\[124\]}\] \[\text{\[125\]}\] \[\text{\[126\]}\] \[\text{\[127\]}\]
(2) Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in keeping with the Universal Declaration of the Rights of Man, (sic) the African Charter on the Rights of Man and Peoples’ (sic) and other international treaties on the subject ratified by the Republic of Angola.

(3) In the consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned. (Emphasis added.)

(p. 43) 27 The principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the constitution or are enshrined in law or international conventions.

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

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

3.5.2 Internationalization at the regional level

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

(p. 44) There are five major instruments that contain the basic democratic principles of the AU democracy agenda, namely, the Constitutive Act itself, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government, the Declaration Governing the Democratic Elections in Africa, the Declaration on Election Observation and Monitoring, and the most recent, the African Charter on Democracy, Elections and Governance. All these instruments emphasize the important place given by the AU to democracy and the determination of member states to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. For the past two decades the AU has struggled to promote a culture of constitutional governance amongst its member states. Due to the fact that many of these important instruments are non-binding and even those that are binding
are often ratified but hardly domesticated, the impact on the present provisions of constitutions is rather minimal.

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

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

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

(p. 46) **4. Emerging Features and Trends**

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

4.1 The colonial context as dominant influence

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

From the various influences on the nature, content, and scope of African constitutions examined earlier, it is contended that the most significant, if not dominant influence, is the legal tradition within which they were adopted and operate. As noted earlier, this will mean classifying them into those derived from the common law tradition and those derived from the civil law tradition. There is indeed a strong case for arguing that African constitutions are inextricably linked with the legal system within which they were adopted and have operated since independence. This is mainly because, as we have seen, the independence constitutions were imposed by the departing colonial powers and in many cases, a typical example being the French, who simply transplanted the 1958 Fifth Republic Constitution with very few changes. It is also (p. 47) because, since independence, most African constitutions have been revised within the inherited colonial models. From this, it would seem that a classification based on the legal tradition is quite compelling, for as Cheryl Saunders rightly points out, the legal and constitutional systems complement each other. However, this conclusion is subject to a number of caveats.

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

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

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

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

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

As regards the overall structure, since the 1960s, the constitutions of Anglophone African countries have generally been much longer, more detailed, and explicit as compared to other constitutions, especially those of Francophone African countries which were usually shorter and often set out issues in broad outline, leaving the details to be fleshed out in ‘organic laws’. Since the 1990s, most constitutions both civilian and common law models, have increased in length to reflect new issues such as the wide range of human rights recognized and protected, environmental protection, and as we shall soon see, new institutions designed to promote democracy and accountability. Nevertheless, Anglophone constitutions have remained quite long, for example the 2013 constitution of Zimbabwe with 345 sections, Nigeria’s 1999 constitution with 320 sections, Ghana’s 1992 constitution with 299 articles, Kenya’s 2010 constitution with 264 articles and South Africa’s 1996 constitution with 243 sections. Although some civilian constitutions have now increased considerably in length as compared to the past, with the constitutions of Burundi (2005), Angola (2010), DR Congo (2005), and Rwanda (2003) having 307, 244, 229, and 203 articles respectively, they are still relatively shorter, with some being very short, such as Cameroon’s 1996 constitution which has only sixty-nine articles. Even for those post-1990 civilian style constitutions that have become lengthy, this increase in length is mostly in terms of the number of provisions adopted, not with respect to their scope, depth, or the details of issues covered. One reason for the continuous differences in
length and details seems to be that most modern Anglophone constitutions have in different ways copied the interventionist approach started in the South African constitution of 1996. It provided detailed provisions designed not merely to restructure power but also to facilitate societal change in what is now referred to as transformative constitutionalism. Key elements of this agenda of transformative constitutionalism, which has also necessitated long and detailed constitutional provisions, are: broadly worded provisions recognizing a wide range of fundamental human rights which are enforceable vertically and horizontally, broad access to justice rules, and wide ranging institutions of accountability.

Another area of differences concerns the structure and role of the judiciary. Three significant differences stand out when comparing common law- and civil law-styled constitutions in Africa. First, most Anglophone constitutions have maintained the common law approach of a single hierarchy of courts with jurisdiction to deal with all types of disputes but with specific courts to deal with certain matters such as labour and family disputes. By contrast, most constitutions with civilian roots provide for a hierarchy of at least three streams of courts viz, ordinary courts, administrative courts, and audit courts.

The ordinary courts deal with disputes between private individuals, the administrative courts deal with disputes between private individuals and the state or quasi-public agencies, and the audit courts deal with disputes concerning financial matters. Sometimes, a court of conflicts is provided to deal with disputes over which one of these three jurisdictions has the power to deal with a certain matter. Such conflict may arise where for example, more than one of them claims jurisdiction over the matter or declines jurisdiction to entertain the matter. Second, whereas the courts that have powers to entertain disputes concerning the interpretation and application of the constitution in Anglophone constitutions are usually part of the ordinary hierarchy of courts, in the civilian-style constitutions, the courts that have exclusive jurisdiction to deal with these disputes are specialized centralized courts which do not form part of the hierarchy of courts.

Third, whilst some recent Anglophone constitutions, the best examples being those of South Africa and Zimbabwe, have gone to considerable lengths to recognize and protect the independence of the judiciary, civilian-style constitutions do no more than pay lip service to this concept. Almost all these constitutions provide that the president will act as guarantor of the independence of the judiciary and in doing so, will be assisted by the Conseil Supérieur de la Magistrature (a body with some limited functional resemblance to the judicial service commissions in Anglophone Africa). Since the president often controls this body both in terms of composition and agenda setting, this effectively limits the ability of the judiciary to operate independently.

Two other important area of differences, which are discussed in other chapters of this book concern the approaches to the doctrine of separation of powers and the hybrid institutions of accountability which complement it, which are becoming increasingly common. As regards the approach to separation of powers, most Anglophone constitutions have adopted the English approach but with some elements of the American approach, whilst the approach adopted in the civilian jurisdictions is mainly based on the French 1958 Fifth Republic Constitution’s approach. With respect to independent watchdog institutions to promote transparency and accountability, this is becoming a common feature of post-1996 Anglophone constitutions and actually started with the 1996 South African constitution. The most elaborate examples of similar institutions now appear in articles 248–54 of the 2010 constitution of Kenya and sections 232–63 of the 2013 constitution of Zimbabwe. By contrast, it is only fairly recently that some civilian-style constitutions are beginning to entrench such institutions. However, apart from articles 126–30 of the 2014 constitution...
of Tunisia which contain a list of what it refers to as ‘independent constitutional bodies’ the practice is not well developed in the civilian jurisdictions.

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

5. Conclusion

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

An overview of the constitutional developments since independence shows that there is a strong connection in terms of form, structure, and content between modern African constitutions and the diverse elements that have influenced them. It was shown that these constitutions have been influenced by factors such as the legal tradition within which they operate, ideology, religion, indigenous culture, as well as international and intra-African developments on issues of human rights protection and good governance. Although no constitutional model has reached the point of global dominance, it was however noted that the radical constitutional changes that have taken place since the 1990s have been influenced by and remained within the framework of the legal and constitutional traditions inherited at independence. In this regard, two constitutional traditions, closely linked to the legal systems within which they were developed or have evolved, have been dominant and substantially influenced most current constitutional developments on the continent. One is the common law constitutional tradition based on the Westminster constitutional system with many elements of the US constitutional system crafted onto it which has been widely adopted in Anglophone Africa. The other is the civil law constitutional tradition mainly based on the French Fifth Republic Constitution of 1958, which has been widely adopted in Francophone Africa and to some extent, Lusophone and Hispanophone Africa. The chapter showed that there were significant differences in approaches between these two received dominant constitutional traditions in dealing with issues such as judicial independence, separation of powers, and judicial review. Some of the differences might be more apparent.
than real. For instance in spite of the different approaches to law-making, it is a practical reality that in both constitutional traditions, most laws are initiated by the executive. It is also worth noting that the reforms have, as a result of the increasing process of internationalization and the borrowing of ideas showed some areas of increasing convergence. Such is the case with the adoption of abstract (usually associated with the civilian tradition) and concrete (usually associated with the common law tradition) reviews and the trend towards entrenching institutions to promote and support democracy and good governance, which could be attributed to some extent to the democracy promoting efforts of the AU.

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

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Footnotes:


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

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

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


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

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

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

10 This attitude had been influenced by scholars such as Jeremy Bentham who, in commenting on the French Declaration of the Rights of Man and of the Citizen, is quoted by Nihal Jayawickrama, The Judicial Application of Human Rights: National, Regional and International Jurisprudence (Cambridge University Press 2002) 106 to have described constitutionally entrenched human rights as ‘rhetorical nonsense—nonsense upon stilts’. Albert Dicey in his famous, An Introduction to the Study of the Constitution (10th edn, Macmillan 1959) 199 was able to boast that habeas corpus is ‘for practical purposes worth a hundred constitutional articles guaranteeing individual liberty’.

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

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

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

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

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

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

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


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

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

26 ibid 150.
27 See, for example, art 35 of the Constitution of the Republic of Congo of 1969; and arts 8, 9, and 55 of the Madagascar Constitution of 1975.
28 For different views on this see, for example, Benjamin Nwabueze, *Presidentialism in Commonwealth Africa* (Hurst & Co 1974) 217–22.
29 For example, Idi Dada Amin of Uganda, Emperor Jean Bedel Bokassa of Central African Empire (Central African Republic), and Mobutu Sese Seko of Zaire (today DR Congo).
30 In Okoth-Ogendo (n 1) and for a more general account, see GN Barrie, ‘Paradise Lost: The History of Constitutionalism in Africa Post Independence’ (2009) 2 TSAR 290.
33 National conferences were held in nine Francophone countries namely, Benin, Chad, Comoros, Congo, Gabon, Mali, Niger, Togo, and Zaire between 1990 and 1993. Similar bodies were also convened in three other African countries viz, Ethiopia in July 1991, South Africa in December 1991, and Guinea-Bissau in 1992. Attempts to organize national conferences in Burkina Faso, Cameroon, Central African Republic, and Guinea failed. Although a typically Francophone phenomenon, some other non-Francophone countries, such as Ethiopia in 1991 and Guinea-Bissau in 1992 also held national conferences. See further, Pearl T Robinson, ‘The National Conference Phenomenon in Francophone Africa’ (1994) 36 *Comparative Studies in Society and History* 575.
34 In fact, Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010) 54, has suggested that the degree of public participation in the constitution-making process in South Africa was probably without historical precedent anywhere in the world.
36 For an elaborate discussion of this, see Fombad (n 5).

37 See Fauré (n 13).

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

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


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


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

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

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


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

Nyerere (n 47) 8.

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

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

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

See Go (n 46).

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

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


The inspiration for this approach first appeared in the 1936 constitution of the Soviet Union which distinguished between the power of the state and the power of the administration. In the Madagascar constitution of 1975, the holder of the supreme power of the state was the Supreme Council of the Revolution who according to art 55, had as its main function to act as ‘guardian of the Malagasy socialist revolution’. The most important political acts had to be decided upon by the president upon hearing from this Council whilst, under art 40, the government was merely ‘the supreme organ of the administration of the state’. The 1973 constitution of Congo Republic had a similar partition of power under art 70.
See arts 27 and 39 of the Algerian Constitution of 1963; and more generally, see Saïd Arjomand (n 45) 62–64.

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

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

See further Reyntjens (n 48).

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

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


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

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

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

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


The word simply means ‘Western education is sin’.

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


So far the most significant effect of these prohibitions has been to drive the extremist Islamic parties with a rigid and uncompromising religious agenda underground whilst the moderate parties have either renounced or denied their Islamist proclivities. See further, Walaa Hussein, ‘Egypt’s New Draft Constitution Threatens Islamist Parties’ (Al Monitor, 4 September 2012) <http://www.al-monitor.com/pulse/originals/2013/09/egypt-new-draft-constitution-ban-islamist-parties.html> accessed 21 April 2015.
See arts 3 and 7.

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


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

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

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

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

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

George Ayittey, Indigenous African Institutions (Transnational Publishers Inc 1991) 386‒94, points out that most of the colonial authorities in trying to impose their authority and mode of government removed and exiled many of the traditional African chiefs and kings and replaced them with other individuals whom they felt they could control. He however points out that the French and Belgians went much further in trying to destroy the great rulerships and kingdoms which they met. The Belgians in particular tried to do away with everything African in the Congo and ran the country with laws, edicts, and directives coming directly from Brussels.
89 Claude-Hélène Perrot, ‘Le Contrôle du Pouvoir Royal dans les Etats Akan aux XVIIIe et XIXe Siècles’ in Gérard Conac (ed), *L’Afrique en Transition vers le Pluralisme Politique* (Economica 1993) 149, points out that in several pre-colonial kingdoms in sub-Saharan Africa, the kings operated and were guided by a number of unwritten laws which defined the limits of their powers.


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

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

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

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

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

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

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


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

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


107 ibid.

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

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

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

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

112 See s 251 of the constitution of the Republic of South Africa, 1996 under ‘National Unity and Reconciliation’, where it says: ‘The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.’ As Christof Heyns, ‘Where is the Voice of Africa in Our Constitution?’ <http://www.chr.up.ac.za/images/files/about/archive/occasional_paper_8.pdf> accessed 21 April 2015, rightly points out, the ubuntu concept was introduced right at the end of the interim constitution, ‘almost as an afterthought in a section with an uncertain title’.

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

114 For a discussion of this, see Tom Bennett, ‘Ubuntu: An African Equity’ (2011) 14 PER 30.

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

116 For example, in S v Makwanyane 1995 (3) SA 391 (CC) para 225, the Constitutional Court said: ‘An outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one’s own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of ubuntu. The heinous crimes are the antithesis of ubuntu.’ For one of the papers that tries to explain the concept of ubuntu, see Justice Yvonne Mokgoro, ‘UBUNTU and the Law in South Africa’ <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDgQFJAC&url=http%3A%2F%2Fwww.\%t_PMTg7QbVpICABQ\&usg=AFQjCNGZDDDcHqTRiY_TKRhuMQ4_RPAb0Cw&sig2=v1Mxt3vffV\&accessed 21 April 2015.

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

118 See further, Agbese (n 105) 7.


120 In fact, in 2010 it was estimated that over a third of Africa’s one billion inhabitants currently live and will spend almost all their life in urban areas. By 2030 the proportion of those who live in towns is expected to rise to half. See ‘The Urbanisation of Africa: Growth Areas’ (*The Economist*, 13 December 2010) <http://www.economist.com/blogs/dailychart/2010/12/urbanisation_africa> accessed 21 April 2015. This increasing urbanization and resulting detachment from rural communities where traditional institutions still hold sway has a negative impact on both knowledge and interest in these institutions. See further, Charles Manga Fombad, ‘Gender Equality in African Customary Law: Has the Male Ultimogeniture Rule any Future in Botswana?’ (2014) 52 *Journal of Modern African Studies* 475.

121 In Murray (n 94).

122 See Agbese (n 105) 2.


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

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

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

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

(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.

(2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.

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

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


134 See art 43(1) of the constitution.


136 See art 22 of the African Charter.

137 Viljoen (n 131) 226.

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


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

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


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

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

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

In Heyns (n 140) 5.


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

ibid 179.


Saunders (n 42) 11.

See generally Law (n 42).

In Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2006) 425.
About twenty-five of Africa’s fifty-four countries are Francophone, five Lusophone (Angola, Cape Verde, Guinea Bissau, Mozambique, and Sao Tome & Principe), whilst two (Equatorial Guinea and Western Sahara) are Hispanophone.

Saunders (n 42) 29.

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

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

Except perhaps the Angolan constitution of 2010.


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

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

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

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

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

See Ch 14 of this volume.

See Ch 2 of this volume.

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

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

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

171 See Saunders (n 42) 12.

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