PROVIDING A FOUNDATION FOR WEALTH FOR WEALTH CREATION AND DEVELOPMENT IN AFRICA: THE ROLE OF THE RULE OF LAW

JOHN MUKUM MBAKU, University of Utah
ABSTRACT

This paper examines the struggle in Africa to alleviate and eventually eradicate poverty. It is argued that the most effective way for African countries to deal with poverty is to create wealth. Unfortunately, these countries have not been able to create the wealth that they need to confront poverty. This is due primarily to the fact that since independence, these countries have not been able to undertake democratic institutional reforms to create and adopt institutional arrangements that guarantee and sustain the rule of law. Within legal systems in which the rule of law is accepted and respected, civil servants and political elites are adequately constrained and hence, cannot engage in growth-inhibiting behaviors such as corruption and rent seeking. In addition, these types of institutions enhance peaceful coexistence and provide an enabling environment for wealth creation. So they can effectively deal with poverty and improve the people's living conditions, African countries must engage in reforms to provide themselves with institutional arrangements that guarantee the rule of law.

I. INTRODUCTION

Africa of the mid-to-late twentieth century was a continent afflicted with a lot of ills—extremely inefficiently managed economies, high levels of political and bureaucratic corruption, capriciousness and arbitrariness in the delivery of public goods and services, rampant military intervention in politics, violent and destructive ethnic mobilization, some of which resulted in brutal civil wars, ecosystem degradation, and generally very poor economic performance. Such an environment could hardly have been considered attractive to

---

*John Mukum Mbaku* is Presidential Distinguished Professor of Economics and Willard L. Eccles Professor of Economics & John S. Hinckley Research Fellow at Weber State University. He is also a Nonresident Senior Research Fellow at the Brookings Institution, Washington, D.C., and an Attorney and Counselor at Law, State of Utah. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor, *Journal of Land, Resources & Environmental Law*, and the Ph.D. (economics) degree from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

1 For a review of these issues see generally WORLD BANK, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION (World Bank, 1981); OAU (ORGANIZATION OF AFRICAN UNITY), THE LAGOS PLAN OF ACTION FOR THE ECONOMIC DEVELOPMENT OF AFRICA 1980-2000 (International Institute for Labor Studies, 1981); PREPARING AFRICA FOR THE TWENTY-FIRST CENTURY: STRATEGIES FOR PEACEFUL COEXISTENCE AND SUSTAINABLE DEVELOPMENT (John Mukum Mbaku ed., Ashgate, 1999); JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (Praeger, 1997); JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN
domestic investors, let alone those from outside the continent. The political and economic uncertainties brought about by these events led not only to Africa’s failure to attract foreign investment but also to capital flight as domestic savers sought investment opportunities in more stable economies abroad.2

In the mid-1980s, however, grassroots prodemocracy movements emerged in many African countries and riding on the wave of the global struggle for change that had begun in the Iberian Peninsula in the mid-1970s, they successfully toppled various civilian and military dictatorships and paved the way for significant improvements in governance.1 Later buoyed by the collapse of the brutal and inhuman apartheid system in South Africa,4 Africa’s prodemocracy movements successfully established an enabling environment for the continent’s transition to democratic governance.5 Thus, Africa’s political economy in the twenty-first century has been significantly different from that which characterized the continent in the last century. While many problems remain, investors—both domestic and foreign—are beginning to see the continent as an emerging market for both trade and


2 See EXTERNAL DEBT AND CAPITAL FLIGHT IN SUB-SAHARAN AFRICA (S. Ibi Ajayi & Mohsin S. Khan eds., IMF, 2000) (examining the continent’s twin evils of capital flight and increasing external debts and offering reasons for such a state of affairs) & THE POLITICAL ECONOMY OF AFRICA (Vishnru Padayachee ed., Routledge, 2010) (showing that political instability in Africa is a major cause of capital flight). Note that capital, as used here, includes both financial and human capital. During the last several decades, many highly skilled and educated Africans have exited their economies and migrated to Europe, North America, the Middle East, and various parts of East Asia, notably Australia and New Zealand, in search of opportunities to make more effective use of their skills and, at the same time, avoid being subjected to the vagaries of authoritarian rule in their home countries.


4 See, e.g., PATTI WALDMER, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (W. W. Norton, 1997) (providing an eye-witness account of events leading to the demise of one of the most brutal and inhuman governmental regimes ever devised by man) & RICHARD TAMES, THE END OF APARTHEID: A NEW SOUTH AFRICA (examining critical milestones in the evolution and demise of the apartheid system in South Africa).

5 For a thorough review of some of the changes that opened up political spaces for participation by popular forces and hence, enhanced the continent’s transition to more effective governance systems, see generally MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA (John Mukum Mbaku & Julius O. Ihonvbere eds., Africa World Press, 2006).
investment. Thus, after many decades of extremely poor governance and dismal economic performance, Africa, thanks to reforms developed and implemented during the last four or so decades, is posed to become a global center for significant economic activities. According to the World Bank, as many as thirty six governments in sub-Saharan Africa have significantly improved their economies’ regulatory environments, leading to increased trade and investment.6

Additionally, the reforms that have taken place in the continent since the mid-1980s have paved the way for the growth of a robust civil society which is gradually taking an active part in governance—in fact, in countries such as Ghana and South Africa,7 civil society has become an important check on the government. And, in Egypt and Tunisia,8 civil society and its organizations were responsible for toppling long-serving autocratic rulers and paving the way for these countries to accelerate their transition to democratic governance and the rule of law.

Along with the rise of civil society, which is helping improve governance in the continent, there have been discoveries of significant natural resources in various countries that are likely to provide the catalyst for growth. In addition to Ghana, Kenya and Uganda have discovered considerable deposits of petroleum and arrangements are already underway to exploit these resources and make the proceeds available for investment in various sectors of national economies.9 Finally, many developed countries have taken a renewed interest in investing in Africa. For example, since 1998, the People’s Republic of China (PRC) has significantly increased its volume of trade and investments in Africa.10 In addition, China’s President Hu Jintao has made several official trips to the continent and many African heads-of-state, including Salva Kiir Mayardit, president of Africa’s latest independent country, have been brought to China to consult with the PRC’s business and political leaders. Significant contact between Africa and the PRC during the last several decades has resulted in China

---

8 Ashraf Khalil, Inside the Egyptian Revolution and the Rebirth of a Nation: Liberation Square (St. Martin’s Press, 2011) (discussing, inter alia, the role of nongovernmental organizations and civil society organizations in Egypt’s recent “revolution”) & Ignacio Garcia Marin, Political Participation, Democracy and Internet: Tunisian Revolution (GRIN Verlag, 2011) (drawing lessons from the use of the Internet by Tunisian civil society to overthrow their country’s autocratic regime).
9 See, eg., Duncan Clarke, Africa: Crude Continent—The Struggle for Africa’s Oil Prize (Profile Books, 2008) (provides a historical review of Africa’s oil resources and the scramble by multinational companies for them).
emerging as Africa’s biggest trade and investment partner. According to Ching, “the speed with which China has engaged with the continent is breathtaking, with two-way trade rising about 30 percent each year so far in the 21st century, reaching a record [U.S.] $166 billion in 2011.”

Recently, the United States has indicated an interest in improving its trade relations with Africa. A bill, titled “Increasing American Jobs Through Greater Exports to Africa Act of 2012” (HR 4221/SB 2215) has been introduced in Congress—the bill is designed to increase U.S. economic engagement with the continent of Africa. These developments—increased Chinese trade with the continent and the recent interest of the U.S. Congress to improve the country’s trade relations with Africa—augur well for wealth creation and the eradication of poverty in the continent.

Despite what appears to be an august environment for trade and investment in Africa, it is important to recognize that the type of economic growth that results in development—that is, growth that produces significant improvements in human conditions, especially for the poorest 20% of the population—cannot take place in Africa under existing institutional environments. Granted, since the mid-1980s, there have been significant social, economic, and political transformations in the continent. In fact, governance systems have improved in most of the continent. Yet, as recent events in Egypt, Tunisia, and Libya, have shown, most African countries are yet to deepen and institutionalize democracy and hence, provide themselves with legal and judicial systems that guarantee the rule of law. For one thing, Africans, like their counterparts in other parts of the world, are not just interested in increases in the gross domestic product—they want to participate in the creation of that wealth and receive their equitable share of all the proceeds of economic growth. They want to live in peace with their neighbors; they want to get married and raise families; they want to live free of government tyranny; they want to use their talents and resources to create the wealth that they need to meet their obligations; and they want to govern themselves. What they want is human development, not just increases in GDP. Unfortunately, most African countries, including those, such as Egypt, Tunisia and Libya, that have recently gone through “revolutions,” have not yet transformed their political economies well enough to create institutional environments capable of promoting and sustaining significant improvements in human development. For there to be genuine and sustained human development in Africa, each country must undertake necessary reforms to provide itself with institutional arrangements that guarantee the rule of law. Specifically, each country must engage its citizens in democratic constitution making to produce institutional arrangements that adequately constrain civil servants and political elites, provide the wherewithal for the effective management of ethnic and religious diversity, and promote entrepreneurial activities and the creation of wealth, especially among historically marginalized and deprived groups—such a set of institutional arrangements is characterized by a general adherence and fidelity to the rule of law."

---

11 Frank Ching, *China Deepening Aid and Trade Ties with Africa*, THE JAPAN TIMES, July 28, 2012. Kiir is the President of South Sudan, which gained independence on July 9, 2011.
12 *Id.*
13 *Id.*
14 See, e.g., JOHN MUKUM MBAKU, *INSTITUTIONS AND DEVELOPMENT* (Africa World Press, 2004) (emphasizing the importance of institutions to development in Africa). Here, “human development” involves much more than increases in the national output. Certainly, the
This research seeks to accomplish the following objectives: (i) emphasize the need to complete Africa’s transition, which began in the 1980s, and produce within each country, governance structures that guarantee the rule of law; and (ii) show that while there have been significant institutional changes in the continent during the last several decades, genuine human development in Africa requires the institutionalization, in each country, of the rule of law.

The methodology that is employed in this study is James M. Buchanan’s constitutional political economy model, which deals with how societies formulate, select, and amend the rules that regulate their socio-political interaction. Rules, which Adam Smith called “laws and institutions,” have a significant impact on, and to a great extent, determine, the outcomes

increased wealth associated with the higher GDP may, under the appropriate institutional environment, provide the additional resources needed to significantly improve national standards of living. Whether such economic growth would lead to improvements in the standard of living, especially for the bottom half of the population, would be determined by the nature of the country’s institutional arrangements. For example, in a country in which the citizens enjoy a significant level of economic freedom—that is, the right to engage freely in exchange and contracting are constitutionally guaranteed and entrenched; see e.g., John Mukum Mbaku, Entrenching Economic Freedom in Africa, 23 CATO J. 217 (2003)—and most citizens are well-educated and possess the skills required by the productive sector, then the rise in the GDP or economic growth would come primarily from the contributions of these citizens. Income distribution would reflect such contributions—that is, the bulk of the people would benefit from economic growth and the latter would translate into significant increases in development. However, if growth derives primarily from the export of raw materials such as oil, whose production does not utilize significant amounts of local labor, then little or no income would accrue to domestic labor and it would be left to the government to effect the necessary redistributions of income. Unfortunately, for many countries in the region, high levels of corruption have usually made such redistributions ineffective as a way to effect development. Besides, redistribution of income is not a sustainable way to enhance development. There is more. Development involves much more than providing citizens with access to more financial resources. Citizens want to have the opportunity to create wealth for themselves and not depend on the government or some other external source to provide it to them. Citizens want self-respect and the right to participate in community and family life—in Africa, ethnic and religious groups want to be able to practice their religions, cultures and traditions without interference from state or non-state actors. Where the rule of law exists, citizens have a much better chance of achieving genuine development. See e.g., THE QUALITY OF LIFE (Martha Craven Nussbaum & Amartya Kumar Sen eds., Clarendon Press, 1993) (elaborating on the concept of development and providing a working definition for development that goes beyond increases in per capita income).


that result from sociopolitical interaction. Brennan and Buchanan\(^{17}\) argue that while rules enhance the ability of individuals to maximize their values, which may include engaging in wealth-creating activities, they do so in a context in which they do not prevent others from doing the same. That is, in providing citizens with the tools to organize their private lives and maximize their values, rules also serve the “negative function of preventing disastrous harm.”\(^{18}\)

Throughout the continent, although governance systems have improved significantly, many citizens still face rules that empower their governors to oppress, exploit and infantilize them. This is due partly to the fact that the process through which these rules were selected was top-down, elite-driven, and non-participatory. Such a non-democratic approach to constitution making produced rules that were not locally-focused and hence, did not reflect the values and interests of each country’s relevant stakeholders. Of course, because they were not selected by the people themselves, these rules were not relevant to the problems that the various groups in each African country faced on a daily basis and hence, could not help them organize their lives. Instead, the rules served primarily the interests—specifically for primitive accumulation—of the ruling classes.

Peaceful coexistence and wealth creation in Africa, in particular, and human development in general, require state reconstruction and reconstitution through democratic constitution making to produce institutional arrangements that guarantee the rule of law. This study dissects the elements of the rule of law and shows how critical they are to the management of ethnic diversity and hence the promotion of peaceful coexistence, the creation of wealth and poverty eradication, and human development in Africa.

II. FRAMING THE PROBLEM

A. Colonialism and Its Institutions

After African territories were annexed by the Europeans and colonies established, the colonizers then proceeded to impose institutional arrangements, which they hoped would significantly enhance their ability to exploit Africa’s large endowments of resources for the benefit of the metropolitan economies.\(^{19}\) Effective colonization required the Europeans to restructure the critical domains (economic, cultural and bureaucratic) and impose new legal and judicial institutions on the colonies—this process was expected to enhance the ability of the European colonial elites to subjugate and rule each colony’s population groups and provide the institutional structure within which metropolitan-based mercantile firms could

\(^{17}\) GEOFFREY BRENNA

\(^{18}\) Id. at 14.

\(^{19}\) See generally SIR ALAN CUTHBERT BURNS, HISTORY OF NIGERIA (Allen and Unwin, 1963) (examining British colonization of Nigeria) and HARRY RUDOLPH RUDIN, GERMANS IN THE CAMEROONS, 1884-1914: A CASE STUDY IN MODERN IMPERIALISM (Jonathan Cage, 1938) (detailing the founding of the German colony of Kamerun and the subsequent exploitation of its resources by German entrepreneurs).
help exploit the resources of the new territories and Christian missionaries could sell their version of salvation to “heathen natives.”

To minimize the costs of exploitation of resources, it was necessary for the Europeans to devise an effective mechanism to manage ethnic and religious diversity in the colonies. The

20 For example, when the French took over the administration of the eastern part of the former German colony of Kamerun, they faced significant opposition from various kingdoms that existed in what was now generally referred to as French Cameroons. One such kingdom was Bamoun, whose sovereign, Sultan Njoya, had developed a script for the kingdom’s language and used it to produce tracts on laws and customs, as well as a volume that outlined a “new religion based on Islam, Christianity, and Bamoun traditional religious practice.” JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON 73 (Greenwood, 2005). Sultan Njoya subsequently established Royal schools throughout the kingdom and instruction was offered using the new script. Additionally, a printing press was established to produce materials for education and social dialogue. However, after World War I, Bamoun became part of French Cameroons and as part of their colonial policy, the French introduced a new educational system and proceeded to destroy the kingdom’s traditional forms of instruction—French Christian missions took over administration of schools; French became the only legal language of instruction in schools; a curriculum based on French culture and civilization was introduced and subjects relevant to the local populations were disallowed. In addition to destroying the king’s printing press and effectively putting a halt to the creation of knowledge that was relevant to local development, Sultan Njoya was forcefully removed by the French colonial authorities and sent to Yaoundé (then, the capital of French Cameroons) where he died in isolation and away from his people. Id. See also John Mukum Mbaku, Copyright and Democratization in Africa, 7 BYU INT’L. L. & MGMT. REV. 51, 54 at fn. 17.

Shortly after annexation of territories on the Cameroon River District in 1884, the German colonial government sought to accord them a locus standi in the German legal system. There, however, was no constitutional discourse within the colony, nor were the colonial inhabitants granted an opportunity to either refuse association with Germany or determine the terms of the arrangement. Instead, Bismarck brought the matter to the German Reichstag when he introduced a bill on January 12, 1886. The bill was subsequently passed on April 10, 1886. In addition to the fact that citizens of the colonies were never consulted during the process of writing this “colonial constitution,” subsequent amendments to the law were undertaken entirely in Germany—the bill was actually developed or drafted by a committee that was influenced significantly by a German planter in Kamerun, Adolf Woermann. Rudin, supra note 19, at 127-128 & 159. The new “constitution” vested enormous powers in the Kaiser. This “concentration of authority in [the hands of the Kaiser] was the legal device through which [German] traders sought to be as unhampered in administering and exploiting the colonies as they had been in acquiring them.” Rudin, supra note 19, at 129. Hence, as was typical of other colonizers of Africa, the Germans established a colony on the Cameroon River District in 1884 called Kamerun and introduced laws and institutions that helped them maximize their objectives, which were, according to Adolf Woermann, then the leading German trader in Kamerun, “increasing German trade, English opposition to German traders generally and especially in the court of equity, the need of protecting trade against natives, the fear of the French and their high discriminatory duties, and the fear of the Congo treaty made by Portugal and England.” Rudin, supra note 19, at 33.
Europeans could have taken advantage of existing traditional approaches to conflict resolution or help the new colony develop democratic institutions, which would provide the institutional mechanism for population groups within each colony to live together peacefully. The colonizers, instead, used their comparative advantage in the employment of violence to forcefully bring together African peoples of different ethnicities and religions to “form a single political and administrative unit.”

In the African colonies in which there existed a significant concentration of European settlers (e.g., Southern Rhodesia, now Zimbabwe; South West Africa, now Namibia; the four colonies—Cape of Good Hope, Natal, Orange River Colony, and Transvaal—which united to form the Union of South Africa in 1910), the colonial government with the help of colonists—most of whom were farmers and planters—forcefully removed many African groups from their ancestral lands and resettled them in what came to be known as “reservations” in order to provide more land for European economic activities.

But, what was the main objective of colonialism? It was the maximization of the economic and political interests of the metropolitan economies and those of Europeans resident in the colonies (i.e., settlers or colonists). Colonialism was an insidious, cruel, despotic, and exploitative pact imposed on Africa and Africans by Europeans. Hence, colonial institutions were instruments of exploitation and violence. Yet, in the study of the

---


23 In each colony, there were three major groups of Europeans—settlers or colonists (i.e., individual migrants from the various European countries who intended to make the colony their permanent home; of course, if the colony was French, the majority of Europeans settlers would usually be French); colonial administrators (the various elites, military and civilian, who were sent to the colonies by the colonizer of record to administer the affairs of the colony); and Christian missionaries. Most of the settlers were planters, miners, industrialists, and traders.

24 See generally Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 POL SC. Q. 455 (1990), who argues that the Europeans imposed themselves and their institutions on Africans and that the latter were never part of what has sometimes been referred to as a “mercantile pact” but were forcefully brought into the arrangement. That arrangement produced, for Africans, years of humiliation, degradation, and infantilization. *Id.*
police in colonial Nigeria, Tamuno\textsuperscript{25} stated that the rise of crime and civil disorder provided the impetus for the establishment of instruments of violence such as the police.\textsuperscript{26} Tamuno argued that increased levels of violence, brought about by “dynastic disputes” and “interethnic conflicts” contributed significantly to a rise in criminal activities and “had an important bearing on the origin, development and role of [the] modern police force [in Nigeria].”\textsuperscript{27} This characterization places the police force among the group of institutions that were supposed to maintain law and order and enhance peaceful coexistence in the colonies.\textsuperscript{28}

The characterization of the police and other colonial institutions as instruments of law and order is part of the mistaken belief by apologists for European conquest of Africa that colonial occupation was actually a “civilizing” mission “designed to prevent African societies from degenerating into anarchy.”\textsuperscript{29} This view argues that European laws and institutions were designed to provide the colonial government with the wherewithal to “civilize” Africa’s perpetually warring factions and help improve their quality of life, as well as provide them with the benefits of the Christianity.\textsuperscript{30} Viewed from this perspective, colonialism was far from being cruel or despotic; instead, it was a benevolent and development-enhancing enterprise.

Colonialism, on the contrary, was not a benevolent enterprise, designed to benefit Africans. It was, instead, a violent and insidious effort by the Europeans to conquer Africans and exploit their resources for the benefit of the metropolitan economies. For example, according to Hugh E. Egerton, an expert on British imperial history, the “motives which prompted the European nations upon the field of colonization were in the main two, viz, the desire to win converts for the church, and the desire to win wealth for themselves.”\textsuperscript{31} Lord Frederick Lugard, who was responsible for administering Britain’s policy of indirect rule in colonial Nigeria, posited that the colonies represented important sources of primary commodities for Britain’s domestic industries and markets for excess output from

\textsuperscript{25} 

\textsuperscript{26} 
\textit{Id.} at 10.

\textsuperscript{27} 
\textit{Id.}

\textsuperscript{28} In addition to the fact that such a characterization of the police and other colonial institutions totally misstates the appropriate role of these institutions, it also does not make an allowance for the examination of the role that colonialism played in the rise of a significant part of the social and political violence that came to envelop the colony. Colonialism was a brutal, exploitative, and humiliating system, designed specifically to enhance the ability of Europeans to exploit both Africans and their resources. It was inevitable that a system conceived in violence and implemented similarly, would necessarily increase the various forms of violence in the colonies. Most of this so-called political and social violence was actually resistance, by indigenous groups, to the activities of the European interlopers. \textit{See generally} \textit{Imperialism and Colonialism} (George H. Nadel and Perry Curtis eds., Macmillan, 1969) (describing the various European colonial systems in Africa).


\textsuperscript{30} \textit{Id.}

metropolitan factories.\footnote{Marked as unnumbered} Of course, to fulfill the two objectives mentioned by Lord Lugard, the government of Great Britain (and, indeed, those of other European countries) could have engaged in mutually beneficial trade arrangements with the various African kingdoms and states. However, the British chose to employ conquest through violence as a way to maximize their objectives in Africa.

The late African political scientist and social commentator, Professor Claude Ake, argued that the colonial project was motivated primarily by the internal contradictions of capitalism as it was then practiced in the European countries.\footnote{Marked as unnumbered} He stated that

\[\text{the transplanting of capitalism arises from those contradictions which reduce the rate of profit and arrest the capitalization of surplus value. Confronted with these effects, it was imperative that the capitalist, forever bent on profit maximization, would look for a new environment in which the process of accumulation could proceed apace. Capitalists turned to foreign lands attacked and subjugated them and integrated their economies to those of Western Europe.}\]

Those who initiated the colonial project never pretended to be engaged in mutually beneficial trading arrangements between Africans and themselves. Even the European settlers who intended to make Africa their permanent home never pretended to treat Africans as co-equals in trade. Instead, they planned to seize African lands and their other resources and force Africans to assist them in extracting profits for the benefit of the metropolitan economies and the colonists. Take, for example, the view expressed by then French Governor of Algeria, General Bugeaud, in 1841, when he declared that “[w]henever the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists.”\footnote{Marked as unnumbered} The French, like other European colonizers, used their superior military and police force to seize lands belonging to Africa groups and establish their colonies. Of course, French settlers were not the only ones who viewed force and violence as a legitimate way to deal with Africa and Africans. Earl Grey, a well-known British colonial officer, summarized the views of his fellow settlers in southern Africa towards African populations when he declared that if and whenever and wherever there was conflict between English settlers and any African group, especially over land, the interests of Africans must be categorically ignored and that “facilities should be afforded the white colonist for obtaining the possession of land theretofore occupied by the Native tribes.”\footnote{Marked as unnumbered} Throughout this period, the “Native tribes” were viewed by the Europeans (colonial elites, farmers, planters, miners/prospectors, and missionaries) as peoples whose only function was to serve the interests of the Europeans. To function effectively and productively in the new role chosen for them by the conquerors, the “Native tribes” had to be converted to Europe’s brand and concept of Christianity—this

\begin{footnotes}
\item{32} LORD FREDERICK LUGARD, THE DUAL MANDATE IN TROPICAL AFRICA, 3RD EDITION 7 (William Blackwell, 1926).
\item{33} CLAUDE AKE, A POLITICAL ECONOMY OF AFRICA (Longman, 1981).
\item{34} Id. at 19.
\item{35} RICHARD M. BRACE, MOROCCO, ALGERIA, TUNISIA 48 (Prentice-Hall, 1964).
\end{footnotes}
was the job of the Christian missions. To serve the needs of the European entrepreneurial class, Africans had to forsake their customary and traditional pursuits and take up wage employment in European business enterprises, including performing domestic services in European households. In addition, Africans had to voluntarily give up their lands to the Europeans or lose them through forced alienation. Finally, self-actualization for Africans had to be based on each individual aspiring to achieve the European cultural ideal.

Professor Fatton describes colonial institutions as primarily “structures of exploitation, despotism and degradation.” Considering, as Michael Crowder argues, that “the colonial state was conceived in violence rather than by negotiation,” the laws and institutions that facilitated this process had to be themselves instruments of violence—first, the laws were imposed externally by the colonialists without any input from Africans; second, the laws and institutions were designed specifically to disenfranchise Africans and enhance European control of the colonies; third, new languages were introduced (e.g., English, French, Spanish) for use in social, economic and political discourse; fourth, a new religion, Christianity, was introduced to replace African traditional religions; and finally, African ethnic groups were forcefully brought together to form easily controlled and administered economic and political units called colonies.

Given the fact that Europeans were determined to use the coercive apparatus of state as a tool for the allocation of colonial resources, institutions of law and order (e.g., the police and the judiciary) evolved as instruments of violence to enhance the ability of the Europeans to “conquer, control, subjugate and exploit Africans.” Within each European colony in Africa, there were never the types of benevolent public institutions that were expected to

---

37 See generally VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (Hoover Institution, 1964) (examining, inter alia, French colonial policy in the UN Trust Territory of Cameroons under French administration; note, especially, France’s policy of association—politique d’association).


39 Id. at 457.

40 MICHAEL CROWDER, WEST AFRICA UNDER COLONIAL RULE (Hutchinson, 1981) (describing the colonial enterprise as it functioned in the West African colonies).

41 Id. at 11-12.

42 John Mukum Mbaku & Mwangi S. Kimenyi, Rent Seeking and Policing in Colonial Africa, 8 INDIAN J. OF S. SCIENCE 277, 283 (1995). Mbaku and Kimenyi examine the emergence of the police force in the British colony of Nigeria and show how it was developed specifically as an instrument of violence to enhance British exploitation of the resources of the new colony for metropolitan development needs. The police force that emerged in the colony of Nigeria, they argued, was never a benevolent public institution, dedicated to maintaining law and order and ensuring the peace. For a contrary view, see C. JEFFRIES, THE COLONIAL POLICE (Max Parrish, 1952). Jeffries argues that the colonial police was a benevolent institution whose main function was to “act impartially in the interest of the community as a whole, to preserve and re-establish the rule of law and order.” Id. at 198-199. Ahire, however, questions Jeffries’ assertions, and argues that anyone who sees the colonial police as a “legal and constitutional imperative ignores the fact that the police in these [colonies] were established by force, despite indigenous resistance to them.” Philip T. Ahire, Policing and the Construction of the Colonial State in Nigeria, 1860-1960, 7 J. OF THIRD WORLD STUDIES 151, 156 (1990).
maintain law and order and enhance the ability of all of each colony’s population groups to live together peacefully, maximize their values and create the wealth that they needed to meet their needs. Instead, what came to characterize governance in the colonies were mainly institutions designed to enhance European exploitation, infantilization, and denigration of Africans, all for the benefit of the metropolitan economies.

B. Independence and the Hope for a New Governance Dispensation

Independence was expected to grant Africans several benefits, the most important of which were the “opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process (i.e., a people-driven, bottom-up, participatory, and transparent institutional reform process), institutional arrangements based on their own values, aspirations, traditions, and customs.”

The hope was that the new post-independence laws and institutions would secure the peace (i.e., provide the wherewithal for peaceful coexistence of each new country’s diverse population groups) and provide an enabling environment for the development and nurturing of an indigenous entrepreneurial class whose job it would be to create the wealth needed to confront mass poverty. New post-independence institutions were also expected to adequately constrain civil servants and political elites so that they would serve only the national interests and not engage in corruption, rent seeking and other forms of opportunism to secure income and wealth for themselves.

The post-colonial state was expected to devote all its policies to national integration, nation building and the improvement of the welfare of all citizens. To accomplish these objectives, government would be “controlled and directed not by center elites and their [foreign] benefactors, but by popular forces with significant allowance made for the full and effective participation of the relevant stakeholder groups—those whose lives would be governed or affected by these institutions.”

Of course, this view of the post-colonial state was not shared by all Africans. This is evidenced by the types of behaviors that the continent’s post-independence bureaucrats and political elites preferred to engage in. For, in the post-independence period, corruption and rent seeking had become endemic in virtually all African countries. Most of these opportunistic activities represented efforts by ruling elites to subvert national laws to enrich themselves at the expense of the rest of the people. Given the fact that such elites approached decolonization and independence as an opportunity for them to capture the evacuated structures of colonial hegemony and use them to redistribute income and wealth in their favor, they did not make any effort to ensure that the critical domains were properly transformed, nor did they insist on democratic constitution making either in the pre- or post-independence period. In fact, in the case of former French colonies, all of them,

---

44 Id.
45 Id. at 2.
46 For example, during the struggle for independence in the UN Trust Territory of Cameroons under French administration, it was argued that many of the territory’s political elites, including Ahmadou Ahidjo, who became the country’s first president, were willing to
except Guinea, accepted the offer made by then French president, Charles de Gaulle, of free association as autonomous republics within the French Community (Communauté française) and as a consequence, did not engage their populations in democratic constitution making, choosing instead, to use the French Constitution of 1958 as the foundation for their laws and institutions. Such a process effectively deprived the citizens of the francophone countries of the opportunity and right to select their own laws and governance institutions.47

The law was supposed to help Africans organize their private lives and provide them with mechanisms to peacefully resolve conflicts arising from socio-political interaction, including those from trade and other forms of exchange. Instead, what they got were various forms of laws and institutions inherited from the colonial state, all of which were incapable of promoting law and order and providing the enabling environment for the creation of wealth. These laws and institutions, after all, were instruments of oppression, used by the Europeans, during the colonial period, to enrich themselves at the expense of the inhabitants of the colonies. The African elites who captured the apparatus of government at independence, turned these same European-inspired laws and institutions into instruments of plunder and proceeded to use them to oppress and infantilize the masses, just as the Europeans had done.

C. The Policy Imperative in Africa Today

While African countries currently face a lot of problems, the most important are how to (1) manage ethnic and religious diversity and provide for peaceful coexistence; (2) create the wealth that these countries need to deal with poverty and improve national living standards; (3) establish entrepreneurial sectors capable of providing a solid foundation for economic growth and development; (4) minimize corruption, rent seeking, financial malfeasance, and deal effectively with other forms of political opportunism, which have emerged as important constraints to governance and economic transformation; (5) promote the protection of

forego proper state reconstruction and institutional development (i.e., they were willing to postpone effective constitution making) and gain independence. See generally JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 46 (Africa World Press, 2004). The hope was that once independence was achieved and governance structures were in the hands of indigenous elites, the latter would engage the people in democratic constitution making to produce appropriate institutional arrangements for governance. That, unfortunately, never happened. In fact, in the case of Cameroon, the 1960 Constitution, which was based on the Constitution of the French Fifth Republic and whose compacting did not involve any robust constitutional discourse, remains the foundation of the country’s 1972, 1996, and 2008 constitutions. The latter is the country’s present constitution. Throughout its existence as a sovereign country, Cameroon has never undertaken democratic constitution making. Instead, the country’s political elites have engaged in opportunistic institutional “reforms” to produce laws and institutions that have allowed them to monopolize the supply of legislation and effectively plunder the national economy for their own benefit. See generally VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (Hoover Institution, 1964).

fundamental and human rights; and (6) significantly improve the continent’s participation in the international economy and global affairs.

One can argue that for Africa to effectively and fully deal with these problems requires the cooperation of the international community. That may be true, especially given the influence of international organizations such as the World Bank, International Monetary Fund (IMF), as well as the developed market economies of the West, which along with their multinational companies, continue to dominate investment in the African countries. Additionally, in recent years, the People’s Republic of China (PRC) has significantly increased its involvement and influence in the African economies. However, effective economic, political and social development in Africa requires that Africans take ownership of their problems and seek ways to deal with them. They must recognize that eliminating poverty in the continent and significantly improving living standards of the people must be based on and informed by full participation of all Africans in the policy process. Africans cannot rely on the benevolence of external actors in order to realize the solutions to these problems. Specifically, each African country must engage its citizens in the process of state

48 The International Bank for Reconstruction and Development (also called the World Bank) and the International Monetary Fund (IMF) are generally referred to as the Bretton Woods Institutions because they were founded at Bretton Woods, New Hampshire, United States, in 1944. While the IMF’s main mission was to ensure that global trade was not interrupted and to provide financial assistance to countries to deal with temporary balance of payments problems, the World Bank was tasked with promoting economic growth and development in the post-World War II period, primarily in the poor and developing countries that emerged from colonial rule in the post-war period. See generally JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA (Africa World Press, 2004) (hereafter, “INSTITUTIONS AND DEVELOPMENT”) (discussing, among other things, the impact of the IMF’s structural adjustment on economic development in Africa in the mid-1980s and early 1990s); 50 YEARS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (K. Danaher ed., South End Press, 1994) (arguing that despite the fact that the Bretton Woods institutions were given clear and well-defined mandates, they nevertheless proceeded to pursue other objectives, which included trying to integrate economies into the “capitalist world economy.”); STRUCTURAL ADJUSTMENT, RECONSTRUCTION AND DEVELOPMENT IN AFRICA (Kempe Ronald Hope, Sr. ed., Ashgate, 1997) (arguing that the approach to development and balance-of-trade adjustment taken by the World Bank and the IMF is not appropriate for the African countries). The World Bank is a major supporter of economic development in Africa. In 2010, the Bank committed U.S. $11.5 billion in loans to development projects in Africa. See http://web.worldbank.org/WEBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,menuPK:258649~pagePK:158889~piPK:146815~theSitePK:258644,00.html. The IMF has been involved in many projects in Africa. The most important of them have been the structural adjustment programs (SAPs), which were designed to enhance the ability of African countries to service their external debts and improve macroeconomic performance. See generally Mbaku, INSTITUTIONS AND DEVELOPMENT, Id. at 141-175.

49 See Danaher, supra note 48 & Mbaku, supra note 48.

reconstruction to provide institutional arrangements that (1) effectively manage ethnic and religious diversity and ensure their peaceful coexistence; (2) establish and maintain a fully functioning private sector, which will create the wealth that is needed to deal with mass poverty and help eradicate poverty; (3) minimize all forms of political opportunism, including especially corruption, rent seeking and public financial malfeasance, all of which are major constraints to economic growth and wealth creation; (4) ensure that the people’s fundamental and human rights are guaranteed and fully protected; and (5) enhance Africa’s participation in and influence on international trade and global affairs.

This research has two important objectives, viz, to (1) call attention to the need for Africans to revisit existing approaches to wealth creation and economic growth, as well as poverty alleviation and eventual eradication in Africa; and (2) show that while international cooperation is important for success in fighting poverty and improving living conditions on the continent, Africans must recognize that international support, through, for example, foreign investment, development aid and grants, is a necessary but not sufficient condition. Sufficiency mandates that each African country provide itself with institutional arrangements that guarantee the rule of law. Thus, part of Africa’s effort to eliminate poverty and enhance human development must involve the development, through a democratic (i.e., bottom-up, inclusive, participatory, and people-driven) constitution making process, of institutional arrangements that guarantee the rule of law.

The study employs a constitutional political economy model, which posits that rules have a significant influence on and to a great extent, determine outcomes resulting from socio-political interaction in any society. Constitutional political economy deals with the rules that constrain the “economic and political relationships among persons” within a country or community. Laws and institutions, in providing individuals living in a society with the wherewithal to organize their private lives, as well as maximize their values (e.g., engage in mutually beneficial exchanges or undertake entrepreneurial activities to create the wealth that they need), function within a context in which they do not constrain or prevent others from achieving their own objectives. Brennan and Buchanan argue that in enhancing the ability of individuals to maximize their interests, rules also serve the “negative function of preventing disastrous harm.”

Throughout the continent, Africans are confronted with governmental systems that exploit, denigrate and infantilize them. Part of the problem comes from the fact that many Africans live in countries or societies with rules, which they either do not understand or are not aware of their existence. In many African countries, only a select group of individuals,

---

51 The eighteenth century Scottish social philosopher and pioneering political economist, Adam Smith, called these rules, “laws and institutions.” See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 40 (T. Nelson and Sons, 1887).


53 Id. at 14.

54 Id.

55 For example, throughout the continent, many poor people are regularly denied access to services at public hospitals because they are not able to pay the bribes demanded by doctors, nurses, and other hospital staff. This takes place despite the fact that there are laws against such conduct by staff at public institutions, including hospitals. See generally JOHAN MUKUM
primarily urban-based elites who control the government, take part in the selection of the laws and hence, are familiar with them. These ruling elites regularly subvert the laws to redistribute income and wealth in their favor. In the process, they violate the fundamental and human rights of their fellow citizens. Effective laws, those that enhance peaceful coexistence and promote wealth creation, are those that adequately constrain the state and hence, prevent civil servants and political elites from engaging in the various forms of opportunism (e.g., rent seeking, corruption, financial malfeasance). Of course, the majority of citizens must voluntarily accept and respect these laws; otherwise, policing to enforce compliance would be a very difficult and odious task. For most citizens to accept and respect the laws, the latter must reflect their values, customs and traditions, aspirations, interests and worldview and must be relevant to the problems that they must deal with on a regular basis and provide them with necessary tools to organize their private lives. Such laws and institutions can only be produced through a bottom-up, participatory, inclusive, and people-driven institutional reform process.

The creation of the wealth that is needed to confront poverty and improve the living standards of Africans requires that each country develop and adopt institutional arrangements that guarantee the rule of law. This study will examine the elements of the rule of law and show how relevant they are to the creation of wealth and hence, the minimization of poverty in Africa.

III. THE RULE OF LAW

A. Introduction

Throughout history, legal philosophers have worked hard to define the concept called the “rule of law.” British jurist and legal philosopher, Albert Venn Dicey, is credited with providing the logical foundation on which the modern definition of the concept of the rule of law is based. He argued that the rule of law must embody three important concepts: first, the law is supreme; second, all citizens are equal before the law; and third, a recognition and acceptance of the principle that the rights of individuals must be established through court decisions.

On November 16, 2006, the Rt. Hon. Lord Bingham of Cornhill KG delivered the 6th lecture in honor of Sir David Williams at the Center for Public Law, University of Cambridge, titled “The Rule of Law.” In that lecture, Lord Bingham stated that “all persons and authorities within the state, whether public or private, should be bound by and

---

56 See, e.g., JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (Praeger, 1997) (examining, inter alia, the monopolization of the supply of legislation by center elites and the impact of that approach to institutional reforms on African economies).
57 ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-201 (Macmillan, 1959 (1885)).
entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”

He set out eight sub-rules, which he argued, underlie the general principle of the rule of law. These sub-rules are: (1) “the law must be accessible and so far as possible intelligible, clear and predictable”; (2) “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”; (3) “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”; (4) “the law must afford adequate protection of fundamental human rights”; (5) “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”; (6) “ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers”; (7) “that adjudicative procedures provided by the state should be fair”; and (8) “the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.”

In a 2009 article, Professor Stein argued that the most important aspect of Lord Bingham’s definition of the rule of law is that “the law is superior, applies equally, is known and predictable, and is administered through a separation of powers.”

Professor Stein then goes on to provide his own definition of the rule of law. He argues that a country governed by institutional arrangements that guarantee the rule of law is characterized by the following:

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.
4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.
5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.

The American Bar Association (ABA) has also shown an interest not only in tackling the issue of defining the rule of law, but also in helping promote its implementation outside the United States. The ABA has taken a leadership role in the movement to help transition countries reform, transform, and reconstitute their legal systems. Finding a workable

---

59 Id. at 5.
60 Id. at 6-29.
62 Id. at 301.
63 Id. at 302.
definition for the rule of law is part of that effort.\textsuperscript{64} The ABA, however, argues that “[t]he rule of law does not depend upon a U.S.-style separation of powers. . . . The key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.”\textsuperscript{65} The rule of law consists of several elements, but the most important of them, especially in Africa where bureaucratic corruption has become endemic and political elites and civil servants behave with impunity, is that no one, even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above the law—the law is supreme.

Joseph Raz, who studied legal philosophy at Oxford University under H. L. A. Hart and later became a Professor of Philosophy of Law at Oxford, provided a definition for the rule of law that encapsulates eight basic guiding principles, namely:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of crime-preventing agencies should not be allowed to pervert the law.\textsuperscript{66}

Law Professor Erwin Chemerinsky, who is a well-known expert on constitutional law, argues that although he agrees with the guiding principles advanced by Professor Raz, he nevertheless, believes that these principles “do not really provide much guidance.”\textsuperscript{67} According to Chemerinsky, “Raz’s idea that laws should be relatively stable gives no indication of when it is appropriate to change laws, whether by overruling precedent or revising statutes.”\textsuperscript{68} He argued further that in order to formulate a practical and workable definition for the rule of law, one must consider or address a specific sect of questions. These are:

1. The rule of law requires the formation of general laws according to set procedures.
2. Laws must be general, prospective, and clearly stated.
3. The government must obey the laws in its actions.

\textsuperscript{65} Id. at 4.
\textsuperscript{67} Id. at 5.
\textsuperscript{68} Id.
4. Government must not infringe the rights of individuals.
5. The government must follow fair procedures in depriving a person of life, liberty, or property.
6. The government must treat likes alike and unalikes unalike.
7. The government must provide a fair system to resolve private disputes.
8. An independent judiciary is essential to the rule of law.\(^{69}\)

In recent years, the United Nations has also become interested and involved in the movement to formulate a definition for the rule of law. According to the UN,

\[\text{[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.}\(^{70}\)

For most countries around the world, even including the highly developed democracies, the rule of law is an ideal, which they hope and seek to achieve. It is not unusual to find highly advanced democracies that are struggling to guarantee the rule of law within their legal systems. The American Republic (i.e., the United States of America), which came into being in 1776, was governed for many years by a Constitution that failed to protect the fundamental and human rights of all its citizens. In fact, although the new country’s Constitution was specifically designed to protect the rights of its citizens, slavery was widely practiced throughout most of the country. In fact, the U.S. Constitution expressly sanctioned the institution of slavery—slavery and the slave trade were legal in the United States until 1808.\(^{71}\)

\(B. \text{The Elements of the Rule of Law}\)

The heart of the rule of law is that “the government must obey the law in its actions.”\(^{72}\) This view flows directly from the belief that the law is supreme. Justice Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court, has stated that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior

\(^{69}\) \text{Id. at 6-8.}\)

\(^{70}\) \text{Quoted in R. H. Wagstaff, The Aftermath of Terrorism: Rule of Law Applies to Detainees in U.S. and U.K., 12 AK BAR RAG 24, 24 (2010).}\)

\(^{71}\) \text{See U.S. Constitution, Art. I, §9. Slavery was eventually abolished in the United States and the country’s Constitution was duly amended to afford descendants of slaves equal protection under the law.}\)

\(^{72}\) \text{Chemerinsky, supra note 66, at 6.}
to, and thus binds, the government and all of its officials.” The supremacy of law is the first element of law that is identified for the purposes of this article.

A country is not likely to be able to “maintain the rule of law if its citizens do not [accept] and respect the law.” If, in a country, the majority of citizens do not accept and respect the law, it would be very difficult for the government agencies whose job it is to maintain law and order to successfully perform their duties. Policing for compliance, for example, would be extremely costly and the government would likely be forced to devote a significant portion of national income to compliance, a process that can reduce expenditures on important sectors of the economy such as health and human capital development. Hence, the second element of the rule of law is that the majority of citizens must accept and respect the law.

The U.S. Supreme Court has contributed significantly to the development of modern rule of law jurisprudence. In U.S. v. United Mine Workers, a case that was decided in 1947, the U.S. Supreme Court held that:

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.

Many of the definitions of the rule of law proffered by various scholars and examined above share the U.S. Supreme Court’s assertion in U.S. v. United Mine Workers that “[t]here can be no free society without law administered through an independent judiciary.” For example, among Professor Chemerinsky’s eight key questions to be answered in an effort to formulate a practical definition for the rule of law is: “An independent judiciary is essential to the rule of law.” In arguing that “[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, . . . ” the United Nations also acknowledges judiciary independence as an essential and critical element of the rule of law.

Thus, the third element of the rule of law is judicial independence. In many African countries, even where the constitution specifically makes allowance for separation of powers and guarantees judicial independence, the judiciary is still subject to or controlled by the executive branch of government. In many of these countries, the executive employs the judiciary as an instrument to control citizens and enhance the regime’s ability to monopolize power. Little emphasis is placed on the administration of justice.

---

73 Quoted in Stein, supra note 61, at 299.
74 ABA Division for Education, supra note 64, at 5.
76 Id. at 312.
78 Id. at 312.
79 Chemerinsky, supra note 66, at 8.
80 Quoted in Wagstaff, supra note 70, at 24.
81 Consider the case of the Republic of Cameroon. According to the country’s Constitution—Constitution of the Republic of Cameroon—judiciary independence is
Law functions effectively only if citizens are aware of, understand, and appreciate the law. Governments can help citizens understand and appreciate the law through broad-based education programs, undertaken at schools and in community-based adult education centers. Such programs, however, should only be designed to supplement, but not replace, participatory and inclusive constitution making. First, citizens must be provided the facilities to participate fully and effectively in constitution making. Second, the enactment of laws in the post-constitutional society should be open and transparent, making allowance for as much participation as possible. Finally, the “laws [must be] applied predictably and uniformly” and not capriciously or arbitrarily. The fourth and fifth elements of the rule of law are openness and transparency and predictability.

According to the ABA, as a legal principle, the rule of law developed in the United States “around the belief that a primary purpose of the rule of law is the protection of certain basic rights.” In similar fashion, the decolonization projects of the 1950s and 1960s in Africa were based on the desire of Africans, first, to rid themselves of the European-induced laws and institutions, and second, to replace them with institutional arrangements designed by Africans themselves. The hope was that each country would develop and adopt laws and institutions, which would enhance the ability of its diverse citizens to live together peacefully and create wealth to deal with poverty and improve living conditions. Such post-independence institutional arrangements were expected to adequately constrain the state, effectively preventing civil servants and political elites from engaging in corruption, rent seeking and other forms of opportunism; and guarantee the protection of fundamental and human rights, as well as provide citizens with the wherewithal for self-actualization.

Instead, constitution making in the pre- and post-independence periods was elite-driven, top-down and non-participatory. The outcome of such a rules selection process were expressly guaranteed. However, the same constitution vests the President of the Republic with the power to guarantee the independence of the judiciary. Art. 37(2)-(3).

ABA Division for Public Education, supra note 64, at 5.

Id. at 5.

See, e.g., John Mukum Mbaku and Julius O. Ihonvbere, Introduction: Issues in Africa’s Political Adjustment in the “New” Global Era, in THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1 (John Mukum Mbaku & Julius O. Ihonvbere eds., Praeger, 2003). They argue that “[m]any Africans, especially the historically marginalized and deprived (e.g., women, rural inhabitants, ethnic minorities, and those forced to live on the urban periphery), believed that independence was an opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process (i.e., a people-driven, bottom-up, participatory, and transparent institutional reform process), institutional arrangements based on their own values, aspirations, traditions, and customs.” Id. at 2.

In the French colonies, constitution making degenerated into the adoption of the constitutional platform offered these colonies by General Charles de Gaulle. It was only Guinea that voted against de Gaulle’s offer of association. In British colonies, constitution making was carried out primarily in London and away from the people—the African peoples were represented by urban-based elites, many of whom were actually chosen by the colonial government instead of the people. In the colonies with significant populations of settlers, the latter dominated and/or controlled constitution making. See, e.g., Victor T. LeVine, The Fall and Rise of Constitutionalism in West Africa, 35 THE J. OF MOD. AFRICAN ST. 181 (1997);
institutional arrangements that failed to adequately constrain the state and did not provide each new country’s diverse population groups with the mechanisms for peaceful coexistence. Specifically, these post-independence laws and institutions, especially in the francophone countries, created so-called imperial presidencies with power concentrated in the center and failed to protect the fundamental and human rights of citizens. Thus, the sixth element of the rule of law is the protection of the fundamental rights of citizens.

IV. THE RULE OF LAW AS A FOUNDATION FOR DEVELOPMENT IN AFRICA: OVERVIEW

A. Introduction

The struggle against poverty and deprivation in Africa is actually a fight to create wealth—that is, a fight to establish within each country, viable and fully functioning entrepreneurial communities. For, with increased wealth, and given the appropriate institutional environment, Africans can invest in human development—the additional resources can be used to increase spending on nutrition, especially for infants and children; education, especially at the primary and secondary levels; clean water; women’s health, especially on prenatal care; and social overhead capital that is needed to enhance the country’s ability to create more wealth.

Fighting poverty and improving living conditions, especially for historically marginalized groups and communities, is the most important public policy priority for African countries. During most of the post-independence period, African countries have relied heavily on resource flows from abroad, especially in the form of official development assistance (ODA), as well as food aid, to deal with poverty and poverty-related problems. The most effective way for Africans to deal with poverty, especially on a sustainable basis, is for each economy to significantly improve its capacity to create wealth. That capacity includes and is dependent

DENNIS V. COWEN, THE FOUNDATIONS OF FREEDOM: WITH REFERENCE TO SOUTHERN AFRICA (Oxford University Press, 1961) (providing an insight into constitutional discourse in the colonies that united in 1910 to form the Union of South Africa) and VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (Hoover Institution, 1964) (examining constitution making in the UN Trust Territory of Cameroons under French administration).


87 Women, infants and children, rural inhabitants, the urban poor and ethnic and religious minorities.

significantly on the existence, within each country, of institutional arrangements that guarantee the rule of law.\(^89\)

B. The Supremacy of Law

By far the most important obstacles to the creation of wealth and improvement in the human condition in Africa are bureaucratic and political corruption, rent seeking, public financial malfeasance, and other forms of opportunism, perpetuated by civil servants and political elites. In fact, during the last several decades, these behaviors have become endemic in many African countries.\(^90\) These growth-inhibiting behaviors have actually stunted the emergence of the type of productive (i.e., private) sector capable of producing enough wealth to meet the needs of the people. In fact, corruption remains a very serious obstacle to entrepreneurship, especially among historically marginalized and deprived groups. The pervasiveness of corruption and other forms of political opportunism in the African countries is due to the fact that the laws and institutions that emerged in these countries in the post-independence period did not adequately constrain the state and hence, many civil servants and political elites have been able to act with impunity.\(^91\) Specifically, the constitutions of these countries did not guarantee the supremacy of law and as a consequence, there were no mechanisms available to citizens to effectively check the excesses of the government.

In the 1920s, John Dickinson studied administrative tribunals and common-law courts in the United States and concluded that the law serves as an important mechanism for citizens to check the exercise of government agency.\(^92\) The ability of citizens to adequately check on the government is critical for the maintenance of the rule of law. As argued by British legal


\(^{90}\) The Berlin-based Transparency International (TI) monitors perceptions of corruption around the world. According to TI’s Corruption Perceptions Index (CPI) for 2011, for example, most of the corrupt countries in the world are found in Africa. See TRANSPARENCY INTERNATIONAL, CORRUPTIONS PERCEPTIONS INDEX 2011 (TI, 2011). See also JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (Lexington Books, 2010) (examining the pervasiveness of corruption in the African economies) & CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES (K. R. Hope, Sr. & B. Chikulo eds., Macmillan, 2000) (examining the endemic nature of corruption on various African economies and its impact on growth and development).

\(^{91}\) Mbaku, supra note 90, at 156-164.

\(^{92}\) J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 32 (Harvard University Press, 1921).
philosopher, Albert Dicey, the rule of law comprises “firstly, the supremacy of law as opposed to arbitrariness or even wide discretion by governments; second, the equality of all persons before the law; and third, in England, principles establishing the rights of individuals developed by case law through centuries in that country.” Both Dicey and the many legal scholars and practitioners that came after him, especially in the Anglo-American spheres of influence, believed that in order for the rule of law to exist in a country, all citizens, including those who serve in government, must be subject to laws agreed in an earlier period. Under such a legal regime, the country’s citizens, whether they are members of the government or non-state actors, are subject to the country’s “known and standing” laws. Thus, governance institutions under such a legal regime do not grant civil servants and the political elites wide discretion to either make their own laws or subvert existing ones to generate extra-legal income for themselves. These elites, like other citizens, must respect existing laws and be subject to them.

According to Dickinson, in a legal system characterized by the supremacy of law, “every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and secondly, to call into question in such a court the legality of any act done by an administrative tribunal.” Throughout most of post-independence Africa, governments have operated with impunity, with those who are supposed to serve the public interest (i.e., so-called state custodians, that is, civil servants and political elites) considering themselves to be above the law. In the words of Dicey, the existence of the rule of law in a country means “that no man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals. . . . With us, every official, from Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”

But, is not supremacy of law a concept that is uniquely a “central and most characteristic feature of . . . Anglo-American juristic habit”? In the mid-1980s and early-1990s, there were mass demonstrations throughout Africa. Led by grassroots organizations, these anti-government riots were designed to oust authoritarian regimes and bring about people-driven institutional reforms to enhance the deepening and institutionalization of democracy. Implicit in these agitations for political transformation was the belief that the only way to bring about the peaceful coexistence of each country’s diverse population groups, as well as provide an enabling environment for the creation of wealth, was to introduce into each country, institutional arrangements that guarantee the supremacy of law. If the law is

---

93 Dicey, supra note 57.
94 Dicey, supra note 57, at 181.
95 Id. at 181.
96 Id.
97 Dickinson, supra note 92, at 34-35.
98 Id. at 35.
99 Quoted in Dickinson, supra note 92 at 34.
100 Id. at 32-33.
102 See generally Mbaku and Ihonvbere, supra note 21.
supreme, implying that citizens, including those who serve in the government, do not consider themselves above the law, then citizens would be able to more effectively challenge and scrutinize the behaviors of those who govern them. Where citizens are able to question the actions of civil servants and politicians, the latter will find it quite difficult to engage in corruption and other growth-inhibiting behaviors (e.g., rent seeking) and as a result, public impunity would be minimized.\textsuperscript{103}

In a study of Cameroon, Nantang Jua\textsuperscript{104} was unable to find a single instance in which the government’s anti-corruption programs had ever successfully brought a high-ranking or political elite to justice. He determined that

\begin{quote}
[t]he Financial Disciplinary Committee of the Ministry of Public Service occasionally prosecutes low-ranking government officials such as postmasters, school bookkeepers and, from time to time, a few men of managerial rank. This can be seen as a device that, in a quest to enhance its legitimacy, the state uses to satisfy society’s clarion call that sanctions be meted out on deviating bureaucrats. That higher-level bureaucrats are largely immune from trial by the Disciplinary Committee is evidence that Cameroon has an attenuated patrimonial administrative structure in which public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.\textsuperscript{105}
\end{quote}

Despite the fact that since the 1990s, Cameroon’s political economy has changed significantly and the country now has a functioning multiparty “democratic” system of governance, the rule of law and hence, supremacy of law remain elusive. In fact, “journalists who venture into investigations of the so-called ‘untouchables’ have found their newspapers seized by the government, their lives threatened, or worse—many of them have ended up in

\textsuperscript{103} See generally JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (Lexington Books, 2010).

\textsuperscript{104} Nantang Jua, Cameroon: Jump-starting an Economic Crisis, 21 AFRICA INSIGHT 162 (1991).

\textsuperscript{105} Id. at 166. It is important to note, however, that some high-ranking officials were supposedly prosecuted and imprisoned for engagement in corrupt activities. These individuals were grouped into two main categories—“sacrificial lambs” and “fall guys.” As determined by Mbaku, “sacrificial lambs’ are members of the incumbent ruling coalition who are carefully selected and then run through a phony and opportunistic anti-corruption program in which the individual’s ‘conviction’ is a forgone conclusion. Such conviction is followed by the imposition of ridiculously long prison sentences or exile. However, no genuine effort is made to recover the stolen public resources. This process usually satisfies the people’s desire for sanctions against civil servants who have abused the public trust.” JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 98 (Lexington Books, 2010) (“CORRUPTION IN AFRICA”). Eventually, the disgraced civil servant is later “rehabilitated” and brought back into the government and in many cases, assigned positions of higher rank than the ones from which they had been sacked. “Fall guys’ fall into two main categories: (1) top civil servants who have fallen out of favor with the incumbent ruling coalition and, unlike sacrificial lambs, are not considered loyal enough to be rehabilitated; and (2) low-level civil servants who are considered dispensable. When these individuals are ‘judged’ guilty of corruption, there is not much chance that the regime will rehabilitate them and return them to the public services.” Id.
prison.” For example, the late Pius Njawé, considered Cameroon’s foremost independent journalist and publisher of *Le Messager*, was fined and imprisoned by the Biya regime for publishing in his newspaper, an article seeking answers to the question: “Is President Biya Sick?”

Cameroon, like many other countries in Africa, has not been able to provide itself with a legal system in which the law is supreme. As a result, most high-ranking civil servants and political elites in these countries consider themselves above the law and act with impunity. Citizens are unable to hold their governors accountable, and corruption is pervasive, effectively constraining investment in productive activities, leading to the failure of Cameroon and the other African countries in the same situation to create the wealth that they need to confront poverty and deprivation and, improve national living standards.

In the 1980s, Gould and Mukendi conducted a study of corruption in Zaire and determined that wealthy and politically-connected individuals considered themselves above the law. Under the legal system existing in Zaire at the time, these highly-placed individuals, all of whom were politically well-connected to the regime of President Mobutu Sese Seko, considered themselves “untouchables” and hence, not subject to the country’s known and standing laws. Thus, it was rare to find a high-ranking civil servant or politician, or an individual of high wealth status in Zaire at the time, who was either subject to the law or who did not consider himself or herself above the law. Such well-placed individuals involved regularly in corrupt deals but were rarely prosecuted. Even if they appeared before a court of law, they were not likely to be convicted because, as determined by Gould and Mukendi, adjudication of court cases was not based on established legal rules but on the wealth and political status of the individual.

What Gould and Mukendi found in Zaire was not unique to that country. Throughout the continent, many civil servants and political elites continue to consider themselves above the law and either because of the pervasiveness of corruption or the fact that the judiciary in these countries is controlled by the executive, most of these high-ranking political operatives are rarely, if ever, brought to justice for their complicity in corruption and other forms of opportunism. As a consequence, growth-inhibiting behaviors (e.g., corruption) are pervasive throughout many countries in the continent.

In the struggle to create the wealth that Africans need to deal with mass poverty and deprivation, it is very important that each African country undertake necessary reforms to provide institutional arrangements that guarantee the supremacy of law and force all citizens, including those who hold high-ranking positions in the government, as well as those who are financially well-to-do, to subject themselves to the law. Unless this is done, corruption and deprivation will continue to be pervasive.

---

106 *Corruption in Africa*, supra note 103, at 97.
109 Id. at 429.
110 Id. at 429-430.
111 Id. at 427-457.
other growth-inhibiting behaviors (e.g., rent seeking) would continue to frustrate these countries’ ability to deal effectively with poverty.

C. Voluntary Acceptance of and Respect for the Law

The American Bar Association, which has taken a leadership role in the promotion of the rule of law in developing and transition countries, has stated that “[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law.” While citizens can be forced, through government coercion—usually with the help of the police and military forces—to obey the law, such a legal system would be extremely costly and difficult to maintain or sustain. However, if the majority of citizens voluntary accept and respect the law, they are mostly likely to comply, significantly minimizing the costs of compliance. As stated by the ABA, “[t]he rule of law functions because [the majority of citizens] agree that it is important to observe the law, even if a police officer is not present to enforce it.”

Of course, the main question for an African country struggling to institutionalize the rule of law is: how can citizens be made to accept and respect the law? The answer lies in what the country’s laws are and how they are enacted. First, the laws enacted and adopted by the country must be those that citizens can obey and do so willingly. As stated by U.S. suffragist and advocate of women’s rights, Elizabeth Cady Staton, “[t]o make laws that man can not and will not obey, serves to bring all law into contempt. It is very important in a republic, that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?” If, however, the laws that exist in a country are those that citizens cannot or are unwilling to comply with, the country’s counteracting agencies (e.g., the police and the judiciary) would face an uphill battle in trying to force compliance—within such an institutional environment, maintaining law and order would either be extremely difficult or virtually impossible, especially for countries with limited resources to devote to law enforcement. Where the laws are extremely complex and/or difficult to understand, or are not relevant to the lives of the people and the problems they face, the people would most likely not respect them or willingly obey them.

Second, citizens see the law as a tool that they can use to organize their private lives (e.g., engage in productive activities to create wealth—for example, start and run a business for profit; acquire and dispose of property; get married; engage in contracting; and protect one’s

112 ABA Division for Public Education, supra note 64, at 5.
113 Id. at 5 (emphasis added).
114 Quoted in id. at 5.
115 Except for customs and traditions, laws in most African countries today are often adaptations of those left behind by the colonial government. In addition to the fact that the constitutions of all francophone countries, except Guinea, are based on the Constitution of the French Fifth Republic (1958), many of the penal codes in these countries are actually based on those in existence during the colonial period. By accepting Charles de Gaulle’s offer of free association as autonomous republics within the Communauté française (French Community), the francophone countries effectively deprived their citizens of the opportunity to engage in robust constitutional discourse and produce laws and institutions that reflected their values, interests, aspirations, and customs. Such laws, had they been selected by each colony’s relevant stakeholders, would have been those that they were willing and able to obey and which were relevant to their lives.
values from encroachment by either state or non-state actors. The law can also serve as an important instrument used by groups, especially ethnic and religious groups, to protect their beliefs and practices from government interference. Most African countries have extremely diverse populations. At independence, some groups—ethno-regional coalitions in West, East and Central Africa, and religious groups in North Africa—captured control of the evacuated structures of colonial hegemony. Many minority ethnic and religious groups came to believe that public policy in their countries was controlled and dominated by the politically-dominant groups—that is, those that now controlled the apparatus of government and that they (i.e., the minority groups) were being systematically marginalized and deprived.116

In a country where the rule of law functions effectively, ethnic and religious groups (or for that matter, any group at all) that considers themselves marginalized and/or deprived, do not have to resort to violent and destructive mobilization in order to improve their conditions. They can, on the other hand, utilize the law to assert their rights—they can, for example, bring legal action against offending parties, whether these are state- or non-state actors or present members of the group as candidates for election to important positions in the country’s political system.

Citizens are most likely to accept and respect the law if they or their chosen representatives are the ones responsible for designing and adopting those laws. Making certain that the process through which the laws are made is participatory and inclusive achieves at least two critical objectives: such a process ensures, first, that the resulting laws are locally-focused and hence, are relevant to the lives of the people whose behaviors the laws are expected to regulate, as well as reflect their values, and second, that the laws are those that the people understand, respect and are able and willing to obey. If the laws are externally imposed, they are not likely to reflect the people’s values, nor would they be relevant to their lives.

Hence, the third way to enhance the ability of Africans to accept and respect their laws is to make sure that the process through which laws are enacted in each country is open and transparent and that citizens who so desire can participate fully—either directly by participating in the political process (e.g., getting elected to a legislative position) or indirectly by influencing the political system through voting, or using available public and private mechanisms to voice their opinions and try to shape public policy outcomes. Openness and transparency help the people know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance. Additionally, if the law-making process is open and transparent, citizens will be

116 This was the main argument given by the Ibo-dominated Biafrans when they sought to secede from the Federal Republic of Nigeria and form their own sovereign state. The Ibos argued that they had, since independence in 1960, been marginalized and discriminated against by the ethno-regional coalition (the Hausa-Fulani/Yoruba) that controlled the central government in the then capital city of Lagos. See, e.g., RALPH UWENCHUE, REFLECTIONS ON THE NIGERIAN CIVIL WAR: FACING THE FUTURE ( Trafford, 2004) (providing a rigorous examination of the Nigerian civil war, which came directly out of the struggle by Biafra for secession and independence) & ALFRED OBIORA UZOKWE, SURVIVING IN BIAFRA: THE STORY OF THE NIGERIAN CIVIL WAR OVER TWO MILLION DIED (iUniverse, 2003) (providing an account of the war by a survivor of the conflict).
able to understand and appreciate the reason why a specific law has been enacted and why they must obey it.\textsuperscript{117}

The decolonization and immediate post-independence periods were supposed to offer Africans opportunities to engage in democratic constitution making so that they could choose their own laws and institutions. Unfortunately, constitution making at this time in virtually all African countries was top-down, elite-driven, and non-participatory, depriving citizens of each country of the opportunity to develop institutional arrangements capable of providing them with appropriate governance mechanisms. What these countries ended up adopting were laws and institutions that did not reflect local realities, the specificities of each country, as well as values critical to the majority of each country’s relevant stakeholders. Basically, the non-participatory and non-inclusive, and to a certain, secretive,\textsuperscript{118} approach to constitution and law making in these countries produced institutional arrangements that the majority of citizens did not know or understand and hence, were unwilling to accept or obey. In post-independence Cameroon and, indeed, in many other African countries, citizens came to see national laws and institutions as part of an illegitimate legal regime designed to oppress and exploit them for the benefit of the ruling elites and their foreign benefactors.\textsuperscript{119}

Finally, to make sure that citizens accept and respect the laws, the latter must be relevant to their lives and the problems that they face on a regular basis. Citizens must see the law as an instrument that they can use to deal effectively with everyday problems, including organizing their lives and peacefully resolving conflicts, including those that arise from trade and other forms of free exchange. If, however, citizens view the laws and institutions as “alien” impositions, used by the political elites to oppress and exploit them, they are most likely to refuse to recognize these laws, let alone obey them. Within such a context, compliance would be very difficult—the police and other enforcement agencies would be totally overwhelmed and would simply not be able to perform their constitutionally assigned functions effectively and society is likely to degenerate into chaos and violence.

\textsuperscript{117}ABA Division for Public Education, \textit{supra} note 64, at 5.

\textsuperscript{118}For example, in the UN Trust Territory of Cameroons under French administration, the constitution for the independence of the territory was “compacted” by the Consultative Committee, created by Law No. 59-56 of October 31, 1959—in addition to the fact that the committee was not elected by Cameroonian citizens, it carried out most of its work in Paris and the final text was a thinly disguised copy of the French Constitution of 1958. In fact, the \textit{Union des populations du Cameroun} (UPC), the “country’s largest and most important indigenous political party and one that represented a significant part of national political opinion, was denied participation in the constitution-making process.” \textsc{John Mukum Mbakue}, \textsc{Institutions and Reform in Africa: The Public Choice Perspective} 81 (Praeger, 1997). Excluding the UPC from participating in the constitution making process effectively “eliminated a significant portion of national political opinion from constitutional discourse.” \textit{Id}.

\textsuperscript{119}See generally \textsc{John Mukum Mbakue}, \textsc{Corruption in Africa: Causes, Consequences, and Cleanups} (Lexington Books, 2010) (discussing the endemic nature of corruption and other forms of political opportunism in post-independence Africa and how this situation has been made possible by laws that failed to adequately constrain the state) & Victor T. LeVine, \textsc{The Fall and Rise of Constitutionalism in West Africa}, 35 J. of MOD. AFRICAN ST. 181 (1997) (examining the failure of West African countries to undertake democratic constitution making to provide locally-focused laws and institutions).
D. Judicial Independence

It is virtually impossible to maintain the rule of law in a country if the latter’s judiciary does not operate independently of the other branches of government. Judicial independence is a multifaceted concept that specifically requires that judicial officers be granted “security of tenure,” “financial security,” and “institutional independence.” According to Judge Louraine C. Arkfeld, a one-time chair of the ABA Judicial Division Rule of Law and International Courts Committee, the following are the five critical principles of judicial independence:

- Decisional independence allows fair and impartial judges to decide cases pursuant to the rule of law and the governing constitutions unaffected by personal interest or threats or pressure from any source.
- Institutional independence recognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law and as a constitutional partner with the executive and legislative branches authorized to manage its own internal operations without undue interference from the other branches.
- Fair and impartial courts require competent judges who have been selected for their merit, who represent the diversity of their community, and who are provided with access to the law and continuing legal education provided by nonpolitical sources.
- An independent judiciary must have adequate resources including a budget that provides for adequate facilities and equipment, security, and just compensation for judges. In developing countries, the ability to provide security protections for judges is essential to their ability to decide without fear.
- There also must be a system of accountability for judges including a judicial code of ethics as well as a process for citizens to file complaints against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges.

Judicial independence, as argued by the American Bar Association, is built on a foundation in which judges are fair and impartial, there is separation of powers—the judiciary is a separate and co-equal branch of government, the selection of judges is based on merit and these judges represent the diversity of their communities, the judiciary and the judges who serve in them are granted enough resources and security, and judges are accountable to the Constitution.

120 R v. Valente [1985] 2 S.C.R. 673, paras. 27, 40, & 47. This is the case by the Supreme Court of Canada that set the standard for judicial independence in Canada.
122 Id. at 13.
123 Id.
In framing the U.S. Constitution, the founders of the American Republic made certain that judicial independence was provided for and guaranteed by the Constitution. As part of the effort to entrench judicial independence in the Constitution, the framers made certain that all federal judges are guaranteed life tenure and their compensation is protected against diminution. According to Art. III(2) of the U.S. Constitution,

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.\footnote{U.S. CONSTITUTION, ART. III(2).}

As argued by Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia, “[i]f the judges are given a role of reviewing the actions of the political branches as against a written constitution and its protective features, judicial independence must be built into the constitution itself.”\footnote{Judge Abner J. Mikva, \textit{The Need for an Independent Judiciary: Implications for South African Reform}, 8 AM. U.J. INT’L L. & POL’Y 621 (1993).} Judge Mikva then concludes by saying that a truly independent judiciary “must be protected from any institution or group capable of creating pressure. This means not only the ancient power of sovereigns to dismiss judges at their pleasure, but also the more subtle ability of officials to interfere with the administration of justice.”\footnote{\textit{Id}. at 622-623.}

Of course, the constitutions of virtually all African countries have some provision guaranteeing the independence of the judiciary. For example, the Constitution of the Republic of South Africa (1996) states, at § 165, that:

\begin{enumerate}
\item The judicial authority of the Republic is vested in the courts.
\item The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.
\item No person or organ of state may interfere with the functioning of the courts.
\item Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
\item An order or decision issued by a court binds all persons to whom and organs of state to which it applies.\footnote{Constitution of the Republic of South Africa, 1996, § 165. Other African constitutions that expressly provide for judicial independence include Ghana (Articles 125 & 127); Namibia (Article 78); Uganda (Articles 126 & 128); Zambia (Article 91); and Egypt (Articles 165 & 166). For a discussion of judicial independence in Africa, see H. Kwasi Prempeh, \textit{Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa}, 80 TUL. L. REV. 1239, 1304-1307 (2006).}
\end{enumerate}
The independence of the judiciary has been recognized by South Africa’s Constitutional Court in several cases, holding that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”128 In its ruling, the Constitutional Court endorsed the view expressed by the Supreme Court of Canada in R v. Valente129 that the minimum requirements for judicial independence are “security of tenure,”130 “financial security”131 free from “arbitrary interference by the Executive in a manner that could affect judicial independence,”132 and “institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”133

In addition, South Africa’s Constitutional Court has also held that:

[the Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for the courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates’ courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court.]

Through its various rulings, the Constitutional Court of South Africa has made clear that judicial independence has two important dimensions—individual independence (when adjudicating cases, judicial officers must be independent and impartial), and institutional independence (specific structures and guarantees must be provided so that judicial officers and the courts are adequately protected against interference from external actors, including other branches of government, notably the Executive who is likely to come before the judiciary).135

Now, I will examine a country that has failed to guarantee judicial independence—Cameroon. The latter’s Constitution guarantees judicial independence—“[j]udicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals,”136 and “[t]he Judicial Power shall be independent of executive and legislative powers.”137 Nevertheless, the Constitution also declares that “[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal

130 Id. at para. 27.
131 Id. at para. 40.
132 Id.
133 Id. at paras. 47 & 52.
135 See the Constitutional Court’s decisions in De Lange v Smuts and Van Rooyen v. The State, supra notes 128 & 134. See also AMY GORDON & DAVID BRUCE, THE TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA (The Center for the Study of Violence and Reconciliation, 2006).
136 CONSTITUTION OF THE REPUBLIC OF CAMEROON, ART. 37(2).
137 Id. at Art. 37(3).
department.” By assigning one branch of government the power to guarantee the independence of another, the framers of Cameroon’s Constitution could not have been thinking of true judicial independence and separation of powers. According to C. M. Fombad, “[a] careful analysis of the constitutional provisions,” show that the 1996 amendment did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.

According to Fombad, all of Cameroon’s post-independence chief executives—the country has had only two heads-of-state since reunification in 1961—have enjoyed absolute power and control over the judiciary branch through the control of (i) the appointment and promotion of judiciary officers; and (ii) budgetary allocations to the judiciary. In addition, Fombad determined that shortly before the elections of 1996 and 1997, President Paul Biya issued a decree doubling the salaries of judicial officers and raised the compensation rates for justices of the Supreme Court, who have the authority to certify the results of each election, including the presidential election, by almost 200 percent.

What has happened in Cameroon since reunification and the formation of what is now the Republic of Cameroon is that, the country’s Constitution does not provide for an effective separation of powers. As a consequence, the universally accepted elements of the rule of law do not actually exist under the terms of Cameroon’s 1996 Constitution—the guarantee of security of tenure, financial security, and institutional independence of the judiciary have all been left to the vagaries of the political process and specifically to the discretion of the President of the Republic, another branch of government. This, of course, is in line with the imperial presidency that was created by the adoption of the Gaullist model of government in the former Trust Territory of Cameroons under French administration when it gained independence on January 1, 1960. That model of government remained in effect when the Republic of Cameroon united with the former UN Trust Territory of

---

138 Id.
140 Cameroon’s 1996 Constitution was an amended version of the 1972 Constitution. Part of the objectives of those who developed the amendments was supposedly to improve the constitution’s formal restraint mechanisms and prevent arbitrary exercise of government agency. The amendments formally introduced the concept of the separation of powers, judicial independence and freedom of expression. See Constitution of the Republic of Cameroon, Arts. 37(2) & 37(3).
143 Id. at 247-248.
144 See, e.g., VICTOR T. LEVINE, *THE CAMEROONS: FROM MANDATE TO INDEPENDENCE* (Hoover Institution, 1964) (detailing constitution making in the UN Trust Territory of Cameroons under French administration). The Trust Territory gained independence on January 1, 1960 and took the name République du Cameroun.
Southern Cameroons under British administration on October 1, 1961 to form what is now present Cameroon.\textsuperscript{145}

\textit{E. Openness and Transparency}

In the effort to improve conditions for wealth creation and human development in Africa, three aspects of openness and transparency are important. First, it is important that the process through which the constitution is compacted is transparent and open so that the participation of all of each country’s relevant stakeholders is maximized. Second, post-constitution law-making must be open and transparent so that even those who do not actively participate in the political process are aware of how laws are made and why certain laws are selected. Finally, the design and implementation of public policies is a critical element in the fight against such behaviors as rent seeking and corruption, which have been found to be major constraints to wealth creation and economic growth in Africa.\textsuperscript{146} Making certain that the government conducts the people’s business openly and in a transparent manner\textsuperscript{147} significantly reduces corruption and other forms of political opportunism. Most

\textsuperscript{145} LeVine, supra note 144; John Mukum Mbaku, \textit{Institutions and Reform in Africa: The Public Choice Perspective} (Praeger, 1997) (detailing, inter alia, the struggles of Africans to provide themselves with institutional arrangements that adequately constrain the state) \& John Mukum Mbaku, \textit{Cameroon’s Stalled Transition to Democratic Governance: Lessons for Africa’s Democrats}, 1 African and Asian Studies 125 (2002). Note that the polity that emerged from the unification of the former UN Trust Territory of Southern Cameroons under British administration and the then République du Cameroun was a federation called the Federal Republic of Cameroon (République Fédérale du Cameroun) with Ahmadou Ahidjo as President. A new constitution was adopted in 1972 and effectively abrogated the federation, turning the latter into a unitary state. In 1984, Paul Biya, who had succeeded Ahidjo as president in 1982, changed the name of the country to Republic of Cameroon (République du Cameroun), the name that the country has retained to the present moment. \textit{See}, e.g. John Mukum Mbaku, \textit{Culture and Customs of Cameroon} (Greenwood Press, 2005).

\textsuperscript{146} For a study of corruption and other forms of opportunism in Africa, see generally John Mukum Mbaku, \textit{Corruption in Africa: Causes, Consequences, and Cleanups} (Lexington Books, 2010). As argued by Gerring and Thacker, “[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption. Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).” John Gerring and Strom C. Thacker, \textit{Political Institutions and Corruption: The Role of Unitarism and Parliamentarism}, 34 B. J. Pol. S. 295, 316 (2004).

\textsuperscript{147} This includes making sure that information about government activities is presented to the people and done so in a relatively accessible form and manner. Note that while putting information on government websites may at first appear to be an effective way to maintain transparency in government operations, this method may not be adequate in a country where most citizens do not have access to the Internet. Hence, adoption of a given technology to enhance transparency should be context-specific—that is, the ability of the people to use the
important, especially for African countries, is the fact that openness and transparency in the design and implementation of public policies significantly enhances participation and hence, improves chances that the outcome would be policies that reflect the values, interests, and aspirations of all of the country’s relevant stakeholder groups. Where openness and transparency are maintained, groups (e.g., minority ethnic and religious groups) that believe that given policies do not adequately reflect their values and interests are not likely to resort to violent and destructive mobilization, especially if as a result of the government’s open approach to policy, these groups had either had the opportunity to participate fully and effectively in the design process or were quite aware of how the laws were made and why.

In studies of good governance, the concepts “openness” and “transparency” are considered to be closely linked but are not synonymous. Openness and transparency, as it relates to the government, can be understood as “the availability of relevant information about the functioning of the polity.” According to Lord Nolan, “transparency is said to require that ‘holders of public office should be as open as possible about all decisions and actions they take.’” Regardless of how transparency is defined or conceived, most scholars and practitioners generally agree that “transparent decisions must be clear, integrated into a broader context, logical and rational, accessible, truthful and accurate, open (involve stakeholders), and accountable.” Additionally, “[a] transparent decision record should provide enough information to allow an interested person to ‘verify claims made’ or otherwise reconstruct both the process and rationale for the decision.”

In general, transparency enhances the ability of an individual who is interested in a public policy or thinks or believes a decision might affect them to understand and appreciate how that decision was made or arrived at and why. Transparency, then, is very important in the case where the government makes decisions that affect the lives of citizens, for example, public policies on health and safety. In fact, in Africa, where a significant number of technology should be considered before adoption. Also to be considered is the language or languages in which the information would be provided to the people. In Africa, most countries have adopted European languages (French in former French and Belgian colonies; English in former British colonies, etc.) as so-called “official languages” and these are used widely in government and commerce. Unfortunately, most of the citizens in these countries are not fluent in these foreign languages. Hence, for purposes of making certain that citizens have access to government operations, the government should provide information in languages that are accessible to the people.

149 Id. at 316.
152 Id. at 36, citing L. Garrett, Betrayal of Trust: The Collapse of Global Public Health (Hyperion, 2000).
153 Drew & Nyerges, supra note 151, at 33.
154 This includes, especially, policies on environmental health. For example, decisions made by government agencies, such as the U.S. Environmental Agency (EPA) that regulate industrial pollution can have significant impact on the health of citizens. Hence, those
countries have governments that are not representative of their diverse populations, making certain that public decisions are made through transparent processes can significantly minimize the distrust that many ethnic and religious groups, especially those which, historically, have been marginalized and pushed to the economic and political periphery, have for their governments. Thus, if a minority ethnic or religious group argues that government policies are significantly influenced by, and benefit essentially, the ethno-regional groups that dominate and control the government, an open and transparent approach to the design and implementation of public policies would, at the minimum, (1) provide opportunities for these heretofore marginalized groups and communities to participate; and (2) also allow them to witness and understand how decisions affecting their lives are made. This is especially critical for African countries, most of which have extremely diverse populations and which have, during the last several decades, encountered significant ethnic-induced violence. A lot of this violence has been perpetuated by groups that believe that public policies were designed in secret and were aimed at marginalizing them.

Since independence, many African countries have had governments that have not been representative of their diverse populations. In such polities, openness and transparency, especially in the design and implementation of public policies, can minimize the distrust that some ethnic and religious groups have for their governments. Some parts of the population of the country often believe that national policies are designed to benefit exclusively members of the ethno-regional groups that dominate and control the government.

decisions must be made in an open and transparent manner. See, e.g., CRAIG E. COLTEN & PETER N. SKINNER, THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE EPA (University of Texas Press, 1996) (explores the tragedy of Love Canal before the formation of the EPA and how openness and transparency may have averted the disaster or at the very least, minimized its impact on the town and its environs).

155 For example, in Cameroon, the Anglophones have complained of political and economic marginalization at the hands of the Francophones who have dominated the government since reunification in 1961. In fact, since 1961, the Presidency of the Republic has been monopolized by Francophones and some ministries, especially defense and territorial integrity, have never been headed by an Anglophone. For examination of Anglophone marginalization, see generally Piet Konings and Francis B. Nyamnjoh, President Paul Biya and the “Anglophone Problem” in Cameroon, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 191 (John Mukum Mbaku & Joseph Takougang eds., Africa World Press, 2004); Piet Konings, Le ‘problème anglophone’ au Cameroun dans les années 1990, 62 POLITIQUE AFRICAINE 25 (1996) & Piet Konings & Francis B. Nyamnjoh, The Anglophone Problem in Cameroon, 35 J. MOD. AFRICAN ST. 107 (1997).

156 Drew & Nyerges, supra note 151, at 33.

157 For example, the Anglophones of Cameroon. See Konings and Nyamnjoh, The Anglophone Problem in Cameroon, supra note 155.

158 For example, the groups that engineered the brutal civil wars that brutalized the citizens of Liberia, Rwanda, and Sierra Leone, gave as reasons for their actions, marginalization of their own groups at the hands of a central government dominated by other groups. For example, in overthrowing the government of Liberia on April 12, 1980, Master Sargent Samuel Kanyon Doe sought to bring to an end the Americo-Liberian hegemony that had since 1847, exploited and marginalized the country’s indigenous groups, including Doe’s
Transparency and openness in the design and implementation of public policies will provide opportunities for all these minority groups to participate, as well as enhance their ability to understand how government decisions affecting their lives are made.  

Corruption is today one of the most important constraints to wealth creation and economic growth in Africa. While there are many ways to clean up corruption and minimize its impact on wealth creation, the most important is openness and transparency, especially in government operations. As argued by Gerring and Thacker, “since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).” Generally, even in countries where corruption is endemic, the public usually does not condone corrupt behavior, especially within the bureaucracy. In fact, the productive sector (i.e., the private sector, which is responsible for creating wealth) sees bureaucratic corruption as a serious obstacle to the

Krahn ethnic group. In fact, shortly after Doe executed the overthrow of the government of William R. Tolbert, “[t]he majority of Liberians welcomed the coup: the indigenous people especially rejoiced that they had finally attained the power and full rights that had been denied to them for far too long.” JULIUS MUTWOL, PEACE AGREEMENTS AND CIVIL WARS IN AFRICA: INSURGENT MOTIVATIONS, STATE RESPONSES, AND THIRD-PARTY PEACEMAKING IN LIBERIA, RWANDA, AND SIERRA LEONE 51 (Cambria Press, 2009).

See, e.g., Drew & Nyerges, supra note 151. Note that although Doe, as well as the leaders of the events that led to civil wars in Liberia and Sierra Leone and the Rwanda genocide, may have used supposed marginalization of the groups to which they belonged as the reason for their actions, as history has since proved, these individuals were opportunists seeking ways to capture the government so that they could use the latter’s structures to enrich themselves. Their intentions, as proven by the actions that they took once they had control of the apparatus of government, were not to right any perceived or actual wrongs and make governance and resource allocation more efficient and equitable. In the case of Liberia, for example, this is evidenced by the level of brutality visited on the various population groups in the country, as well as the wanton destruction of private property and the country’s social overhead capital (e.g., schools, roads, power lines, and other infrastructure) by the Doe regime. See, e.g., GEORGE KLAY KIEH, JR., THE FIRST LIBERIAN CIVIL WAR: THE CRISIS OF UNDERDEVELOPMENT (Peter Lang, 2009) (presenting an alternative to the dominant view that the Liberian civil war was caused by historical conflicts between the country’s various ethnic groups; instead, he argues that the war was a result of the failure by those who established the Liberian state in 1847 and successive governments to provide the state with institutional arrangements that would have enhanced the ability of all groups to live together peacefully and maximized their values).


Id. at 316.
profitability of their enterprises. Ordinary citizens, on the hand, consider the corrupt behaviors of civil servants and political elites as interfering with their ability to organize their lives and improve their welfare.  

Some scholars have argued that “[c]orruption often results from a lack of accountability and participation.” Hence, legal and institutional schemes that enhance citizen participation and force more accountability of the governors to the governed and, by implication, to the constitution (e.g., openness and transparency) can help significantly in the fight against corruption.

Public sectors in many African economies are notorious for having extremely high levels of corruption. In the provision of public services, for example, civil servants in many African countries are known to act arbitrarily and capriciously, favoring those individuals who pay them bribes. In these economies, openness and transparency can serve two important, separate but related purposes. As argued by Stirton and Lodge, “[t]he first is to ensure that public service providers respect both the positive and negative rights of individuals.” They argue further that “[t]his instrumental justification for transparency of public services comes close to Bentham’s principle for good governance: ‘The more strictly we are watched, the better we behave.’” The second purpose, argues Stirton and Lodge, “relates more directly to democratic theory, which values participation by individuals in the decisions that affect them.” Young argues that “[p]articipatory approaches to democratic

163 For example, corruption can make it virtually impossible for citizens, especially the poor and historically marginalized groups (e.g., women), to have access to welfare-enhancing public services (e.g., prenatal care; clean drinking water; education, especially at the primary level; basic health care; and police protection). See, e.g., Mbaku, supra note 160, at 109-110.
165 Id. at 216.
167 See, e.g., Mbaku, supra note 160, at 102-105.
169 Id. at 476.
170 Id. at 476. The Bentham quote is from CHRISTOPHER HOOD, COLIN SCOTT, OLIVER JAMES, GEORGE JONES & TONY TRAVERS, REGULATION INSIDE GOVERNMENT: WASTEWATCHERS, QUALITY POLICE AND SLEAZE-BUSTERS 3, 5-6 (Oxford University Press, 1999).
171 Stirton & Lodge, supra note 168.
172 Id. at 476. Economists have long known and argued that participation in the design of policies by people at the local level is critical because those people have more information about demand and supply conditions at the local or community level than the elites at the center. See, e.g., JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (Praeger, 1997) (arguing, inter alia, that effective policy design requires access to time-and-place information that is more easily available to individuals at the local level than those at the center).
theory hold that democracy is a hollow set of institutions if they only allow citizens to vote on representatives to far away political institutions and protect those citizens from government abuse. A fuller democracy in principle means that people can act as citizens in all the major institutions which require their energy and obedience.”

Stirton and Lodge argue further that “[t]ransparency, on this view has moral value because it enhances individual autonomy by involving citizens directly in the process of making decisions which affect their lives and interests” and “enhances individual autonomy to the extent that transparent institutions are predictable, allowing individuals to order their own private choices knowing the way that these are affected by public decisions.”

In the view of Koppell, “[t]ransparency is the literal value of accountability, the idea that an accountable bureaucrat and organization must explain or account for his actions.” Additionally, “[t]ransparency is most important as an instrument for assessing organizational performance, a key requirement for all other dimensions of accountability.”

Citizens, including those of the African countries, place a high value on transparency and openness in the operation of their governments—citizens are interested in knowing how public policies are designed and implemented, especially those which have a direct impact on their lives. Considering the negative impact that corruption has on the lives of many people, and considering also, the fact that transparency tends to minimize engagement in corrupt behaviors, it is no wonder that citizens are interested in transparency.

Transparency is also a critical element of a trustworthy governmental regime. As argued by Fairbanks, Plowman and Rawlins, where government communicators undertake their operations in a transparent and open manner, such an approach is likely to garner significant support for the government. Specifically, the benefits of transparent communication practices by the government include “increased public support, increased understanding by the public of agency actions, increased compliance with agency rules and regulations, an increased ability for the agency to accomplish its [sic] purpose and a stronger democracy.” In order for government communicators to achieve transparency, they “must adopt practices that promote open information sharing. These include working to enhance agency relationships with the publics they serve through responding to public needs, seeking and incorporating feedback and getting information out to the public through a variety of channels.”

---

174 Id. at 485.
175 Stirton and Lodge, supra note 168.
176 Id. at 476.
178 Id. at 96.
179 Id.
181 Id. at 33.
182 Id.
From their study of transparency, Fairbanks, Plowman and Rawlins\textsuperscript{183} also conclude that “[t]ransparency in the decision making process, quells the fear that decisions in government agencies have been made as a result of undue political or industry influence because the process is open to the public.”\textsuperscript{184} They also determined that transparency in government operations produces “a feeling of trust in [one’s] government and the ability to realize a comfort in understanding that [one is] being treated equally with others and that the government is working in [one’s] best interest.”\textsuperscript{185} For Africa, this is an important and critical point—effective management of ethnic and religious diversity requires that all groups within the country feel that they are being treated equally and that the process of designing and implementing public policies is not being used to marginalize them. Of course, one way to restore a feeling of trust among a country’s diverse population groups in their government is to make certain that public operations are as transparent as possible.

One of the most important outcomes of the top-down, elite-driven, non-participatory approach to constitution making is that many of today’s governance systems in the African countries do not offer citizens the wherewithal to hold their civil servants and political leaders accountable—in these countries, those who serve in government are neither accountable to civil society nor to the constitution.\textsuperscript{186} As the struggle to improve governance in the continent continues, it is important for Africans to recognize that an effective way to enhance accountability is to mandate transparency in the performance of public-sector activities. First, transparency can force civil servants and political elites to be accountable to the citizens that they serve, and second, transparency “can also act as an incentive for people to participate in collective action and it facilitates the spread of innovation and technical change.”\textsuperscript{187}

An African country, which is interested in improving governance and minimizing public-sector opportunism by implementing transparency in, say, government communications, should consider the following: (1) In all its activities or operations, the government must adopt a policy that values “open, honest and timely” communication with citizens\textsuperscript{188} and must avoid the manipulation of information, a process that has become part of the survival strategy of many authoritarian regimes in the continent. (2) All individuals who communicate on behalf of the government—civil servants, political elites and other agents of the government—should adopt “practices that promote open information sharing.”\textsuperscript{189} (3) The government, while taking into consideration, issues of privacy, should work closely with bureau managers to “create an organizational structure that supports transparency.”\textsuperscript{190} (4) All

\textsuperscript{183} Id. at 28.

\textsuperscript{184} Id.

\textsuperscript{185} Id. at 28-29.


\textsuperscript{188} Fairbanks, Plowman & Rawlins, supra note 180, at 33.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 34.
government communicators should be provided with enough access to time, staff and monetary resources. One must note, however, that although openness and transparency are desirable qualities in a democratic government, care must be taken so that the private rights of citizens are not violated. While it is critical that the law provide public communicators with the tools to enhance openness and transparency, the law should also constrain these communicators in order to make certain that they or their activities do not violate the rights of citizens.

Since the Internet became a viable mode of communication, the “e-government” model has been recommended as an effective way, even for money-strapped developing countries, to improve transparency. According to Pina, Torres and Royo,

[t]he interactivity of the Internet is expected to make governments more responsive to the needs and demands of citizens. More information delivered in a more timely fashion to citizens is expected to increase the transparency of government and to empower citizens to monitor government performance more closely. E-government is therefore viewed as a positive channel for enhancing trust in governments through government accountability and by empowering citizens.

Although the e-government model has the potential to significantly improve transparency and openness and hence, accountability in the governments of developed countries such as the United States and those of the EU, one must note that in many African countries, where the Internet is still in its embryonic stages and only a few privileged groups and individuals are able to have access to it, this potential for transparency is still yet to be exploited. An important way for the government to improve transparency is to make certain that all its agencies develop websites and publish information about their operations on these websites so that citizens can easily access these data. In order for this to materialize in Africa, however, each African government must first provide the appropriate infrastructure for enhancing the ability of each citizen to have full and effective access to the Internet. Additionally, governments should accelerate their efforts to improve access to education, especially at the primary level, so that the population, notably members of historically disadvantaged groups (e.g., girls, rural inhabitants, and minority ethnic groups) can accumulate the human capital needed to enhance their ability to benefit from the new information technology. As part of the process to improve access to education, the government should make sure that facilities are provided in the rural areas, as well as to adult learners, so that they can participate fully and effectively in new knowledge-based economy.

191 Id. at 32.


193 Id. at 450.

In the struggle against those factors that constrain wealth creation in Africa, such as corruption and rent seeking, openness and transparency can serve as important tools. In addition to the fact that openness and transparency significantly increase and improve accountability, and hence, minimize corruption and rent seeking, transparency and openness also enhance the participation of citizens in governance, a process that enhances the ability of the government to effectively fight corruption.

F. Predictability

As the American Bar Association and several legal scholars and philosophers have argued, a very important element of the rule of law is that the law must not be administered arbitrarily and capriciously. It is important that citizens be able to “expect predictable results from the legal system.” By “predictable results,” the ABA means that “people who act in the same way can expect the law to treat them in the same way.”

In countries in which the common law is the foundation for the legal system, “courts contribute to the rule of law through their authority to make common law rules and to interpret legislation and constitutions; those actions shape the legal environment in which citizens order their economic and personal affairs.” When courts make law, unlike legislatures and administrative tribunals, they are “not subject to democratic processes that ensure citizens’ participation in the creation of new rules or the alteration of existing ones.” Courts employ the informal norm of stare decisis to promote and advance critical elements of the rule of law such as stability and predictability. If a country’s legal system follows the norm of stare decisis, then that country’s courts would not reject legal authority established by the rulings of an earlier court if the facts presented in the extant case (i.e., the case currently waiting to be decided) are analogous to those of the case whose decision produced the legal authority. By maintaining fidelity to precedent and the informal stare decisis norm, courts significantly enhance the stability and predictability of the law.

U.S. courts have recognized the critical role played by adherence to precedent in legal stability in the United States. In a U.S. Supreme Court decision in John R. Sand & Gravel Company v. U.S., the Court held that,

195 ABA Division for Public Education, supra note 64, at 5.
197 ABA Division for Public Education, supra note 64, at 5.
198 Id. & Erwin Chemerinsky, Toward a Practical Definition of the Rule of Law, 46 JUDGES’ J. 4, 5 (2007).
200 Id.
201 Id.
202 Id.
even if the Government cannot show detrimental reliance on our earlier cases, our reexamination of well-settled precedent could nevertheless prove harmful. Justice Brandeis once observed that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right. To overturn a decision settling one such matter simply because we might believe that decision is longer ‘right’ would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.’

In certain circumstances, it might be necessary to forego adherence to precedent for public policy reasons—that is, if the courts determine that doing so would further important societal objectives. What is important to note here is that while adherence or fidelity to precedent is important for achieving legal stability, the latter must not be achieved or secured at the expense of making the law so rigid and unbending that it becomes “impervious to changing societal norms and practices.” Judges, then, should be granted the discretion to occasionally decline to follow precedent in order to meet certain well-defined societal needs or objectives. Of course, if judges do opt to ignore or not follow precedent, and as a consequence create new law, they must appreciate the fact that the new law that they create will invariably produce a new set of constraints, separate from those that had been created by the previous and now overruled law, that citizens must now deal with. Additionally, judges must recognize that frequent changes in the law, through judges’ failure to follow precedent, can create an unstable legal regime, severely constraining the ability of citizens to use the law to organize or order their private lives.

Stare decisis is an effective, although informal, norm that can be used by judges to improve and enhance stability of the legal system. Nevertheless, judges can and do overrule existing precedent in an effort to make certain that the law continues to evolve and maintain its relevance to citizens’ lives and values. If, however, judges “frequently change the status quo by overruling precedent, it produces an unstable legal environment that creates greater difficulty for citizens to predict the legal consequences of their actions or transactions in the future.”

In an effort to maintain legal stability, a desirable goal in any society, judges must balance that desire with the need to make sure that the law does not remain stagnant but is dynamic enough to meet evolving societal needs. Because legal stability is an important element of the rule of law, it is critical in Africa’s fight against corruption and other growth-inhibiting behaviors. As argued by Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, “the laws must not be arbitrary.”

G. The Protection of Human Rights

Constitution making and the practice of constitutionalism in the United States has, historically, been based on the belief by the Founding Fathers and subsequent leaders and

---

204 Id. at 139.
205 Linquist & Martinek, supra note 199.
206 Id.
social reformers that the Constitution and the laws derived from such a document would guarantee and protect citizens’ fundamental rights. In similar fashion, many of the Africans who fought for or supported and sustained the decolonization project believed that the post-independence dispensation would be built on a foundation of respect for human and fundamental rights. Specifically, many Africans believed that the immediate- or post-independence government would engage each country’s diverse population groups in democratic constitution making to produce and adopt institutional arrangements capable of constraining the state, protecting human rights, enhancing peaceful coexistence, and promoting entrepreneurship and the creation of wealth, especially among historically marginalized and deprived groups and communities (e.g., women, rural inhabitants, minority ethnic groups, and the urban poor).

Throughout the post-independence period in Africa, the indigenous elites who captured the evacuated structures of colonial hegemony, did not undertake the type of constitution making and institutional reforms that would have produced legal and judicial systems capable of ensuring the rule of law and hence, guaranteeing the protection of human rights. On the contrary, most of the continent’s post-independence political elites engaged in top-down, elite-driven, opaque, and non-participatory approaches to constitution making, resulting in laws and institutions that were not capable of protecting the fundamental rights of citizens. In addition, post-independence law making was top-down, non-participatory, and monopolized by elites at the center, many of whom lacked the legitimacy to rule and legislate because they did not secure their positions through popular and free elections.

It is generally believed, at least in the West, that the modern movement to protect human rights began with the signing of the Magna Carta in 1215 by King John of England recognizing the rights of some of his subjects. According to Chapter 39 of the Magna Carta,

No free man shall be seized or imprisoned, or stripped of his rights and possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

208 See, e.g., ABA Division for Public Education, supra note 64, at 5.
210 Ahmadou Ahidjo, the first president of the Republic of Cameroon, argued during the decolonization period that it was not necessary for the territory to engage in democratic constitution making and that such an undertaking should be left for the post-independence period. Achieving independence, he argued, was more important that engaging the population in rules selection. However, like other former French colonies, the Ahidjo-led government accepted Charles de Gaulle’s offer of “association” as autonomous polities within the French Community and hence, based the country’s constitution on the Constitution of the French Fifth Republic (1958). See generally VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (Hoover Institution, 1964).
As argued by the ABA, the Magna Carta “planted the seed for the concept of *due process* as it developed first in England, and then in the United States. Due process means that everyone is entitled to a fair and impartial hearing to determine their legal rights.”

Countries whose legal systems are based on and share the Anglo-American legal and cultural tradition look to the Magna Carta as an important source of many elements of their legal systems, especially those dealing with individual rights. Many of the countries that came into being after World War II, however, consider the UN General Assembly’s adoption, in 1948, of the Universal Declaration of Human Rights, as the foundation for the modern movement to protect human rights. Since 1948, the UN has adopted several other conventions and covenants, all designed to enhance the protection of human rights.

Most African countries have signed and ratified these covenants and conventions. In addition, many of these countries have inserted, within their constitutions, clauses that supposedly guarantee the protection of human rights. Unfortunately, throughout the continent, these rights are regularly violated by both state- and non-state actors. Part of the reason why these rights are not being protected is that African countries have failed to provide themselves with the tools to do so—it is very difficult for the fundamental rights of citizens to be protected in a country whose legal system does not guarantee the rule of law. For example, if law is not supreme and hence, those who serve in government consider themselves to be above the law, they are likely to act with impunity and engage in activities.

---

212 ABA Division for Public Education, supra note 64, at 4 (emphasis present in original).


214 For example, Chapter Five of the Constitution of the Republic of Ghana is headed “Fundamental Human Rights and Freedoms” and contains the following:

(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution.

(2) Every person in Ghana, whatever his race, place of origin, political opinion, color, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

In addition, Chapter Eighteen of the Constitution of the Republic of Ghana establishes a Commission on Human Rights and Administrative Justice, which is charged with making certain that the rights guaranteed by the Constitution are protected. See Constitution of the Republic of Ghana, Chapter 18.
that violate the rights of citizens. For example, civil servants in many African countries engage in opportunistic approaches to the allocation of public services and in the process, deprive many citizens, especially the poor, from having access to welfare-enhancing, and in many instances, life-saving services, such as police protection, clean water, basic health care, prenatal care, shelter, and nutrition, especially for children.

As part of the effort to improve national legal and judicial systems in order to provide an enabling environment for the creation of wealth, each African country must make certain that the new institutional arrangements guarantee citizens’ fundamental rights. Each African country must make certain that its “legal processes are sufficiently robust and accessible to ensure enforcement of [all] protections [of human and fundamental rights] by an independent legal profession.”

On May 25, 2011, the Organization for Economic Cooperation and Development (OECD) released its Guidelines for Multinational Enterprises (“OECD Guidelines”) as part of the effort to improve global governance and enhance the ability of multinational companies to operate in the global economy. The OECD Guidelines make specific reference to human rights and the Universal Declaration of Human Rights (UDHR). Specifically, the Guidelines expressly demand that OECD-based multinational companies “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” However, despite the fact that during the last several decades, multilateral agencies such as the OECD, have provided several legal instruments to fight corruption and protect human rights, it must be reiterated that fighting corruption and protecting human rights in Africa is the responsibility of each African government. Thus, each country must provide an institutional environment that enhances the eradication of corruption and the protection of human rights. Such an enabling environment is built on a foundation of the rule of law.

V. FURTHER INSIGHTS INTO THE RULE OF LAW AS A CATALYST FOR DEVELOPMENT IN AFRICA

A. Introduction

Many studies have been devoted to uncovering the reasons for Africa’s underdevelopment and inability to achieve high levels of human development. These studies have placed the


216 See, e.g., JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANSUP 110 (Africa World Press, 2010).


218 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (OECD, 2011), Section II(2).

219 See generally WORLD BANK, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION (World Bank, 1981); WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH, A LONG-TERM PERSPECTIVE STUDY (World Bank, 1989); Z. Ergas, In Search of Development: Some Directions for Further Investigation, 24 J. MOD. AFRICAN
constraints to poor economic performance and the failure to significantly improve living conditions for Africans into two categories—external and internal.\textsuperscript{220} Identified as external constraints to Africa’s failure to develop are (1) natural disasters;\textsuperscript{221} (2) the international financial system;\textsuperscript{222} and (3) the economic policies of the Western developed countries such as the United States, European Union, and other members of the OECD.\textsuperscript{223}

Internal constraints to development include (4) corruption; (5) highly ineffective economic infrastructures; (6) low domestic savings rates; (7) trade dependence—most African countries carry the bulk of their export and import trade with their former colonizers and little or no trade with their neighbors; (8) high population growth rates; (9) political instability;\textsuperscript{224} (10) military intervention in politics; and (11) external debts that these countries have not been able to service and repay.\textsuperscript{225} By the late 1970s, some scholars had begun to include, as a cause of underdevelopment in the continent, “policy mistakes made

\begin{flushleft}
\textsuperscript{220} Mbaku, \textit{ supra} note 220, at 4.
\textsuperscript{221} See generally ALEXANDER A. MADEIBO, \textit{THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR} (Fourth Dimension Publishers, 1980) (providing an eye-witness account of the Nigerian civil war); RALPH UWECHEU, \textit{REFLECTIONS ON THE NIGERIAN CIVIL WAR: FACING THE FUTURE} (Trafford, 2004) (providing an examination of the causes and consequences of the civil war that lasted from 1967 to 1970); MARK HUBAND, \textit{THE LIBERIAN CIVIL WAR} (Routledge, 1998) (providing an account of the Liberian civil war); GEORGE KLAY KIEH, Jr., \textit{THE FIRST LIBERIAN CIVIL WAR} (Peter Lang, 2007) (detailing the causes of the Liberian civil war); MAHMOOD MAMDANI, \textit{WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA} (Princeton University Press, 2001) (examining the events that led to the genocide in Rwanda); GEBRU TAREKE, \textit{THE ETHIOPIAN REVOLUTION: WAR ON THE HORN OF AFRICA} (Yale University Press, 2009) (providing a history of Ethiopian with specific emphasis on its civil wars) and D. H. JOHNSON, \textit{THE ROOT CAUSES OF SUDAN’S CIVIL WARS} (Indiana University Pres, 2003) (exploring the economic, social, political, and religious causes of Sudan’s various civil wars).
\textsuperscript{222} See also HEALING THE WOUND: PERSONAL NARRATIVES ABOUT THE 2007 POST-ELECTION VIOLENCE IN KENYA (Kimani Njogu ed., Twaweza Communications, 2009) (presenting a series of narratives by individuals who were either directly involved in or affected by the ethnic-induced post-election violence in Kenya in 2007).
\end{flushleft}
by well-meaning but poorly educated and incompetent officials”226 and called for greater emphasis to be placed on recruiting and bringing into the public sector individuals who were “better trained, honest, more disciplined and skilled”227 in order to provide a more enabling environment for economic growth and development. Many of these scholars believed that the main problem in Africa was the absence of effective public policies, those capable of enhancing investment in the productive sectors and advancing the creation of wealth.228 Hence, the suggestion was that more honest and competent individuals should be placed in the bureaucracies.229

In many of these immediate post-independence debates about economic development in Africa, little or no emphasis was placed on institutions and the latter’s impact on entrepreneurship and wealth creation. However, along with the interest in transition to democratic governance that began in the continent shortly after the collapse of the Soviet Union and the demise of socialism in Eastern Europe, many scholars began to study the impact of institutions on macroeconomic performance.230 This new literature on African development argued that “[t]he inability or unwillingness of entrepreneurs in the African countries to engage in wealth-creating activities can be linked to poorly developed, non-viable, and weak institutions that were adopted at independence.”231 In addition to the fact that the institutional arrangements adopted by African countries at independence were incapable of providing the wherewithal for the effective management of ethnic and religious diversity, they also did not foster and promote entrepreneurial activities and hence, wealth creation was stunted. In addition, they failed to adequately constrain civil servants and politicians and as a result, these economies were pervaded by corruption, financial malfeasance, rent seeking, and other forms of political opportunism.252

Although part of Africa’s underdevelopment was attributed to the absence of effective leadership, later studies determined that while competent leadership is necessary, it is not a sufficient condition for sustainable economic growth and development.233 Each country

---

226 Mbaku, supra note 220, at 5.
227 Id.
228 Id.
229 Id.
230 See generally John Mukum Mbaku, Institutions and Reform in Africa: The Public Choice Perspective (Praeger, 1997) (showing how the lack of effective institutions has contributed significantly to poor economic performance in the African countries); John Mukum Mbaku, Institutions and Development in Africa (Africa World Press, 2004) (discussing the failure of development theory and the rise of public choice theory as a more effective mechanism to explain African underdevelopment). See also The Transition to Democratic Governance in Africa: The Continuing Struggle (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (discussing transition to democratic governance as a way to improve not only peaceful coexistence, but also wealth creation and hopefully, economic development).
231 Mbaku, supra note 220, at 5.
233 John Mukum Mbaku, Institutions and Reform in Africa: The Public Choice Perspective (Praeger, 1997) & J. D. Gwartney and R. E. Wagner, Public Choice and the
must be provided with laws and institutions that “provide the appropriate incentive system for market participants”\textsuperscript{234} to engage in wealth creation and economic growth. These institutions are those that guarantee the rule of law.

B. The Rule of Law as a Catalyst for Development in Africa

By far, one of the most important constraints to wealth creation and economic growth in Africa is corruption.\textsuperscript{235} Part of the reason why corruption is virtually endemic in many African countries today is the fact that the institutional arrangements in these countries have failed to guarantee the supremacy of law.\textsuperscript{236} Where the law is supreme, civil servants and political elites are adequately constrained and hence, are prevented from engaging in corruption and other growth-inhibiting behaviors. In Africa today, many of the continent’s political leaders, including civil servants, consider themselves above the law and hence, regularly engage in various forms of opportunism to “enrich themselves at the expense of those they are supposed to serve.”\textsuperscript{237} In a study of corruption in Cameroon, Jua\textsuperscript{238} determined that “public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.”\textsuperscript{239} In August 2012, just a little over a year since South Sudan became an independent country, it is already “engulfed in scandals over top officials allegedly looting the treasury.”\textsuperscript{240} This is due, of course, to the failure of the new nation to provide its various peoples with institutional arrangements that adequately and effectively constrain civil servants and politicians—in other words, laws and institutions that guarantee the rule of law and hence, force all citizens, including those who serve in the government, to

\begin{flushright}
\end{flushright}

\textsuperscript{234} Mbaku, supra note 220, at 5.

\textsuperscript{235} John Mukum Mbaku, Corruption in Africa: Causes, Consequences, and Cleanups (Lexington Books, 2010).

\textsuperscript{236} Note that although some African constitutions purport to guarantee the supremacy of law, the practice is that some individuals, especially those who hold high ranking positions in government, still consider themselves above the law. For example, Cameroon’s 1996 Constitution limited the president to two consecutive terms of 7 years in office. Yet, in 2008, Paul Biya, who had already served two terms of 7 years each in office as president, basically ignored the law and used his position in the party to have the constitution changed so that he could contest the presidency again. Thus, despite the fact that he had agreed in 1996 to the two-term limit, he was still willing to subvert the existing laws to maximize his interests.

\textsuperscript{237} Mbaku, supra note 235, at 118-119.

\textsuperscript{238} Nantang Jua, Cameroon: Jump-starting an Economic Crisis, 21 Africa Insight 162 (1991).

\textsuperscript{239} Id. at 166. Although this study was completed in 1991, the situation has not changed significantly. Fombad’s 2004 study found similar acts of impunity by civil servants and politicians. Charles Manga Fombad, The Dynamics of Record-breaking Endemic Corruption and Political Opportunism in Cameroon, in The Leadership Challenge in Africa: Cameroon Under Paul Biya 357 (John Mukum Mbaku & Joseph Takougang eds., Africa World Press, 2004).

\textsuperscript{240} John Burnett, At Age One, A Tattered Reputation for South Sudan, at http://www.npr.org/2012/08/02/157791705/at-age-one-a-tattered-reputation-for-south-sudan (last visited on August 3, 2012).
remain subservient to the law. Unless this is done, corruption, rent seeking and other forms of opportunism would remain pervasive and entrepreneurs would find it extremely difficult to engage in those activities that create wealth.

Colonialism, as has been argued by many scholars, was not a mutually beneficial arrangement between Africans and the Europeans. Instead, it was a cruel, opportunistic, repressive, violent and highly exploitative system designed to capture benefits for the metropolitan economies and Europeans resident in the colonies (i.e., colonists or settlers). As a consequence, the laws and institutions that the Europeans established in each colony to help them manage the local populations and enhance their ability to appropriate African resources were not democratic but were designed to keep the Europeans—the governors of the colonies—above the law.

In fact, the Europeans who colonized Africa made no effort to either utilize already existing indigenous institutions—which in the past had proven quite effective and efficient in the peaceful resolution of conflict and the promotion of domestic production systems—or engage African populations of the colonies in designing more effective systems of governance. Rather, African institutions were destroyed to make way for the introduction and sustaining of laws and institutions that enhanced European seizure, forceful possession, and exploitation of colonial resources for the benefit of the metropolitan economies.

At independence, many African countries failed to engage their populations in democratic constitution making to secure more effective institutional arrangements to replace those left by the colonialists. For example, in the francophone countries, except for Guinea, national constitutions were based on the French Constitution of 1958, and hence, were not products of national constitutional discourses. In addition to the fact that these top-down, elite-driven and non-participatory approaches to constitution making forced these countries to adopt institutional arrangements that did not reflect the people’s values and aspirations, they failed to adequately constrain the state. Perhaps, more important was the fact that, throughout Africa, citizens came to see these constitutions and the laws that were enacted after them, as foreign impositions designed to maximize the interests of the new leaders and their foreign benefactors. And hence, few Africans came to accept and respect their post-independence laws and institutions. Even as late as the 1990s, francophone

---

242 Id.
243 In the French colonies, for example, the policy of assimilation, later, association, created two legal systems, one for “indigenes” and another for French citizens and those few Africans who had been assimilated to the French cultural ideal. Under this system, French citizens in the colonies functioned essentially above the law. See generally JOHN D. HARGREAVES, WEST AFRICA: THE FORMER FRENCH STATES (Prentice-Hall, 1967); JOHN D. HARGREAVES, FRANCE AND WEST AFRICA: AN ANTHOLOGY OF HISTORICAL DOCUMENTS (Macmillan, 1969); VIRGINIA THOMPSON & RICHARD ADLOFF, FRENCH WEST AFRICA (Greenwood, 1969). For a description of the dual legal system in the UN Trust Territory of Cameroons under French administration, see VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (Hoover Institution, 1964).
countries in Africa were still using the Constitution of the French Fifth Republic as the model for “constructing” their laws and institutions. For example, in a study of the democratization process in Mauritania, Ould-Mey determined that “[t]he July 1991 Constitution [of Mauritania] was essentially based on the Constitution of the French Fifth Republic of October 1958.”

Yet, voluntary acceptance of and respect for a country’s laws significantly lower the costs of maintaining compliance. Because many Africans view their present legal and judicial institutions as alien impositions designed for the benefit of the ruling elites and not for helping the people govern themselves, organize their private lives, and deal with daily problems and conflicts, they have rejected these laws and the civil servants and governmental agencies that enforce them. African countries can only resolve this problem of the failure of the majority of citizens to accept, respect and trust the law, by engaging in the type of institutional reconstruction that allows each country to replace the legal and judiciary systems inherited from the Europeans by structures that are more locally-focused and reflect the values, interests, aspirations and customs and traditions of each country’s relevant stakeholder groups. This can only be achieved by engaging the people in democratic constitution making—given the opportunity, then, the people will choose laws that they can respect, accept and obey and which would enhance their ability to live together peacefully and engage in those activities that maximize their values, including creating the wealth that they need to meet their obligations.

The creation of wealth requires that the country possess a legal and judicial system that can provide the wherewithal for the resolution of conflicts arising from trade and other forms of mutually beneficial trade. In order for the judicial system to function effectively in this capacity, it must be made a coequal partner in governance with the other branches of government (i.e., executive and legislature)—that is, there must be judicial independence. If the judiciary becomes subservient to the executive, it is likely to be used by the latter to maximize its interests and those of its supporters and groups within the country that consider themselves marginalized may resort to violent mobilization, a process that can exacerbate political and economic instability and make it difficult for the country to attract the investment needed for economic growth and development.

As much as judicial independence is a critical factor in creating the appropriate institutional environment for wealth creation in Africa, many countries in the continent

---


246 For example, conflicts arising from the failure of one party to a contract to live up to or abide by the terms of the contract. Although many conflicts associated with private contracts are often resolved by the parties themselves without the involvement of the judiciary system, it is the case that a lot of contract disputes also end up in court. Individuals or businesses intending to invest in an economy usually consider the legal mechanisms for resolving conflicts arising from contract disputes as critical to their decision to commit funds to the economy in question. Studies by economists have shown that a country’s legal structure and protection of property rights are very important for wealth creation. See James Gwartney & Robert Lawson, *Economic Freedom of the World: 2004 Annual Report* 35-37 (The Fraser Institute, 2004).
continue to have problems when it comes to the actual practice of this concept. While many constitutions in the continent actually “honor conventional separation-of-powers principles by organizing the courts into a separate, self-managed branch of government with exclusive functions and jurisdiction,” judiciary independence is rarely realized in practice in these countries. As argued by Prempeh, many African governments, pressured by “international donors and creditor nations to demonstrate their democratic credentials,” provide their countries with a “formal constitutional guarantee of judicial independence,” but in reality, “judicial independence remains vulnerable to political control.” Throughout the continent, many judiciaries are unable to maintain the independence guaranteed them by the constitution because other critical aspects or elements of judiciary independence are missing—such judiciaries usually lack the authority to control their own budgets, because the power of the purse is vested either with the executive or legislature. They also lack “security of tenure” and “institutional independence.” For example, as determined by Fombad in a study of the Cameroon judiciary, the President of the Republic not only has the power to “guarantee” the independence of the judiciary, but he also directly controls all financial matters dealing with the judiciary. Prempeh states that the dependence of African judiciaries on the executive and legislative branches is worsened by “the fact that the judiciary has historically been severely under-resourced, leaving it with inadequate and outmoded technology, dilapidated and overcrowded courthouses and offices, and underpaid judges and staff.”

So that there can be peace (i.e., peaceful coexistence of each country’s diverse ethnic and religious groups), which is critical for engagement in those productive activities that create wealth and enhance human development, judiciary independence must not only be guaranteed in the constitution, but the necessary institutional facilities must be provided so that the judiciary can realize that independence in practice. For example, as has been made clear by South Africa’s Constitutional Court, the judiciary must be provided the minimum requirements for judicial independence, which are (1) “security of tenure”; (2) “a basic degree of financial security”; and (3) “institutional independence.”

248 Id.
249 Id. at 1304-1305.
250 Id. at 1305.
251 Id.
252 Constitution of the Republic of Cameroon, Articles 37(2) & 37(3).
254 Prempeh, supra note 247, at 1305.
256 Id.
Corruption and rent seeking are major constraints to the creation of wealth in Africa.\textsuperscript{257} One of the most effective ways to deal with corruption is to make certain that public policies are undertaken through an open and transparent manner. In addition to the fact that openness and transparency can significantly improve the efficiency of the public sector, they can also force civil servants and politicians to be more accountable to both the people and the constitution, thus, minimizing corruption, rent seeking and other behaviors that stunt entrepreneurship and the creation of wealth. During the last fifty years, corruption has been pervasive throughout most African economies, making it very difficult for these countries to develop and sustain the robust private sector needed to anchor each country’s wealth creation effort. Perhaps, more important is the fact that corruption deprives those at the bottom of the economic ladder of the opportunity to participate gainfully in the economy, as well as gain access to welfare-enhancing public goods and services.\textsuperscript{258}

The protection of human rights is a critical factor in development. For example, throughout Africa, women and girls are regularly abused and deprived of their fundamental rights. In addition to the fact that such abuse significantly degrades the quality of life for these citizens, it also deprives them of the opportunity for self-actualization—for example, the opportunity to (1) develop the human capital that they need to participate fully and effectively in political and economic markets, including creating their own wealth; (2) access the credit that they need to engage in productive activities; and (3) own real property, which is an important way to store one’s wealth for the future. Throughout the continent, human rights abuses remain at the heart of why so many African women and girls are among the continent’s poorest inhabitants. Hence, the protection of the fundamental rights of all citizens is critical for poverty alleviation and human development.\textsuperscript{259}

VI. THE ARAB AWAKENING: THE CONTINUING EFFORT TO ENHANCE DEVELOPMENT IN AFRICA

After a Tunisian street vendor, named Tarek al-Tayeb Mohamed Bouazizi, set himself on fire as a protest against humiliation by the government, his subsequent death provided the impetus to what later became a new awakening among ordinary Tunisians. This awakening, which was later referred to as the “Arab Spring,” manifested itself in a series of grassroots anti-government protests, which effectively overthrew the government of Tunisia’s authoritarian ruler, President Zine el-Abidine Ben Ali, on January 14, 2011.

The pro-democracy demonstrations that began in Tunisia after Bouazizi’s self-immolation, spread to other countries in North Africa and the Middle East. In Egypt, citizens took to the streets to demand the ouster of their president, Housni Mubarak.\textsuperscript{260} Throughout this region, citizens awoke to a new way of thinking about human rights, governance, and development. They arose to demand that their governments respect their


\textsuperscript{258} Mbaku, Corruption in Africa, supra note 257, at 109.

\textsuperscript{259} See generally Human Rights, the Rule of Law, and Development in Africa (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., University of Pennsylvania Press, 2004).

\textsuperscript{260} See generally Shubra Ohri, Column: International Legal Updates—Middle East and North Africa, 18 Human R. Brief 45 (2011).
“basic social, political, and economic rights.” Before the masses of these countries took to the streets to demand their rights, the governments of these countries had routinely “violated international law by prohibiting the rights to assemble and to freedom of expression” guaranteed by international conventions, which have been ratified by these countries. Bouazizi’s frustration was shared by not just the masses of Tunisia, but by those in Egypt and other countries in the region—they sought the opportunity to govern themselves (i.e., to determine or at the very least, participate in the determination of their own laws and the choosing of their own leaders) and participate fully and effectively in the creation of wealth.

Generally, the Arab awakening resulted in the demise of brutal governmental regimes in Egypt, Libya and Tunisia. Elections, considered relatively free by both domestic and international observers, have taken place in all three countries and in Egypt and Tunisia, the government has been captured by Islamist political parties. Already, there are fears, especially by some groups in these countries, notably women and religious minorities, that even though these new regimes came to power through democratic processes, they are likely to reject democratic governance as soon as they have consolidated their power.

But were the events that characterized the Arab awakening transformative enough to provide citizens of Egypt, Libya and Tunisia with institutional arrangements capable of enhancing peaceful coexistence, promoting entrepreneurship, especially among historically marginalized groups (e.g., women and minority ethnic and religious groups), and adequately constraining the state so that its custodians would not continue to behave with impunity as they had done prior to the “revolutions”?

The answer to the above question is that, what happened in all three countries can better be described as “regime changes” and not the type of transformative processes that produced truly new governmental institutions. For example, in Egypt, the Mubarak-imposed anachronistic, oppressive, exploitative and elite-driven governance architecture remains firmly in place. Egypt’s revolution did not involve the type of bottom-up, inclusive, participatory and people-driven institutional reconstruction that would have produced institutional arrangements capable of guaranteeing Egyptian citizens’ fundamental rights and

261 Id. at 45.
262 For example, the International Covenant on Civil and Political Rights (1966) & the International Covenant on Social, Political and Economic Rights (1966).
263 Note that unlike the situation in Egypt and Tunisia, where grassroots demonstrations resulted in the ouster of the governments of these countries, the overthrow of Libya’s Muammar Qaddafi was only made possible with significant military assistance from the international community. Nevertheless, there was still significant participation by Libyans who had suffered tremendously under Qaddafi’s brutal dictatorship. See generally Catherine Powell, Note and Comment: Libya: A Multilateral Constitutional Moment?, 106 A. J. I. L. 298 (2012).
264 For example, as reported by Marc Fisher, several YouTube preachers in Tunisia are currently “offering a vision of Islam that rejects democracy and elections.” They preach that “[d]emocracy’s freedom is absolute,” and that “we don’t accept that. In our religion, freedom is limited to the freedom God gives you.” Marc Fisher, In Tunisia after Arab Spring, Islamist’s New Freedoms Create New Muslim Divide, THE WASHINGTON POST, April 28, 2012, at http://www.washingtonpost.com/world/in-tunisia-after-arab-spring-islamists-new-freedoms-create-new-muslim-divide/2012/04/28/gIQAN9yIoT_story.html (last visited on August 4, 2012).
greatly enhancing their ability to coexist peacefully and engage freely in productive activities to create the wealth that they need to deal with poverty and deprivation. First, the country’s first freely-elected parliament in sixty years was sacked by the Supreme Constitutional Court, an anachronism from the Mubarak era. By dissolving a democratically elected parliament, the SCC effectively quashed the most important achievement of the Egyptian “revolution.” Second, the Supreme Council of the Armed Forces (SCAF), a Mubarak-era institution, has assumed the powers of the legislature, as well as some of the powers traditionally vested in the executive. In addition to the fact that the SCAF has appropriated the power to legislate, it has also made it clear to the new president, Mohammed Morsi of the Islamic Brotherhood movement, that in selecting a cabinet, he is to leave the post of defense in the hands of the military. When President Morsi announced his 35-member cabinet on August 2, 2012, Field Marshal Hussein Tantawi, who is also head of the SCAF, retained his position as the defense minister.

Many Egyptians, Tunisians and Libyans are feeling a level of frustrations about their revolutions. That level of frustration may be related to the fact that these revolutions failed to achieve their ultimate objective—to reconstruct anachronistic state systems and provide the people with governance structures capable of effectively constraining state custodians (i.e., civil servants and politicians) and guaranteeing the protection of the fundamental rights of citizens. The revolutions failed to totally transform and reconstitute the critical domains—the political, administrative, and judicial foundations of the state, and as a result, citizens of these countries continue to face the same anachronistic institutions that had oppressed,

---


267 As stated by Sarah El Deeb, the SCAF “stripped [the new president] of significant powers and declared themselves as the country’s legislative authority after dissolving a parliament dominated by Morsi’s Islamic Muslim Brotherhood movement.” The SCAF has also appropriated the power to write the country’s permanent constitution, a job that should be performed either by the Egyptian people or their duly elected representatives. Id.


269 For example, in Egypt, many of the youth leaders of the revolution are frustrated about continued military interference in governance; women and minority groups (e.g., Coptic Christians) are frustrated about the direction in which the Islamist-dominated government is taking the country. Although the new president has “vowed to open up his government to women, minorities and rival political parties, . . . analysts note that the new Cabinet contains only token representation for women and Christians.” Yeranian, *supra* note 268. In Tunisia, the country’s Islamists, who came to power through democratic elections, are likely to reject democracy and elections and bring about institutional changes that would return the country to authoritarian rule, this time, based on extremely conservative Islamic beliefs. Fisher, *supra* note 264.
infantilized, and exploited them for years. Given the opportunity, Egyptians would definitely have engaged in the type of constitutional making that would have subjected the military, including the SCAF, to civilian control and prevented it from engaging in the type of political manipulations that have allowed it to effectively hijack the country’s revolution and frustrate the people’s efforts to reform their institutions.

Like other pro-democracy groups elsewhere in the continent, such as those that emerged across Africa in the mid-1980s and early-1990s, Egypt’s new democrats believed, albeit mistakenly, that if “they ousted the head of state its body would fall.” Although Egypt’s Mubarak, who for many decades had ruled this country with extremely efficient cruelty, is no longer in power, the institutional structures that supported his brutal dictatorship remain virtually intact. Hence, as admirable and as monumental as the uprising was, it was not a real transformative revolution, one producing more democracy-friendly laws and institutions. Today, the political, administrative, and judicial structures that significantly enhanced the ability of the ancien régime to oppress and infantilize the Egyptian people are still intact and are being used by the “new” leadership to frustrate the ability of Egyptians to deepen and institutionalize democratic governance.

What the Arab awakening did was offer citizens of the various countries the opportunity to undertake the reconstruction and reconstituting of the anachronistic state structures inherited from the ancien régimes and provide laws and institutions capable of adequately constraining the state and enhancing the ability of citizens to take a more active part in poverty eradication through entrepreneurship and wealth creation. Unfortunately, the revolutions in these countries were still-born, and state reconstruction remains a work-in-progress. Of course, one can consider the new governments in Egypt, Libya and Tunisia as interim or transitional governments whose job it is to provide the people with the wherewithal to undertake proper state reconstruction. One problem with this approach is that without effective constraints on their activities, these new governments are not likely to engage the people in the type of robust dialogue that could lead to participatory, inclusive, and people-driven institutional reforms. For example, in Egypt, the military has relegated to itself, the power to produce the country’s post-revolution constitution and in Tunisia, Islamist preachers are pushing the Islamist-dominated government to adopt governance structures based on Islamic law.

VII. CONCLUSION

Today, Africans face three important policy priorities: (1) effectively managing ethnic and religious diversity in order to secure the peaceful coexistence that is critical for investment and the building and sustaining of wealth-creating capacity; (2) fostering the development of

---

270 After the Egyptian revolution, institutions that had been used effectively by the Mubarak regime to terrorize the people remain in place. In fact, the SCC, which dissolved the democratically-elected parliament, remains in place and so is the SCAF.
272 El Deeb, supra note 266.
273 Fisher, supra note 264.
private sectors that are capable of producing the wealth that these countries need to deal effectively with poverty and deprivation and provide a foundation for eventual eradication of poverty; and (3) the minimization of corruption, rent seeking and other growth-inhibiting behaviors.

These priorities are all interrelated. For example, the failure of African governments to manage ethnic and religious diversity effectively has often resulted in destructive and violent mobilization by groups that perceive themselves as being marginalized by a central government dominated and controlled by other groups.274 The result has been significantly high levels of political instability, which have created economic environments that are not suitable for investment and/or engagement, by entrepreneurs, in productive activities. Peaceful coexistence creates opportunities for mutually-beneficial exchanges between groups, which may include cultural exchanges and trade. Such exchanges can lead to innovation and the creation of new knowledge that can aid production and the peaceful resolution of problems and conflicts.

State actors, such as civil servants and politicians, are responsible for a significant amount of the corruption and rent seeking that takes place in the African countries today.275 Thus, to minimize the engagement of state actors in growth-inhibiting behaviors, it is necessary that the state be adequately constrained by the constitution. Some of the instruments needed to accomplish this would be to make certain that the law is supreme—no citizen, regardless of their political, economic or traditional standing in society, is above the law; judicial independence is assured, so that the executive does not turn judiciary structures into instruments of control and plunder; the laws chosen are those that reflect the values and aspirations of citizens, that is, the laws are locally-focused, and must also be laws that citizens can obey—this should enhance compliance and minimize the costs of policing; and government operations are conducted in an open and transparent manner—this will minimize corruption, enhance participation, and increase the people’s trust in the government.

The rule of law is a critical catalyst to Africa’s effort to deal effectively with poverty. Each country must engage its citizens in democratic constitution making to provide laws and institutions that guarantee the rule of law. One must caution that what is being advocated here is not simple regime change as has occurred in many countries throughout the continent. In order to secure institutional arrangements that guarantee the rule of law, countries must engage in the type of robust state reconstruction that provides all of each country’s relevant stakeholders with the wherewithal to participate fully and effectively in institutional reforms. It is only through such a democratic process that a country can avail itself of legal and judicial frameworks that guarantee the rule of law and hence, provide the environment for peaceful coexistence, wealth creation, and democratic governance.

274 Examples includes Ibos in Nigeria, Ogonis in the Niger Delta of Nigeria, various indigenous groups in Liberia, southerners in the Republic of Sudan, etc.