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Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency of Post-Authoritarian Africa

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In December 1991, the president of the southern African state of Zambia, “on behalf of the nation,” declared his country a “Christian Nation.” Remarkably, President Frederick Chiluba made this declaration without consulting his cabinet, party, or the national legislature. A self-described evangelical Christian, President Chiluba simply imposed his own religious preferences on his entire nation, ignoring the fact that Zambia has been a secular state since its founding in 1964 and remains a culturally and religiously pluralistic society. Against the objections of influential sections of Zambian polity and society, including well-established Christian congregations, the president stood by his declaration and, in fact, succeeded in 1996 in getting it memorialized in the form of a “Christian Nation clause” inserted in the preamble to the country’s amended Constitution, where it still sits today.

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1 The full text of the speech by Zambian president Frederick Chiluba containing the “Christian Nation” declaration is reproduced in The Nations Called: Theology of the Nations and Their Redemption (Pieter Bos, ed., 2002).


What is significant about this story is that the Zambian president’s declaration was not the act of some notorious “African dictator” whose word had always been law. To the contrary, President Chiluba was one of a “new generation” of African leaders who had been swept into office amidst popular disenchantment with the 27-year rule of Zambia’s founding leader, Kenneth Kaunda. A former trade unionist and a political newcomer, Chiluba had been elected president at the head of a democratic movement that had emerged purposely to resist and challenge decades of authoritarian one-man and one-party rule. Yet, upon assuming the office of president, the democratically elected Chiluba acted brazenly and unilaterally, taking his country down a needlessly divisive path that even his constitutionally authoritarian predecessor had never contemplated. The regime change that was supposed to have ended presidential autocracy in Zambia had ironically brought more of the same.

Throughout sub-Saharan Africa, popular protests and growing civic activism have challenged the rule of once-entrenched dictators since the end of the 1980s. In several African countries, this democratic “wave” has led to unprecedented political liberalization and constitutional reforms. In the process, some of Africa’s longest-serving and most notorious autocrats have been brought down and many more forced by new constitutional rules to face the prospect of electoral defeat or foreseeable exit through presidential term limits. Democratic elections also have helped to revive and restore civil government to so-

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4 See generally Samuel P. Huntington, Democracy’s Third Wave, in THE GLOBAL RESURGENCE OF DEMOCRACY 3 (Larry Diamond and Marc F. Plattner, eds., 2d ed. 1996) (describing the “current era of democratic transitions” as constituting “the third wave of democratization in the history of the modern world.”).

called “failed states”\textsuperscript{6} like Liberia\textsuperscript{7} and Sierra Leone.\textsuperscript{8} Africa now boasts its first elected woman president\textsuperscript{9} as well as a woman prime minister.\textsuperscript{10} However, despite the recent democratic backlash against decades of authoritarian presidential rule in Africa, and the regime change this has wrought in several African states, the phenomenon of “imperial presidency,”\textsuperscript{11} long associated with politics and government in Africa,\textsuperscript{12} persists—and it

\textsuperscript{6} The term “failed state” is used in contemporary discourse to refer to a juridically sovereign state where, usually as a result of protracted civil war, the central authority has collapsed or lost the capacity to enforce or project its power over large portions of the country’s territory, effectively ceding control of such territory to local bandits or insurgent groups. \textit{Foreign Policy} magazine, which first used the term “failed state,” publishes an annual Failed State Index. See http://www.foreignpolicy.com

\textsuperscript{7} See generally JOHN PETER PHAM, LIBERIA: PORTRAIT OF A FAILED STATE (2004)

\textsuperscript{8} See Michael Chege, \textit{Sierra Leone: The State that Came Back from the Dead}, 25 \textit{WASH. QUARTERLY} 147 (2002).


\textsuperscript{11} The term was coined and popularized by Arthur M. Schlesinger, Jr., to describe “the shift in the constitutional balance” in the United States in favor of “presidential supremacy,” which has come about through “the appropriation by the Presidency, and especially by the contemporary Presidency, of powers reserved by the Constitution and by long historical practice to Congress.” ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1972). Throughout this Article, I use the term “imperial presidency” interchangeably with “presidential supremacy,” “presidential imperialism,” “hegemonic presidency,” “presidential monarchy,” and “presidential dominance.” In parts of this Article, I also use the term
persists, ironically, even in those states that have recently transitioned from presidential autocracy to constitutional democracy.

The presidential form of government—comprising an “executive president” elected to office for a fixed term independently of a representative legislature with which the president must share the powers and responsibilities of government—is one of America’s distinctive contributions to modern constitutionalism. In its home of origin, however, the presidential form has been pressed through the mill of history, politics and judicial doctrine, and in the process has morphed into what the late American presidential historian, Arthur Schlesinger, Jr., has called the “imperial presidency.”13 Across the world, too, as democratic government has spread, notably since the end of the Cold War,14 presidential power has tended to assume an imperial character.15 Yet, while constitutional and comparative legal scholars have shown a tremendous amount of interest in new constitutional courts in the world’s newest

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13 SCHLESINGER, IMPERIAL PRESIDENCY, supra note 11.


15 See, e.g., CARNES LORD, THE MODERN PRINCE: WHAT LEADERS NEED TO KNOW NOW 96 (2003) (“[T]he general trend in democracies today seems to be in the direction, if anything, of a further strengthening of the executive element, especially at the expense of legislatures.”); Gary Rosen, The Time of the Presidents, N.Y. TIMES, July 16, 2006, at 6-21 (“Around the world, the imperial presidency appears to be alive and well.”)
democracies, the contemporaneous phenomenon of persistent imperial presidency has been largely overlooked.

This Article examines the phenomenon of imperial presidency in one region of the world—Sub-Saharan Africa—that has been almost entirely ignored by scholars of comparative constitutionalism.\footnote{See Mary L. Dudziak, \textit{Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa}, 101 MICH. L. REV. 1622, 1630 (2003) (book review) (“Amidst the blossoming of comparative scholarship, most of the continent of Africa is usually overlooked, as if it were a legal ‘Heart of Darkness,’ as if it were a lawless world.”).} In part, Africa’s relative exclusion from comparative discourses stems from a widespread belief in the notion of \textquotedblleft African exceptionalism\textquotedblright\footnote{C.R.D. Halisi and and Scott Bowman, \textit{Theory that Matters: The Intellectual Legacy of Richard L. Sklar}, \textit{in African Politics in Postimperial Times: The Essays of Richard Sklar} lxi (Toyin Falola ed., 2002).}—“the idea that the problems that plague Africa are uniquely African”\footnote{\textit{Id.}} and thus must be analyzed without reference to “universal categories of explanation.”\footnote{\textit{Id.}} Regarding Africa’s tradition of imperial presidency, for example, a common tendency is to blame it on \textquotedblleft African culture,” or more specifically, Africa’s indigenous kingship tradition. On that view, the imperial president in modern Africa is merely the contemporary or secular version of the traditional African \textit{chief} \textit{writ large}.\footnote{See, e.g., \textit{James T. McHugh, Comparative Constitutional Traditions} 140 (2002) (“The role of the ‘strong leader’ is consistent with a traditional perception of tribal leadership that is familiar to many people throughout this region of Africa . . . . The traditional political role of the Nigerian president . . . may be based more firmly upon traditional cultural expectations than upon the powers and institutions . . . that are}
This Article challenges and refutes the “African culture” thesis. Instead, it seeks explanation for the phenomenon of imperial presidency and for its persistence in post-authoritarian Africa, first, in aspects of the post-colonial history and evolution of the African state, and, secondly, in aspects of contemporary constitutional design and politics in Africa’s new democracies. The Article thus seeks to do two things: examine and explain, one, the rise of imperial presidency in Africa, and two, the persistence of the phenomenon in the contemporary (post-authoritarian)21 African state.

The Article is divided into four parts. Part I paints a portrait of the nature of presidential power in Africa during the first three decades after colonialism, roughly from 1960 to the end of the 1980s. It then proceeds to describe how the recent democratic and constitutional reforms have altered the constitutional and political contexts of presidential rule in contemporary Africa and, consequently, why the persistence of imperial presidency in Africa presents a puzzle. In Part II, I examine critically, and ultimately refute, the claim that Africa’s longstanding tradition of presidential autocracy or supremacy is a necessary sequel to, or merely a modern reflection of, indigenous modes of rule. Part III of the Article traces the rise of imperial presidency in Africa to Africa’s first postcolonial rulers. I identify independent Africa’s first nationalist ruler, Kwame Nkrumah of Ghana, as the progenitor of the trend

expressly linked to that office.”); B.O. NWABUEZE, PRESIDENTIALISM IN COMMONWEALTH AFRICA 106 (1974) (“The President, in effect, is the chief of the new nation, and as such entitled to the authority and respect due by tradition to a chief.”); Bethwell Ogot, From Chief to President, 10 TRANSITION 26, 28 (1963) (explaining authority in postcolonial Africa in terms of the “traditional model” of chieftaincy).

21 I use the term “post-authoritarian” in this Article as a period marker, to denote the period after a transition from formal authoritarianism to a formal democratic form of government under new constitutional rules.
toward presidential autocracy in postcolonial Africa and examine briefly the incremental steps by which imperial presidency was implanted in Africa’s first sovereign state and then popularized across the region. I also discuss in Part III the “national integration” and “development” rationales that were proffered in support of presidential autocracy and the historical and external factors that conditioned or influenced postcolonial agency in that direction. Finally, in Part IV, I return to the present era to examine why Africa’s presidents, despite recent counter-authoritarian constitutional reforms, continue to be so overwhelmingly powerful. I focus on the pitfalls and limitations of contemporary constitutional design in Africa and identify the presidentialist orientation of contemporary Africa’s political parties and the force of “path dependency” among the main factors that continue to underwrite the tendency toward presidential imperialism in Africa. Though the prospect of “divided government” has a certain allure as a remedy for presidential imperialism in contemporary Africa, I reject it as too fraught with the danger of political instability and governmental paralysis in the particular context of Africa’s unitary states. Instead, I also offer, within the context of the discussion in Part IV, some tentative constitutional reform proposals to mitigate the identified problems.


On March 6, 1957, the date marking the independence of Ghana, the country’s founding leader published his memoirs of the birth of sub-Saharan Africa’s first sovereign nation under the title Ghana: The Autobiography of Kwame Nkrumah.\textsuperscript{22} Nkrumah’s choice of title, with its

\textsuperscript{22} KWAME NKRUMAH, GHANA: THE AUTOBIOGRAPHY OF KWAME NKRUMAH (1957).
bold suggestion of “L’état c’est moi”\textsuperscript{23} may have seemed immodest or presumptuous at the time. But as time would reveal, it was indeed quite prescient. Not only in Nkrumah’s Ghana, but throughout independent Africa presidents would come to personify their states. As Senegal’s President Leopold Senghor observed at the time, “The president personifies the Nation as did the Monarch of former times his peoples. The masses are not mistaken who speak of the ‘reign’ of Modibo Keita [Mali], Sekou Toure [Guinea] and Houphouet-Biogny [Côte d’Ivoire], in whom they see above all, the elected of God through the people.”\textsuperscript{24} While Senghor’s observation was easily true of Africa’s founding generation, presidential omnipotence would remain a distinctive feature of African politics through successive generations of leaders, both soldier and civilian.

Unlike the monarchs of medieval Europe, however, Africa’s postcolonial leaders did not claim an entitlement to rule on the basis of divine right, although their propagandists did not shy from occasional suggestions of divine appointment.\textsuperscript{25} By and large, presidential supremacy in postcolonial Africa was constitutionally sanctioned. The president shared power with no one. Parliament, where one existed, was under the \textit{de facto} or \textit{de jure} control of the president’s party, and its primary purpose was to provide a façade of institutional and

\textsuperscript{23} Meaning “I am the State,” the boast is attributed to the 17\textsuperscript{th} century French monarch Louis XIV (1643-1715).

\textsuperscript{24} \textit{Quoted in} Martin Meredith, \textit{The Fate of Africa—From the Hopes of Freedom to the Heart of Despair: A History of Fifty Years of Independence} 162 (2005).

\textsuperscript{25} See, e.g., Peter G. Forster, \textit{Culture, Nationalism, and the Invention of Tradition in Malawi}, 32 J. Mod. Afr. Stud. 477, 483 (1994) (noting that President Kamuzu Banda of Malawi “allowed/encouraged his image as a kind of Messiah to be built up by younger nationalists” and citing a reported comment by a Banda minister comparing the president with God and Malawi with Heaven).
procedural propriety to the president’s laws. Legislative initiative was a presidential monopoly, and in many states the president had concurrent power to legislate by decree. Important policies and pronouncements intended to have legal effect were routinely announced by the president without prior recourse to the legislative assembly. The president controlled slush funds not subject to parliamentary oversight and often awarded major public works and procurement contracts on his own accord. A nominally separate judiciary completed the formal tripartite structure of the government. But Africa’s courts could operate free of presidential control only in routine matters carrying no political import or consequence. Judges whose decisions challenged the omnipotence and official infallibility of the president were liable to be dismissed or have their decisions reversed.

Presidential tenure was open-ended. The president was entitled to stand re-election an indefinite number of times. The elections, of course, were merely ritualistic exercises, as the president generally stood unopposed and thus faced no credible prospect of defeat. Only in one instance, of a total of 16 (nominally) contested presidential elections held across Africa from 1960 to 1989, did an incumbent president suffer defeat (and leave office accordingly).

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26 Meredith, supra note 24 at 182-83.

27 For example, President Nkrumah of Ghana summarily dismissed the chief justice after a three-judge panel headed by the chief justice acquitted the lead defendants charged with conspiring and attempting to assassinate the president. Nkrumah then pushed through a bill that declared the court’s verdict null and void, paving the way for a new trial that resulted in the conviction of the defendants.


29 Id.
Many African presidents simply dispensed with all pretense of electoral accountability and held on to power indefinitely or made themselves “president for life.”

The preponderant and unaccountable power of the president within the African state (and society) had obvious implications for the nature and quality of constitutionalism in postcolonial Africa. African states had constitutions, to be sure—a long succession of them, in fact. But invariably these were constitutions of power (presidential power, that is), not of restraint. In general, provisions in Africa’s post-independence constitutions concerning the formal organization and distribution of political power (“the power map”\(^\text{30}\)) tended to reflect or follow (rather than condition) actual practice. And whenever regime needs changed or embarrassing gaps developed between actual or intended practice and the formal constitutional text, as happened occasionally, the executive easily and quickly secured passage of conforming amendments to the constitution.\(^\text{31}\) A wider gap tended to exist, however, between assurances contained in constitutional “bills of rights,” or provisions ostensibly restraining the use of power, and their actual implementation. Aided by a “jurisprudence of executive supremacy”\(^\text{32}\) applied by the courts, bills of rights became, in practice, “bills of


\(^{31}\) For example, in 1996 the Kenyan authorities amended the country’s constitution to bring it in conformity with its Preservation of Public Security Ordinance by the addition of a clause which read, “nothing contained in or done under the authority of any provision of . . . the Preservation of Public Security Act shall be held to be inconsistent with or in contravention’ of [this constitution].” Nwabueze, supra note 20 at 320.

\(^{32}\) H. Kwasi Prempeh, A New Jurisprudence for Africa, in The Global Divergence of Democracies 260, 266 (Larry Diamond & Marc F. Plattner eds., 2001) (“A jurisprudence of executive supremacy regards the ‘state’ (personified in an omnipotent chief executive), not a supervening constitution as the source, juridically speaking, of all ‘rights’ and ‘freedoms’”).
exceptions.” The African constitution, then, became an instrument of presidential supremacy, not a limitation of it.

Kenyan legal scholar Okoth Ogendo has coined the apt phrase “constitutions without constitutionalism” to describe the apparent paradox, evident in the first three decades of African independence (1960-1990), of a commitment on the part of Africa’s postcolonial elites to “the idea of a constitution,” on the one hand, and, on the other hand, a “rejection of the classical notation of constitutionalism.” On their part, Africa scholars Robert Jackson and Carl Rosberg, concluding that presidential rule in Africa is restrained not by formal or institutional rules but by certain extraconstitutional and informal relations of exchange and mutual dependency between the ruler and his political ‘clients,’ advised students of African politics who wished to understand the “central characteristics and dynamics” of politics in Africa to “read Machiavelli or Hobbes than the ‘constitutions,’ official plans, or party programs of most African governments.” Jackson and Rosberg popularized the term “personal rule” to describe the highly personalized nature of presidential rule in Africa.

B. The Presidency in the Emerging African Democracy: Transition without Change?


34 Okoth-Ogendo, supra note 12 at 67.

35 Id.

36 Id.


38 Id. at 267.
The above portrait held true for nearly all of Africa for at least the first three decades following independence. Since the end of the 1980s, however, the political context of presidential rule in Africa has experienced significant, sometimes dramatic, change. Across Africa, noncompetitive one-party and one-man rule has suffered a loss of popular and intellectual legitimacy, a result of the unrelenting social, economic and political costs of three decades of authoritarianism. Popular reaction against the status quo expressed itself first and most dramatically in the west African state of Benin, whose long-serving dictator, Mathieu Kérékou, was forced by months of street protests and strikes to yield to demands for a “National Conference.” Once convened, the National Conference assumed sovereign powers. Wrestling power away from the president, it abolished the one-party regime, transferred the powers of government to an interim prime minister, and authorized the drafting of a new democratic constitution, which was later approved in a national referendum. Similar transitions from presidential autocracy to constitutional democracy, though not in nearly as dramatic or as quick a fashion as Benin’s, took place across Africa over the course of the 1990s.

As a result, single-party parliaments and presidents-for-life no longer dominate the political map of Africa. Competitive elections for legislative and presidential office, once a

40 Id. at ix.
42 See generally MICHAEL BRATTON & NICOLAS VAN DE WALLE, DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE (1997).
rarity in Africa, are now regular occurrences. Currently, over 95% of the presidential elections in Africa are contested—in the 1960s only in two of 26 presidential elections held in Africa did a sitting president face an opponent. More important, “African presidents today are more than twice as likely to lose power if they subject themselves to contested elections than they were before 1990, when the loss rate was just over 6 percent (just a single electoral defeat in 16 contested elections).”

The growing prospect of defeat through competitive elections is only one of the many new realities that Africa’s presidents must now face. Constitutional reforms accompanying the democratic transition in several African states have introduced important new changes to the political landscape and power map. Notably, traditional legislative and oversight functions have been restored to Africa’s now-representative and multi-party parliaments, while new constitutional courts, or pre-existing supreme courts, have been emboldened by constitutional guarantees of independence and judicial review authority. Africa’s political authorities also must now contend with critical reporting and commentary from a newly

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43 Posner & Young, supra note ___ at 130.

44 Id. at 131. See also HYDEN, supra note 139 at 20 (“[S]ince the early 1990s . . . being voted out of power is an increasing possibility. Eighteen heads of state have lost elections and been replaced by someone else.”)

45 Posner & Young, supra note 28 at 131 (“Since 1990, more than three dozen African countries have adopted new constitutions . . ..”).

46 See E. Gyimah Boadi, The Rebirth of African Liberalism, in DEMOCRATIZATION IN AFRICA 41 (Larry Diamond and Marc F. Plattner eds., 1999) (“The new liberal constitutions [in Africa] have substantially improved the legal and political status of parliaments by equipping them with greater powers.”)

assertive private media.48 A growing number of democracy- and governance-focused nongovernmental organizations are similarly revitalizing Africa’s civil society and opening new avenues for the mobilization and expression of civic activism.

Perhaps the most profound change in the political and constitutional context of presidential rule in contemporary Africa is the growing popularity of presidential term limits. In sharp contrast to the period before 1990 when Africa’s presidents had the luxury of determining their own longevity or tenure in office or simply risked forcible removal through a coup d’état, today, in a growing number of African states, constitutionally-enshrined term limits impose a definite end to presidential tenure. By the end of 2005, presidential term limit provisions were contained in thirty-three African constitutions.49 In the overwhelming majority of these, elected presidents must serve no more than two terms in office. Term limits have already ended the presidential tenure of fourteen incumbent presidents in Africa since 1990.50 In Malawi, Nigeria, and Zambia, attempts by term-limited presidents to obtain constitutional amendments to remove or extend their terms were defeated and the presidents subsequently retired as constitutionally scheduled.

48 See H. Kwasi Prempeh, Africa’s “constitutionalism revival”: False start or new dawn 5 INT’L J. CON.L. 469, 490-91 (2007); Gyimah-Boadi, supra note 46 at 35.
49 See Posner & Young, supra note 28 at 132 (Figure 3).
50 These are Mathieu Kereko of Benin, Antonio Monteiro of Cape Verde, Jerry Rawlings of Ghana, Daniel arap Moi of Kenya, Alpha Konare of Mali, Joaquim Chissano of Mozambique, Miguel Trovoada of Sao Tome and Principe, France-Albert Rene of Seychelles, Benjamin Mkapa of Tanzania, Frederick Chiluba of Zambia, Bakili Muluzi of Malawi, Sam Nujoma of Namibia, Olusegun Obasanjo of Nigeria, and Ahmad Tejan Kabbah of Sierra Leone.
The combination of term limits and regular elections has displaced the coup d’état as the primary mode of regime change and leadership succession in contemporary Africa. This new dynamic has created a novel political “class” in Africa: the class of elected presidents forced into retirement by constitutional term limits or electoral defeat. There are now over a dozen such former presidents in about as many African countries. The phenomenon of retired presidents living as “private citizens” in the societies they once ruled is such a political novelty in Africa that the question of what their appropriate role in public life must be has become a matter of some spirited debate among Africans.

The prospect of presidential term limits or electoral defeat is constraining presidential incumbency in yet another important respect. The loss of legal immunity that typically accompanies retirement from presidential office opens up the possibility of holding Africa’s retired presidents to account legally for abuses of power during their terms in office. Already, this has happened in Zambia, where former President Chiluba is facing prosecution on corruption charges relating to his term as president. In Ghana, too, several close associates of former president Jerry Rawlings, including the former first lady, are facing trial, and a few

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51 Posner & Young, supra note 28 at 129. See also Nicolas van de Walle, Africa’s Range of Regimes, 13 J. DEMOCRACY 66, 78 (2002) (describing presidential term limits as “a new political norm in the reg. p. 3 (top)

52 See generally LEGACIES OF POWER: LEADERSHIP CHANGE AND FORMER PRESIDENTS IN AFRICAN POLITICS (Roger Southall and Henning Melber eds., 2006) (examining the post-retirement lives of Africa’s current former presidents).

53 See Neo Simutanyi, The contested role of former presidents in Zambia, id. at 88.

have already been convicted,\(^{55}\) on charges stemming from various financial dealings and transactions they allegedly were involved in during Rawlings’ tenure as president. Former Malawian president Bakili Muluzi and some of his close associates have also been the target of official investigation for alleged corruption during his presidency.\(^{56}\)

In short, constitutional rules are beginning to matter in contemporary Africa in ways they did not during the first three decades after the end of the colonial era. Notably, even in those instances where presidents have managed to stay on past their original term limits, the term extensions were sought and obtained through hard-fought constitutional battles, rather than through unconstitutional means.\(^{57}\) Current trends clearly indicate that “[t]he notion of a de jure or de facto president-for-life is no longer a tenable proposition in Africa.”\(^{58}\) Even the African Union (AU), postcolonial Africa’s solidaristic interstate body notorious in the past (when it was called the Organization of African Unity) for being a club of dictators, has officially disavowed coups and adopted a policy condemning and rejecting “unconstitutional changes of governments.”\(^{59}\)


\(^{57}\) Posner & Young, supra note 28 at 134.

\(^{58}\) Prempeh, Africa’s constitutionalism revival, supra note 48 at 20.

\(^{59}\) AFRICAN UNION, CONSTITUTIVE ACT art. 4(p).
Yet, despite these precedent-setting changes to the African political and constitutional landscape, one important feature of the ancien régime survives. This is the tradition of presidential supremacy. Africa’s presidents may have been term-limited, but the evidence suggests that they have not quite been tamed yet. Presidential rule in post-authoritarian Africa has no doubt become less fragrantly abusive and arbitrary, and the climate for personal liberty and rival political activity has improved appreciably in Africa’s democratizing states. However, recent political and constitutional reforms notwithstanding, power in the African state continues to reside disproportionately in the hands of one person: the president. The

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60 See Aili Mari Tripp, *The Changing Face of Authoritarianism in Africa: The Case of Uganda*, 50/3 *AFRICA TODAY* 2 (“The old style personal dictatorships that ruled Africa with impunity are virtually nonexistent today. [African] authoritarianism has ‘softened’.”)


62 Jotham C. Momba, *Evolution of Parliament-Executive Relations in Zambia*, in *AFRICAN PARLIAMENTS: BETWEEN GOVERNANCE AND GOVERNMENT* 114 (M.A. Mohammed Salih, ed. 2005) (“The extensive powers that the president has been enjoying since 1964 have remained essentially unchanged despite the general sentiments against such powers that came out during the three previous constitutional review commissions”); Nicolas van de Walle, *Presidentialism and clientelism in Africa’s emerging party systems*, 41 J. MOD. AFR. STUDS. 297, 310 (2003) (“Regardless of their constitutional arrangements, it is also a fact that power is intensely personalized around the figure of the president.”); Siri Gloppen, *The Accountability Function of the Courts in Tanzania and Zambia*, in *DEMOCRATIZATION AND THE JUDICIARY* 119 (Siri Gloppen, Robert Gargarella & Elin Skaar, eds., 2004) (“multiparty elections and constitutional changes have failed to diminish the dominance of the executive president.”); McHugh, *supra* note 20 at 140 (2002) (“the dominant role of the Nigerian President remains pervasive, even during periods of effective democratic sovereignty and civilian control of the government.”); Eboe Hutchful, *Reconstructing Political Space: Militarism and Constitutionalism in Africa*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 225 (Douglas Greenberg et al. eds., 1993).
restoration and re-empowerment of parliaments and courts in Africa have not altered the presidentialist orientation of African governments or diminished presidential supremacy within the political sphere. Government and power in contemporary Africa are still very much matters to be understood from the vantage point of the presidency. As before, nothing good that needs done, and nothing bad that needs undone, in the African state seems likely to proceed without the personal initiative or intervention of the president. The pace and direction of progress or reform, on nearly every important issue, appears to depend on the level of a president’s personal interest and commitment. Presidents in contemporary Africa still make and announce major policy decisions and policy changes without recourse to parliament. The “presidential directive” remains a common mode of governing, and presidents continue to exert discretionary control over public funds.63 As one Nigerian commentator has observed, describing the current state of constitutional politics in Nigeria, the contemporary president still “wears a dictatorial toga.”64 Similar complaints about persistent presidential supremacy can be heard across post-transition Africa,65 and there are growing calls for another round of

63 See, e.g., ERDMANN & SIMUTANYI, supra note 2 at 17.


constitutional revision to reduce presidential power. In November 2005, Kenyan voters rejected a draft constitution said to vest excessive power in the presidency.\textsuperscript{66}

The persistence of the hegemonic presidency in post-authoritarian Africa is puzzling, but not merely because of all the democratic and constitutional changes that have taken place in several African states since 1990. What makes it even more puzzling is the fact that Africa’s postcolonial experience with this mode of rule has been an unmitigated disaster. Over the course of three decades, personal presidential rule in Africa became, in effect, “a substitute for institutionalization”\textsuperscript{67}—a substitute for building, that is, the capacities, competencies and legitimacy of state institutions, especially in the areas of policy formulation and implementation. As practically every public decision of some import became a matter for the president’s “In Box,” other state institutions, notably parliament, the civil service, and local government, were marginalized and atrophied over time. Even the president’s own ministers who headed cabinet departments were relegated to, or else learned to assume, “an executant’s role,”\textsuperscript{68} routinely referring for the president’s (or his staff’s) pre-clearance matters otherwise delegated for their official decision. “The ‘Office of the president’ became a parallel government, with considerably more executive power and resources than the line ministries.”\textsuperscript{69} One commentator, writing about Nkrumah’s Ghana, called the office of the

\begin{itemize}
  \item \textsuperscript{66} BBC News, \textit{Kenyans reject new constitution}, Nov. 22, 2005, available at \url{http://news.bbc.co.uk/2/hi/africa/4455538.stm}
  \item \textsuperscript{67} NAOMI CHAZAN, ET AL., \textit{POLITICS AND SOCIETY IN CONTEMPORARY AFRICA} 163 (2d ed. 1992).
  \item \textsuperscript{68} Van de Walle, \textit{Presidentialism, supra} note 62 at 310.
  \item \textsuperscript{69} \textit{Id.}
\end{itemize}
president “the fourth branch”\textsuperscript{70} of government—as indeed it was. In Kenya, the office of the president alone reportedly had on its payroll at one time over 43,000 staffers, representing one out of every six civil servants in the country.\textsuperscript{71} As no country can be run effectively from the president’s office, in time presidential imperialism in Africa resulted in the peculiar paradox of nominally “strong presidents” presiding over “weak states”—states that routinely lacked the requisite institutional capacities and resources to fulfill their basic social mission.

Presidential imperialism in Africa also famously brought with it a peculiar form of rule—to which the term \textit{neo-patrimonialism}, of Weberian origin,\textsuperscript{72} was applied\textsuperscript{73}—in which presidential discretion and access to the president became more important than formal rules. The distribution of resources and patronage followed such access, fueling corruption, nepotism, and waste. With the president practically, and oftentimes legally, above the law, executive fiat and arbitrariness became a regular modality of rule in Africa, with damaging consequences for the rule of law.

These and many other costs and abuses associated with presidential imperialism, not to mention gross abuses of human rights, supplied one of the main grievances of the

\textsuperscript{70} Henry Bretton, \textit{The Rise and Fall of Kwame Nkrumah: A Study in Personal Rule in Africa} 97 (1966).

\textsuperscript{71} Van de Walle, \textit{Presidentialism, supra} note \_ at 310 (citing the World Bank as source). The presidency in Congo/Zaire also reportedly controlled between 15% and 20% of the national recurrent budget and 30% of capital expenditures. \textit{Id}.

\textsuperscript{72} See generally Max Weber, \textit{Economy and Society} (1968).

\textsuperscript{73} See generally Bratton & Van de Walle, \textit{supra} note 42 at 61-96 (describing neopatrimonial rule in Africa).
protest movement that propelled recent reforms in Africa. Consequently, “the weakening of the executive branch of government was an objective of the prodemocracy forces in every new constitution promulgated in the 1990s.” Why, then, has presidential dominance survived in contemporary Africa?

To answer the question why imperial presidency persists in Africa, it would help, first, to understand why and how it came to exist as a defining feature of postcolonial African government in the first place. But in order to justify further examination of this phenomenon, it is important, first, to confront the common tendency to avoid critical analysis of Africa’s imperial presidency by treating it as simply “African culture” at work.

II. The African “Culture” Excuse

A. The Trouble with African Exceptionalism

The study and analysis of social and political phenomena in Africa has long been dominated by theories of African exceptionalism. Following this perspective, “African tradition and culture” has become a favorite autoexplanation—and, in many instances, the monoexplanation—for all manner of socio-political dysfunction in postcolonial Africa. It is commonplace, for example, for analysts of political corruption in Africa to lay blame for the scale and persistence of the problem on a so-called African tradition of “gift-giving” and reciprocity. Even postcolonial Africa’s tragic civil wars, those deadly

74 Id. at 246.

75 See, e.g., Robert T. Tignor, Colonial Chiefs in Chiefless Societies, 9 J. MOD. AFR. STUDS. 335, 351 (1971) (tracing the root of political corruption in Africa to “traditional gift-giving, a form of reciprocity between the powerful and the supplicants.”)
consequences and manifestation of elite greed and misgovernance, are routinely blamed on such “cultural” explanations as African “tribalism,” as if the reality of primordial or socialized identities (e.g., race, ethnicity, “tribe”) or the opportunistic mobilization and manipulation of such identities for political ends is a peculiarly or originally African phenomenon.

The “African culture” thesis was in fact pressed in service by some of Africa’s postcolonial elites to justify or explain their authoritarian ideological and constitutional choices in the immediate period after colonialism. Tanzanian President Julius Nyerere, among others, strongly defended socialism as deeply-rooted in the communalistic and egalitarian ethos of traditional Africa.\textsuperscript{76} The move toward a one-party state in postcolonial Africa was similarly defended by its practitioners as reflecting the “consensus” tradition in indigenous political systems.\textsuperscript{77} Equally, leading architects of imperial presidency in postcolonial Africa sought cultural legitimacy for their power grab by presenting the postcolonial African president as simply a modern reincarnation of the

\textsuperscript{76} JULIUS NYERERE, UJAMAA—ESSAYS ON SOCIALISM 12 (1968) (“We in Africa have no more need of being ‘converted’ to socialism than we have being ‘taught’ democracy. Both are rooted in our past—in the traditional society that produced us.”). \textit{See also} TOM MBOYA, THE CHALLENGE OF NATIONHOOD 83-84 (1970) (defending “African socialism” by contrasting African traditions and conceptions of ownership and property rights with Europe’s).

\textsuperscript{77} \textit{See}, \textit{e.g.}, JULIUS NYERERE, FREEDOM AND UNITY 196-97 (1966). \textit{See also} Convention People’s Party (CPP), \textit{Program for Work and Happiness}, reprinted as Appendix B in DAVID E. APTER, GHANA IN TRANSITION 394, para. 11 (1963) (“a multi-party system is alien to the traditional conception of government in African Society.”)
traditional African “chief.” On this view, the African presidential monarch is merely the indigenous African chief *writ large.*

The “African culture” thesis, however, cannot do all of the justificatory or explanatory work that its proponents would have it do. In particular, it fails, upon close scrutiny, to supply the necessary support for the phenomenon of presidential imperialism in postcolonial Africa. The reasons are manifold.

*First, there is the problem of definition.* What exactly does “African culture” mean as an explanation for presidential imperialism? The problem here is, first of all, one of determining what the appropriate level or unit of analysis is. Two possibilities suggest themselves, neither of which is helpful to the African culture thesis. The first is to define African culture at the “continental” level, which would encompass all of Africa or, as is usually intended, sub-Saharan (or “Black”) Africa. The immediate difficulty with a “continent-wide” notion of African culture is its empirical implausibility. Africa simply has too many states\(^{78}\) and, by extension, too many diverse cultures and cultural groups—with wide variation in indigenous political structure and organization—for talk of a monolithic African culture to make analytic or empirical sense in this instance. Indeed, not all indigenous African political systems were hierarchically structured with a chief or king at the head. Many groups, such as the Ibo (Nigeria) and the Kikuyi (Kenya), were “chiefless” (or “stateless”) societies in precolonial times.\(^{79}\) Moreover,

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\(^{78}\) There are 48 states in sub-Saharan Africa.

\(^{79}\) See Tignor, *supra* note 75 at 340 (1971). See generally *African Political Systems* (M. Fortes and E.E. Evans-Pritchard eds., 1940) (describing the political systems of eight societies widely distributed over the African continent and distinguishing them into those with “centralized authority, administrative
there is no uniform pattern to the structure or nature of political organization even in those traditional African states or communities that were governed by some form of centralized authority. While, for example, the monarchies of Benin (Nigeria), Dahomey (Benin), Rwanda, and Buganda (Uganda) were famously authoritarian, even despotic, other precolonial monarchies, such as the kingdoms of the Yoruba (Nigeria), the Mossi (Burkina Faso), the Mandinka (Mali), and the various Akan kingdoms of present-day Ghana, offer important counterexamples of indigenous African political systems where monarchical rule, despite appearances to the contrary, was contained harmoniously within a tradition and structure of checks and balances.

The difficulty is not resolved by shifting the unit of analysis from the continental to the national. While precolonial indigenous societies—the relevant sites of distinctive cultural practice in Africa—were each ethnically and culturally homogenous, their postcolonial counterpart (the contemporary African state) is notoriously diverse and pluralistic, thus making assertions of a single indigenous “national culture” or of a cultural consensus over a unitary national form of rule highly contestable. In short, even machinery, and judicial institutions—in short, a government” and those societies with lack such “government”).

80 See AFRICAN KINGSHIPS IN PERSPECTIVE: POLITICAL CHANGE AND MODERNIZATION IN MONARCHICAL SETTINGS (René Lemarchand ed., 1977) (particularly the Introduction and the chapters on Rwanda and Burundi by René Lemarchand). See also David Apter, The Role of Traditionalism in the Political Modernization of Ghana and Uganda, 13 WORLD POLITICS 45, 51 (1960).

at the level of the single African state, it is hazardous to generalize about a unitary African culture in matters of indigenous rule.

The second problem with the African culture explanation of the imperial presidency in postcolonial Africa is that it treats the postcolonial state in Africa and its traditions as the immediate or linear descendants of Africa’s indigenous precolonial institutions. This, of course, papers over the critical colonial period and its impact. While the colonial state only superseded but did not entirely displace the complex social, cultural and political institutions of indigenous Africa, it is the colonial state and its legacy, not indigenous institutions or praxis, that formed the basis, and determined the political trajectory, of the modern African state. If, then, certain dominant political tendencies and forms, such as the one-party state and the imperial presidency, have emerged “universally” in postcolonial Africa, the source of this commonality must be sought not in a common indigenous political tradition (which does not exist) but in African states’ shared history of contemporaneous colonization and decolonization as well as the common postcolonial challenge of dealing with similar colonial legacies and conditions at roughly the same time.

Third, not only is the African culture thesis analytically unhelpful for the reasons stated earlier, it is also disabling from a prescriptive or policy standpoint. Its underlying determinism reinforces the notion of African exceptionalism that sustains the routine

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82 See, e.g., S.N. Eisenstadt, Reflections on a Theory of Modernization, in NATIONS BY DESIGN: INSTITUTION BUILDING IN AFRICA 69-70 (Arnold Rivkin ed., 1968) (“[Africa’s traditional institutions] are in no meaningful sense the antecedents of most governments and basic legal orders of postcolonial Africa. Most of the independent national governments of sub-Saharan Africa are the progeny of colonialism, not the successors of traditional groups and their governmental arrangements.”).
marginalization of Africa in comparative discourses. As well, it furthers the quick invocation of the “hand of destiny” to explain a host of contemporary problems and phenomena in Africa for which rational or universal modes of explanation and prescriptions generally exist.

Indeed, contrary to the suggestion implicit in the African culture thesis, there is nothing uniquely African about the phenomenon of presidential imperialism or presidential supremacy. The modern trend toward executive hegemony within a system of constitutional government is indeed universal. In the United States where the term originated, presidential imperialism has received a boost recently in the wake of the September 11, 2001 terrorist attacks and resulting “war on terror” declared by President George W. Bush. The phenomenon has been observed even in “parliamentary” Britain, where recent prime ministers, notably Margaret Thatcher and Tony Blair, have been noted for “presidentializing” a traditionally cabinet government. Viewed comparatively, then, the presence of powerful presidents in Africa is, in and of itself, an unexceptional fact.

Of course, merely because a phenomenon is experienced universally does not mean that its specific character and emergence in a particular time and space must share a common explanation with manifestations of the phenomenon elsewhere. America’s modern imperial presidency, for example, is largely an outgrowth of the nation’s foreign

83 CARNES, supra note 15.


policy and military adventures.\textsuperscript{86} Thus, as the United States has become more interventionist and imperial globally so has the American presidency become more imperial in the domestic constitutional orbit. Africa’s imperial presidency, on the other hand, is primarily endogenous in its underlying causes,\textsuperscript{87} the African state having practically no capacity to project its power beyond its own borders. In fact, one of the ironies of presidential imperialism in Africa is that it exists and persists even in the face of the fact that African states are typically “weak states,” both in the international geopolitical sense and in terms of their own internal capacity to govern their territories effectively.\textsuperscript{88} Still, the differences in degree or kind between Africa’s imperial presidency and other comparative cases do not compel a peculiar African “culture” explanation for the African experience of this form of rule.

In the end, the African culture explanation for Africa’s postcolonial tradition of imperial presidency boils down to a rather limited claim about the nature of traditional African kingship or chiefly rule. But even in this limited sense, as the discussion in the next section will show, the thesis remains unpersuasive.

\textsuperscript{86} SCHLESINGER, IMPERIAL PRESIDENCY, \textit{supra} note 11 at 375.

\textsuperscript{87} \textit{See discussion infra} part III.

\textsuperscript{88} \textit{See, e.g.}, Claude Ake, \textit{Rethinking African Democracy}, in \textsc{The Global Resurgence of Democracy} 69 (Larry Diamond and Marc F. Plattner, eds., 2d ed. 1996) (“The coercive monolithism of most African political systems readily gives the impression of strong states with immense penetrative capacity, states which are everywhere doing everything. Yet African states are actually very weak. In Nigeria, for instance, the state has little influence on the lives of the rural people. Much of the development that has taken place in rural communities has occurred not because of the state but in spite of it.”)
B. Examining the African Monarchical Tradition

In the early years after independence Africa’s imperial presidents tried mightily to establish autochthony for their rule by adopting the style of traditional kingship. President Nkrumah of Ghana presents the classic case of this systematic effort to establish an organic connection between traditional African kingship and the postcolonial presidency. Nkrumah adopted customary protocol, titles and symbols of traditional Ghanaian kingship as an integral part of his presidential repertoire. Notably, he appropriated as his official title the traditional Akan royal honorific, Osagyefo, roughly translated as “warrior-savior” or “victorious in war.” His many other oft-used traditional praise names included Oyeadiyeye (“He who restores the damaged”), Kasapreko (“He whose word is final”) and Kantamanto (“He who keeps his oath”). Customary protocol reserved for traditional kingship ceremonies and occasions, notably the offering of ritual sacrifice and libation, were performed for Nkrumah on his visits across the country, at political rallies, and upon his arrival back in Ghana from foreign travels. Nkrumah’s formal opening of the annual session of Parliament was similarly

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89 Immediately upon assuming office as prime minister of an independent Ghana, Nkrumah and his CPP launched “Operation Psychology,” which involved the deployment of “visual aids” and other propaganda designed to build Nkrumah into the symbol of a new Ghanaian nationhood. The pages of the party newspaper, the Evening News, were especially dedicated to this enterprise. See Barbara S. Monfils, A Multifaceted Image: Kwame Nkrumah’s Extrinsic Rhetorical Strategies, 7 J. BLACK STUDS. 313 (1977). See also Graphic Communications Group, Jubilee Ghana: A 50-Year News Journey Thro’ Graphic, 1956-2006 14-17 (2006) (compilation of actual newspaper reports carried in the state-owned Daily Graphic newspaper).

90 See Monfils, id. at 315-17.
attended by royal pomp and ceremony.\textsuperscript{91} His arrival was heralded by the beating of the royal *fontomforom* drum, and he was met at the forecourt of Parliament by a retinue of *akyeame* (or linguists) representing different ethno-linguistic groups in Ghana.\textsuperscript{92} Libation and special customary prayers were offered for Nkrumah before his formal entry into the chamber of Parliament, and his entry was announced by the sound of *mmenson* (the traditional “seven horns” of Akan royalty).\textsuperscript{93} For this and other formal ceremonies, Nkrumah usually wore the traditional *kente* cloth of Akan kingship.\textsuperscript{94} All of these performances were part of an elaborate “cult of personality” built around Nkrumah,\textsuperscript{95} and were designed, in part, to secure cultural legitimacy or autochthony for Nkrumah’s imperial presidency.

In *substance*, however, Africa’s imperial presidency fails to find uniform or firm support in the traditions and practices of African kingship. In articulating a cultural case for presidential supremacy, Africa’s leading proponents offered little specific cultural evidence beyond the simple assertion that “the conception of a Head of State who had virtually no power, and a Prime Minister who did have power was alien to our traditions.”\textsuperscript{96} This, of


\textsuperscript{92} See id.

\textsuperscript{93} Id.

\textsuperscript{94} See Monfils, *supra* note 89 at 315. For populist events like political rallies, Nkrumah usually wore the *batakali*, the smock commonly worn by men in the economically-poorer northern regions of Ghana, which the CPP had adopted as its official dress. See *id.* at 314.

\textsuperscript{95} See Bretton, *supra* note 70 at 87-89.

\textsuperscript{96} Julius Nyerere, *Freedom and Development/Uhuru na Maendeleo* 271 (1973). See also Kwame Nkrumah, *Africa Must Unite* 82 (1964) (“In our present environment and circumstances our people
course, is a statement about the Westminster-style bifurcated executive, which was the form of executive government reflected in the independence constitutions of most African states. The cultural claim here is simply that the idea of a “titular” head of state is foreign to indigenous African conceptions of political authority and, conversely, that the unitary or “executive” presidency—the merger of all of the executive power of the state in a single office—best accords with African traditional government. Indeed, the idea of an executive presidency has parallels in the traditional kingship rule of several of Africa’s indigenous political systems, but a unitary presidency, by itself, falls short of describing an imperial presidency. The essence of presidential imperialism is not merely a president who holds or exercises all of the executive power of the state. Imperial presidency connotes a presidency with extraordinary powers and inherent prerogatives that are not subject to meaningful checks or balances. Such was not the nature of traditional African kingship.

The idea that the African presidential monarch is simply the traditional African chief in modern secular garb is based on a stereotype that has long been refuted authoritatively by anthropologists and other social scientists who have studied traditional African kingship.97 Because claims of autochthony made on behalf of postcolonial Africa’s imperial presidency have often leaned on the “traditional African chief” as the primary cultural precedent, it is important to explore this particular claim further, using two influential examples.

We begin with the Yoruba, one of largest and most important groups in Africa’s most populous state, Nigeria. The Yoruba in precolonial times were organized into many separate states. Each Yoruba state was a sovereign entity with its own oba or king at its head. Yoruba kingmakers approached the selection of an oba with an eye toward forestalling or minimizing autocratic rule. “[A] guiding principle was to select a ruler who would respect and conform to the constitutional conventions of the kingdom.” The kingmakers thus avoided selecting as oba a person who exhibited an autocratic inclination or even one who merely possessed physical characteristics that were believed to suggest such a tendency. In one recorded instance, “a prince was rejected because he was so tall that he would have looked down on his subjects.”

The oba was considered a sacred or divine king and accorded appropriate reverence and authority by his people. However “[t]his sacred aspect of Yoruba kingship did not lead to the oba’s becoming an autocrat but rather the reverse. Not only was he bound by rules and precedents in his personal life but these also required him to submit all business to councils of chiefs and officers, and only after consultation and deliberation by these bodies could a policy be decided and proclaimed in the oba’s name.” The composition of the oba’s council infused Yoruba monarchy with an important element of participatory legitimacy. The chiefs who sat on the council, and thus with whom the oba was required to exercise his legislative

99 Id. at 87-90.
100 Id. at 92
101 Id.
102 Id.
103 Id. at 91
and judicial functions, were themselves hereditary representatives of each of the various lineage groups or “extended families which made up the population of the town.”

In the kingdom of Oyo, the most centralized and most powerful of the Yoruba kingdoms, the king’s council, called the Oyo Mesi, was headed by the bashorun. As chief military commander, chief kingmaker and the king’s “first minister,” the bashorun exerted an exceptional amount of influence within the governmental system and was occasionally known to have been more powerful than the oba himself. Furthermore, the important war-making power in Oyo kingdom was constitutionally divided between the oba and the war chiefs: command and control of the military was in the hands of the war chiefs, but only the oba could authorize a military campaign. In modern constitutional parlance, executive power in Oyo would be said to be bifurcated between the oba (as president and head of state) and the bashorun (as prime minister). This feature of Oyo constitutional order refutes a claim, popularized by African presidents like Nkrumah and Nyerere, that a bifurcation or sharing of executive power is alien to Africa’s indigenous political traditions. The Yoruba political

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104 Id. at 92. See also DAVIDSON, supra note 81 at 87.

105 Id. at 92 and 99.

106 Id. at 93.

107 Id. at 92.

108 See Victor T. Le Vine, African Patrimonial Regimes in Comparative Perspective, 18 J. MOD. AFR. STUDS. 657, 657-58 (1980) (“In traditional Africa, social and political authority, which often focused and particularized, is seldom exercised exclusively by a single person, tending to be vested in such collectives as lineages and/or age-grade societies, or shared with such collateral roles or offices as queen-mothers, senior aunts or uncles, kingmakers, priests, councils of title-holders, masters of ritual, and the like.”)
system ensured a “delicate balance of power,” one in which, to paraphrase Madison, “ambition” was checked by “ambition.”

The Akans of Ghana, one branch of which (the Nzimas) Nkrumah belonged to by custom, also shared a system of rule much like the Yorubas. First, despite occupying a sacral role within the traditional political system, indigenous Akan kings and chiefs were not “above the law,” as postcolonial Africa’s presidential monarchs were. In Ashanti, which was organized along federal lines, the Golden Stool, not the king himself (called the asantehene), symbolized “the highest level of political authority in the land.” In Kelsenian terms, the Golden Stool was the grudnorm in Ashanti; its symbolic counterpart in the American political system would be the U.S. Constitution. All allegiance in the kingdom,

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109 Id. See also DAVIDSON, supra note 81 at 314.
110 THE FEDERALIST NO. 51, at ____ (James Madison).
111 See Apter, supra note 80 at 52 (“[T]he core political unit [in Asante] was the village. The largest unit was the division [or oman], over which there was a paramount chief [or omanhene]. Kumasi, which established a compact with the other divisions in a historical episode veiled in mystery and magic, became the center of a Confederacy. An elaborate balance of checks and controls on authority extended from the village level to the division, including restrictions on the exercise of power by the Asantehene, or king of the Ashanti Confederacy.”). See also BUSIA, supra note 97 at 24 (describing the “delicate balance between central authority and regional autonomy” on which the Asante political structure was predicated.)
112 See DAVIDSON, supra note 81 (recounting briefly the story of Asante’s Golden Stool, the mythical embodiment of Asante nationhood and sovereignty). See also IVOR WILKS, ONE NATION, MANY HISTORIES: GHANA PAST AND PRESENT 28-32 (1996).
113 WILKS, id. at 30.
114 Austrian philosopher Hans Kelsen used the concept of grudnorm to denote the fundamental norm upon which a legal system is based. HANS KELSEN, GENERAL THEORY OF NORMS 252-64 (Michael Hartney trans., 1991).
though nominally rendered to the *asantehene* as occupant of the Golden Stool, was actually owed and sworn to the Golden Stool.\(^\text{115}\) Thus the *asantehene* himself was liable to be deposed for infidelity to the Golden Stool, as happened to four *asantehenes* in the precolonial history of the kingdom.\(^\text{116}\)

Nominally an Akan king combined in his one office multiple roles; he was at once “a judge, a commander-in-chief, a legislator, and the executive and administrative head of his community.”\(^\text{117}\) But this “was not many offices.”\(^\text{118}\) Instead, it was a “single composite office,”\(^\text{119}\) whose diverse components were lodged in different independent constitutional offices and entrusted to different functionaries. As with the Yoruba, the holders of certain of these offices constituted the king’s council.\(^\text{120}\) An Akan king “was bound, by custom, to act only with the concurrence and on the advice of his Council.”\(^\text{121}\)

In effect, while the Akan king might be said to *reign* alone, he was constitutionally enjoined to *rule* only with the advice and consent of his council. Willful disregard of this injunction, which was publicly recited to the king on the occasion of his “enstoolment” (coronation), constituted one of the principal grounds for “destoolment” (equivalent to impeachment and removal).\(^\text{122}\) Thus, while postcolonial Africa’s imperial presidents accorded

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\(^\text{115}\) Wilks, *supra* note 112 at 29.

\(^\text{116}\) Id.


\(^\text{118}\) Id.

\(^\text{119}\) Id.

\(^\text{120}\) Id.

\(^\text{121}\) Id.

\(^\text{122}\) See Rattray, *supra* note 97 at 81-82.
to themselves indefinite or lifetime tenure without the possibility of constitutional removal, chiefs and kings in traditional Africa typically held office “during good behavior;” it was not for them to determine the terms or duration of their rule.

R.S. Rattray, a leading authority on the constitutional system and law of Ashanti, concludes, in the light of the customary limitations on the actions of the Akan chief, that “the West African chief “succeeded to obligations rather than to rights.” The late Nigerian social scientist Claude Ake agrees, adding that “[s]tandards of accountability were even stricter than in Western societies. Chiefs were answerable not only for their own actions but for natural catastrophes such as famine, epidemics, floods and drought.”

In contrast to postcolonial Africa’s imperial presidents, who routinely outlawed criticism of their rule and jailed their opponents without trial, African chiefs were not free from criticism or censure by their subjects. African chiefly councils were forums for open deliberation, where “all different points of view” were granted a hearing. Outside the halls of the chief’s court, criticism of the chief was subject to customary “time, place, and manner” restrictions; but the principle—that the people could criticize their ruler—was not denied. Thus, among the Akan, for example, “there were traditional ceremonies at which the people, particularly the women, could lampoon in song and dance against their rulers with impunity.”

123 R.S. Rattray, Present Tendencies of African Colonial Government, 33 J. ROYAL AFR. SOC’Y. 23, 30 (1934)

124 Ake, supra note 88 at 65.

125 BUSIA, supra note 117 at 28.

126 Id. at 142-43.
Autocrats and tendencies toward tyrannical rule were, of course, not unknown to traditional African society. Certain rulers did, in fact, become tyrannical or corrupt. But where such departures from constitutional and customary precepts occurred, they were understood as such: as “a violation of the system.” And, in due course, popular disapproval and attempts to restore the constitutional order followed, the aim being “only to change the personnel of office and never to abolish it or substitute for it a new form of government.”

Africa’s indigenous political systems and traditions could not be called liberal or egalitarian by any contemporary measure; and no such claim is suggested here. The limited object of this discussion is to refute the claim that the monarchical tradition in indigenous Africa uniformly sanctioned or tolerated absolute power in the fashion of Africa’s modern imperial presidents. While Africa’s traditional monarchies differed widely in their systems of rule, enough influential examples existed of African monarchical rule constrained by constitutional rules and by checks and balances. Attempts by Africa’s postcolonial rulers to defend or justify presidential imperialism in the name of “African tradition” are therefore insupportable. In fact for Africa’s imperial presidents, “[t]raditional social institutions and practices had value only in political ritual.” In practice, Africa’s postcolonial elites were contemptuous of, and often hostile to, such institutions.

127 Id. at 26.

128 Id. See also Fortes & Evans-Pritchard, supra note 79 at 13.

129 Fortes & Evans Pritchard, id.

130 Bretton, supra note 70 at 11.

131 See Richard Rathbone, Nkrumah and the Chiefs 7 (2000) (“African nationalists, like nationalists everywhere, used the clustered histories of their putative nations romantically and instrumentally. They did so partly to establish their own legitimacy . . . . But nowhere in Africa, however, were nationalists in
How, then, did the phenomenon of imperial presidency emerge in postcolonial Africa? The answer must be sought at the moment of the founding of Africa’s modern states.

III. The Making of the Imperial Presidency in Postcolonial Africa

The search for the African agency behind the implantation of the tradition of imperial presidency in postcolonial Africa must begin with Africa’s first generation of national leaders. Heroes of the popular independence movements that emerged victorious in the national struggles to end colonialism, postcolonial Africa’s historic “founding fathers”—Osagyefo Kwame Nkrumah of Ghana; Mwalimu Julius Nyerere of Tanzania; Modibo Keita of Mali; le Grand Silly Sékou Touré of Guinea; Houpêet-Biogny of la Côte d’Ivoire; Mzee Jomo Kenyatta of Kenya; Ngwazi Kamuzu Banda of Malawi; Kenneth Kaunda of Zambia—were the architects of the imperial presidency in postcolonial Africa.132 Popular legend as well as the dominant nationalist historiography of the times—“the epic as political elites wanted it told”133—bestowed upon these new leaders a messianic stature for their role in wrestling business to rehabilitate the dynasties, institutions, offices and practices of the precolonial past . . . . Their mission was to destroy what they regarded as antique, feudalistic and unprogressive.”). See also Ali Mazrui, The American Constitution and the Liberal Option in Africa: Myth and Reality, in THE U.S. CONSTITUTION AND CONSTITUTIONALISM IN AFRICA 23 (Kenneth W. Thompson, ed. 1990) (“The actual deal we made in Africa with the 20th century did not take into account enough of the preceding heritage that we had accumulated. Initially there was almost cultural self-contempt so that inadequate allowances were made for the usages of the indigenous population or for what had been sanctioned by time.”)

132 See Victor T. Le Vine, The Rise and Fall of Constitutionalism in West Africa, 35 J. MOD. AFR. STUDS. 181, 203 (1997) (“It is a sad fact that it was the founding fathers in [Africa] who must bear the blame for a great deal of what went wrong with their countries.”)

sovereign statehood from the grips of imperial Europe. These were the George Washingtons of Africa’s new states. But the parallels end there. For while America’s popular Revolutionary War hero and first president also enjoyed father-of-the-nation adulation and reverence,\textsuperscript{134} Washington did not yield to the temptation to initiate a tradition of perpetual presidential reelection that could well have made him his new nation’s first elective monarch.\textsuperscript{135} In contrast to Washington’s self-abnegation, Africa’s founding fathers could not decouple their personal identities and life plans from the future of their new nations. Regarded both by themselves and by their followers as philosopher-kings,\textsuperscript{136} they deemed their personal Platonic Guardianship indispensable to the future progress and fortunes of their newly emancipated states. “The story of post-colonial rulership in Africa [is thus] at first largely a story of the historic nationalist leaders.”\textsuperscript{137}

\textsuperscript{134} \textit{See} Seymour Martin Lipset, \textit{The First New Nation: The United States in Historical and Comparative Perspective} (1967) (“We tend to forget today that, in his time, George Washington was idolized as much as many of the contemporary leaders of new states.”)

\textsuperscript{135} \textit{See} Akhil Reed Amar, \textit{America’s Constitution: A Biography} 146 (2005) (“Washington set a striking example for his successors when in 1796 he declined to stand for reelection at the end of his second term, even though he would have been a shoo-in.”) \textit{See generally} Seymour Martin Lipset, \textit{George Washington and the Founding of Democracy}, 9 J. Democracy 24 (1998).

\textsuperscript{136} \textit{See} Tom Mboya, \textit{The Challenge of Nationhood} 9 (1970) (describing the popular perception of the first leader of the independent African state as “the political philosopher of the new nation.”). \textit{See also} Goran Hyden, \textit{The Failure of Africa’s First Intellectuals}, 28 Transition 14, 17 (“Plato’s idea of the philosopher-king has hardly anywhere been more deliberately put into practice than in Africa. As the philosopher kings, the intellectuals in power have often been considered the ‘national conscience’.”)

A. Constructing Africa’s “Model” Imperial Presidency

Presidential supremacy is rarely created by a “big bang” or granted gratuitously by constitution makers. The Framers of the U.S. Constitution did not create America’s modern imperial presidency; “[t]he assumption of that power by the Presidency was gradual and usually under the demand or pretext of an emergency.”\(^\text{138}\) Similarly, the rise of presidential omnipotence in postcolonial Africa was not an instant or spontaneous creature of constitutional design. Constitutional design, when it was deployed, as indeed it was, served primarily to ratify what was on the way to becoming political reality. While they used constitutions instrumentally to serve their political and other regime purposes, postcolonial Africa’s first imperial presidents relied primarily on supra-constitutional sources for their legitimacy.

Among Africa’s founding generation, “the name of Kwame Nkrumah should feature prominently in any analysis of how the political dynamic in Africa after independence would evolve.”\(^\text{139}\) The first black African nationalist to become Prime Minister at the head of an all-African cabinet in colonial Africa, Nkrumah also blazed the trail in sub-Saharan Africa when, in March 1957, he led the Gold Coast to independence (as the new state of Ghana). On the occasion of Ghana’s independence he had announced that his new nation’s independence would be “meaningless unless it is linked with the total liberation of Africa.”\(^\text{140}\) His avowed commitment to that declaration as well as his persistent advocacy of a federated Union of African States\(^\text{141}\) made him a most beloved pan-Africanist. To his admirers and praise singers,

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\(^\text{138}\) SCHLESINGER, IMPERIAL PRESIDENCY, supra note 11 at ix.

\(^\text{139}\) GORAN HYDEN, AFRICAN POLITICS IN COMPARATIVE PERSPECTIVE 26 (2006).

\(^\text{140}\) THE EDITORS OF THE SPARK, SOME ESSENTIAL FEATURES OF NKRUMAISM 71-72 (1965)

\(^\text{141}\) See NKRUMAH, AFRICA MUST UNITE, supra note 96 at 216-222.
he was not just Kwame Nkrumah of Ghana; he was “Kwame Nkrumah of Africa,” a style of address he used himself. But while Nkrumah’s dream was supranational or continental in scope, his immediate concerns and focus upon inheriting the colonial state were local. He first had to consolidate and secure his “political kingdom” at home. In the process, Ghana became the site where postcolonial Africa’s first imperial presidency would be launched.

1. Building Nkrumah’s Political Kingdom.

Like the other African states that would come after it, Ghana entered sovereign statehood under a Westminster-style constitution, the form and substance of which reflected both the metropolitan (in this case, British) constitutional practice and a delicate political compromise brokered by the departing colonial authorities between the “unitarist” Nkrumah and his “federalist” rivals in the nationalist class. Ghana’s independence constitution established a Canadian-style constitutional monarchy, with the British monarch, represented locally by a governor-general, as the titular head of state, and a prime minister (as head of government) who exercised executive power with a cabinet drawn from the majority party in a single-chamber legislature. The governor-general’s assent was required before any bill could

142 See Bretton, supra note 70 at 36.
143 Id.
144 The term “political kingdom” comes from Nkrumah’s famous statement made during the anticolonial period: “Seek ye first the political kingdom and all things shall be added unto you.” It became the slogan of Nkrumah’s Convention People’s Party. See Nkrumah, supra note 131 at 50.
145 See William Burnett Harvey, Law and Social Change in Ghana 141 (1966)
146 See Rubin & Murray, supra note 91 at 8.
become law, but in performing this function, as in nearly all other duties required of him under the constitution, the governor-general was bound by the advice of the prime minister’s cabinet.

Although pre-independence demands for a federal form of government had failed to carry, the constitution provided for the establishment, by an Act of Parliament, of Regional Assemblies in the five territorial regions of Ghana as well as a House of Chiefs in each region. The constitution enumerated certain functions and powers, among them education, public health, town and country planning, and local police, that Parliament was required to place under the non-exclusive legislative jurisdiction of the Regional Assemblies. The Regional Assemblies and the Houses of Chiefs were also assigned an important role in the constitutional amendment process.

The constitution also contained substantive protections for freedom of conscience and religion, for private property, as well as safeguards against racial or ethnic discrimination. The Supreme Court of Ghana was vested with original jurisdiction in all cases challenging the validity of a law and also empowered to declare void any law that contravened the substantive limitations on the legislative power of Parliament.

Ghana’s independence constitution did not suit Nkrumah’s conception of how a newly independent African state must be governed. However, to have rejected the constitution beforehand would have delayed until an uncertain future the grant of Ghana’s independence. Thus, Nkrumah tactically accepted the terms of the constitution as a precondition for independence and deferred his preferred constitutional design until later. The construction of

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147 See HARVEY, supra note 145 at 141-42.
148 Id. at 221.
149 Id.
150 See THE SPARK, supra note 140 at 43-49.
Africa’s first imperial presidency, however, did not begin with constitutional reform. In fact, the move toward that end preceded the grant of independence. Roughly, the project of constructing the imperial presidency in Africa’s maiden state consisted of the following parts and steps: first, the assumption of personal supremacy over the governing party; second, centralization of the state; third, suppression—and later elimination—of political opposition; and finally, subordination of the legislature and judiciary to the presidency.

*Personal Control of the Party.* The first of these building blocs was laid during the late colonial period, within the nationalist party that assumed leadership of the anti-colonial struggle. Nkrumah had founded the Convention People’s Party (CPP) in 1940. To Nkrumah, the CPP was, from the beginning, “my party.”¹⁵¹ Nkrumah was, from the time of the founding of the party, its life chairman and leader.¹⁵² In that capacity, he chaired both the national executive committee and the more influential central committee of the party.¹⁵³ Later after independence, as the party consolidated its hold on national government, Nkrumah added to his life chairmanship the positions of general secretary of the party (after 1961) and executive secretary of the party (from 1965). In 1962, at the party’s annual national delegates conference, Nkrumah gained the power to change unilaterally the constitution of the party as well as membership of the central committee. This was a mere formality, for Nkrumah had always stood above the constitution and structures of the party.¹⁵⁴ Within the CPP, legitimacy

¹⁵¹ See NKRUMAH, AUTOBIOGRAPHY, supra note ___ at ___ (Chapter 9 titled “Birth of My Party”).


¹⁵³ Cohen, id. at 185.

¹⁵⁴ DENNIS AUSTIN, GHANA IN TRANSITION 207 (1963)
came solely from Nkrumah and from association with him. The CPP loyalty oath, administered to all party members, demanded allegiance to the party and its “Leader, Comrade Osagyefo Dr. Kwame Nkrumah.” The party’s ideology was “Nkrumaism,” an ideology the full content of which was to be “worked out by Nkrumah and expounded in his writings.” As later expounded by Nkrumah, notably in the 1960 constitution and subsequent amendments, Nkrumaism committed Ghana to a one-party state under the personal rule of Nkrumah. Nkrumah’s successful and unchallenged supremacy over the CPP easily enabled his ultimate assumption and consolidation of his supremacy over the government and state of Ghana.

Centralizing the State. The first step for Nkrumah, once independence had been achieved, was to dismantle the fetters that he believed the independence constitution had placed on his freedom of action. Nkrumah condemned the constitutional scheme for a sharing of certain powers and functions between the central government and regional assemblies as “political separatism,” “schisms” devised by the departing colonial power to impede “speedy development” and designed to ensure the “preservation of imperial interests in the newly emergent state.” Abolishing the regional assemblies would thus become Nkrumah’s topmost political priority immediately after independence.

In September 1958, as constitutionally required, legislation establishing the regional assemblies was passed, but the new law transferred no legislative or executive powers to the

155 Id.
156 Id. at 353 n.31.
157 CPP, Work and Happiness, supra note 77 at 395, para. 16.
158 Id.
159 THE SPARK, supra note 140 at 39.
regional assemblies. The regional assemblies were merely to offer advice to ministers and regional administrators appointed by the central government. An opposition party boycott of the ensuing regional assembly elections gave Nkrumah’s party total control of all five regional assemblies. Relying on his overwhelming majorities in both the regional assemblies and the national legislature, Nkrumah easily secured passage of a bill in December 1958 to repeal the amendment procedure in the constitution that required the approval of a super-majority of regional assemblies for certain proposed amendments. With the repeal of that portion of the constitution, any provision of the constitution could now be amended or repealed by a simple majority vote of parliament. In effect, the constitution had been reduced to an ordinary statute; parliamentary supremacy had replaced constitutional supremacy. In March 1959, the Nkrumah-controlled parliament approved a legislative amendment to the constitution abolishing the regional assemblies. All legislative and executive power, including the power to amend the constitution, was now completely centralized.

Suppressing Political and Chiefly Opposition. By a series of legislation, Nkrumah also nationalized the management of, and revenue receipts from, all lands under the control of Ghana’s influential chiefs, thus depriving the chiefly class of the economic basis of their customary power. Chiefly subordination to political control was furthered ensured by

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160 See HARVEY, supra note 145 at 147.
161 Id.
162 Id. at 148.
163 Id. at 149.
164 Id. at 149.
165 Id.
166 Id. at 115-120
legislation making the official “recognition” of the central government a precondition for the exercise of customary authority by a chief.\textsuperscript{167} A Preventive Detention Act was enacted in 1958, pursuant to which the executive (if it was satisfied that the national security so demanded) could order the arrest and detention without trial of any citizen for periods up to five years at a time.\textsuperscript{168} Detention under the act constituted grounds for disqualification from or forfeiture of membership of parliament.\textsuperscript{169} The preventive detention law, as well as other new revisions and additions to the criminal code targeting political dissent,\textsuperscript{170} were vigorously enforced against leading or suspected members of the opposition party, severely hampering opposition activity and driving some of their leaders into exile.

\textit{Constitutionalizing Presidential Supremacy.} The next step, once all putative rivals to the central authority—the constitution’s “vertical restraints”—had been neutralized, was to concentrate the centralized governmental power “horizontally” in the hands of a single person. “Despite the widening of his executive powers as Prime Minister since 1957, Nkrumah was still constitutionally \textit{primus inter pares} amongst his cabinet colleagues. He was still in theory at least subject to the possibility of upset or removal in the event of a domestic [internal party] crisis.”\textsuperscript{171} Nkrumah’s new constitution, enacted in 1960, “would insure against that contingency.”\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{167} \textit{See} RATHBONE, \textit{supra} note 131 at 130.
\item \textsuperscript{168} \textit{See} HARVEY, \textit{supra} note 145 at 283-84. The Act is reproduced as an appendix to Harvey’s book. \textit{See id.} at 446-448.
\item \textsuperscript{169} \textit{Id.} at 431.
\item \textsuperscript{170} \textit{Id.} at 312-321.
\item \textsuperscript{171} TREVOR JONES, GHANA’S FIRST REPUBLIC: THE PURSUIT OF THE POLITICAL KINGDOM 27 (1976).
\item \textsuperscript{172} \textit{Id.}
\end{itemize}
The “Republican Constitution” of 1960\textsuperscript{173} abolished Ghana’s constitutional monarchy, thus eliminating the Queen of England as titular head of state. Executive power, which had previously been nominally bifurcated between a titular head of state and a prime minister-led cabinet, was now vested exclusively in a unitary president. Ghana’s conversion to a unitary presidency was itself unexceptional, except that the new Ghana constitution also conferred broad, often \textit{sui generis}, powers on the President while correspondingly reducing the powers of the legislative assembly.

For example, the President could use his veto to reject a bill in its entirety or in part—a “line item” veto, in effect. A presidential veto was not subject to a legislative override.\textsuperscript{174} The President also had power to “prorogue” or terminate at any time a session of parliament.\textsuperscript{175} Parliament had power to approve (or reject) each head of the executive’s annual budget estimates, but it had no power to amend them as proposed by the President.\textsuperscript{176} The President could authorize moneys to be drawn from public funds outside the statutorily approved budget.\textsuperscript{177} The President was empowered to appoint from among members of parliament any number of ministers to constitute his government.\textsuperscript{178} No legislative approval was required for these appointments, and the legislature had no power to censure or remove a minister, only the president could do so.\textsuperscript{179} The President was also vested with unilateral appointment power.

\textsuperscript{173} The full text of the 1960 Constitution is reproduced as Appendix II in HARVEY, \textit{ supra} note \textsuperscript{__} at 390

\textsuperscript{174} GHANA (1960) CONST. art. 24(1).

\textsuperscript{175} \textit{Id.} at art. 22(2).

\textsuperscript{176} \textit{Id.} at art. 31(2).

\textsuperscript{177} \textit{Id.} at arts. 32 & 34.

\textsuperscript{178} \textit{Id.} at art. 15.

\textsuperscript{179} \textit{Id.}
over numerous other constitutional offices, including, notably, the appointment of the chief justice and other judges of the superior courts, the auditor general, the attorney general, and members of the civil service. The chief justice, and by subsequent amendment all judges of the supreme court or high court, held their offices at the pleasure of the president, as, of course, did the attorney general, whose position had been moved in 1959 from the civil service category to that of a political appointee.

Ghana’s 1960 constitution reserved certain “special powers” for the “First President,” and Nkrumah was specifically named in the constitution as the First President, having been deemed appointed to that office by an earlier referendum that approved a draft of the constitution. The tenure of the First President was co-terminus with Nkrumah’s, which was

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180 Id. at arts. 44(1) & 45(1).
181 Id. at art. 38(1).
182 Id. at art. 47(1).
183 Id. at art. 51(2).
184 Id. at art. 45(3).
185 Id. at art. 47(3).
186 BRETTON, supra note 70 at 48.
187 See GHANA CONST. art. 55 (1960).
188 Id. art. 10.
189 The draft of the Constitution submitted to the national referendum did not include the provision relating to the special powers of the First President, and the enacted constitution included other significant post-referendum changes and additions made by Nkrumah’s government. See RUBIN & MURRAY, supra note 91 at 15-31.
indefinite, as it “continue[d] until some other person assume[d] office as President.”\textsuperscript{190} The President was subject to re-election without limit—but only by parliament. The constitution made no provision for a vice or deputy president. By a later amendment, the president was empowered to appoint a three-member presidential commission to act in the event of his incapacity, resignation, or absence.\textsuperscript{191}

As First President, Nkrumah had power under the 1960 Constitution “whenever he considers it to be in the national interest to do so, [to] give directions by legislative instruments.”\textsuperscript{192} And such presidential “legislative instruments” could be used to alter any law (other than the Constitution itself). In effect, Nkrumah could legislate alone or alter unilaterally a pre-existing statute.

The constitution required the President, upon assuming office, to make a solemn declaration of his “adherence” to certain enumerated “fundamental principles,”\textsuperscript{193} among them, that “no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to the courts of law” and “no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.” Initial uncertainty as to the juridical character of this declaration was resolved in \textit{Re Akoto},\textsuperscript{194} a \textit{habeas corpus} case brought by certain opposition party politicians held in detention under the Preventive Detention Act. Denying relief for the petitioners, the Ghana Supreme Court held that the “fundamental principles” subscribed to by the President in the declaration did not

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\textsuperscript{190} \textit{GHANA (1960) CONST.} art. 55(5).
\textsuperscript{191} \textit{Id.} at 18(1).
\textsuperscript{192} \textit{Id.} at art. 55(2).
\textsuperscript{193} \textit{GHANA (1960) CONST.} art. 13.
\end{flushleft}
constitute a justiciable Bill of Rights.\textsuperscript{195} In the opinion of the Court, the solemn declaration of the Ghanaian president was “similar to the Coronation Oath of the Queen of England.”\textsuperscript{196} As such, it imposed, at best, only a “moral” but not a legal obligation on the President that could be enforced in the courts.\textsuperscript{197} In effect, the Republican Constitution of Ghana guaranteed the citizens of Ghana no rights whatsoever.

The ruling in \textit{Re Akoto} essentially confirmed that Ghana was now, both in law and in fact, firmly under the autocratic grip of an imperial president and that President Nkrumah was above the law. A later amendment to the constitution, outlawing all opposition parties and making the CPP the sole political party in Ghana, finally affirmed in law the party’s long-running boast that “The CPP is Ghana and Ghana is the CPP”—but it also fatally drove the opposition into illegality. With Nkrumah already firmly in control of the CPP, the conversion to a \textit{de jure} one-party state crowned Nkrumah as Ghana’s “presidential monarch.”\textsuperscript{198}

2. \textit{Exporting the “Nkrumah Model”}

Since pioneering African independence in 1957, Ghana has “served as a social laboratory for the continent as a whole.”\textsuperscript{199} This was especially so under Nkrumah. Not only was Nkrumah’s Ghana “in many respects the bellwether for the continent,”\textsuperscript{200} but, more

\begin{itemize}
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textsc{Apter, Ghana in Transition, supra} note 77 at 371.
\item \textsuperscript{199} \textsc{Paul Nugent, Big Men, Small Boys and Politics in Ghana} 10 (1995).
\end{itemize}
importantly, Nkrumah himself “came to set the tone, ideologically and organizationally, for much of the rest of Africa.”201 Besides being the first to lead his country to independence in sub-Saharan Africa, Nkrumah’s influence in this regard must have stemmed also from the fact that, among his peers in independent Africa, he had the first and exceptional experience of actually exercising executive power—as Leader of Government Business and then as Prime Minister—and running a national government for at six continuous years (1951-57) before Ghana became fully sovereign.

At any rate, as independence spread to the rest of Africa following Ghana’s lead, the post-independence constitutional and legislative moves implemented in Nkrumah’s Ghana, notably the rejection of arrangements for regional devolution of power and the recentralization of government, the installation of a de jure one-party state, and the subordination of party and state to the “personal rule” of a unitary president, would inspire imitations from one African state to the other. In the brief period from the end of 1960 to early 1962, thirteen African states enacted new constitutions or revised the constitutions they had inherited at independence.202 Others followed suit as they gained sovereign status. Common to these constitutional revisions was “a movement from traditional parliamentarianism to a new form of presidentialism,”203 characterized by “enhanced” or “reinforced” presidential power.204 Importantly, these emerging presidential regimes tended to follow the pattern set by Nkrumah.205 Particularly in those African states that shared with Ghana a common British

201 HYDEN, supra note 139 at 26.


203 Id.

204 Id.

205 NWABUEZE, supra note 20 at 114
colonial experience and heritage, such as Kenya, Uganda, Tanzania, Malawi, and Zambia, “almost every step in Ghana’s post-independence constitutional development [was] followed, in almost its precise sequence.”

Thus, for example, the nationalist governments of independent Kenya and Uganda both unilaterally discarded the regionalist or federalist features in their independence constitutions; Tanzania and Uganda moved quickly to abolish the customary law powers of traditional chiefs, with Zambia following suit in short order; and, in time, the idea of a president-dominated one-party state achieved such ubiquity across the continent that it came to be regarded as a distinctive African constitutional form. Importantly, too, the nationalist leaders in independent Africa all ensured their personal supremacy over their respective governing parties, almost as a necessary first step toward establishing presidential supremacy over the state.

B. Rational Explanations for the Rise of the Imperial Presidency in Africa

If, as I have previously argued, the African culture thesis fails to account for the tendencies and development outlined above, what “rational” explanation might be proffered for the continental move toward presidential imperialism in postcolonial Africa? In fact, there was no shortage of rational explanation or justification for the installation of presidentialist regimes in Africa in the period following the end of colonial rule. By far, the dominant explanation at the time focused on the pressures and demands

206 Id.

207 Id. at 146-59.

208 See NWABUEZE, supra note 20 at 161-71.
of national integration and socio-economic development—the two main challenges that confronted Africa’s new states and their governments at independence.

In the next section, we examine each of these “internal” rationales for the implantation of authoritarian presidential regimes in postcolonial Africa and, then, discuss briefly the “historical” and “external” factors that may have conditioned postcolonial agency in the direction of presidential autocracy.

1. The Internal Rationales
   a. The “National Integration” Rationale

   “National integration” was the rationale most commonly cited by Africa’s first postcolonial leaders to justify the move, during the early post-independence years, to centralize government and suppress partisan rivalry. The colonial project in Africa collected into arbitrarily drawn boundaries separate and diverse ethno-linguistic groups and communities, many of them with little or no pre-colonial history of mutual co-existence. Colonial policy naturally did not encourage the rise of national feeling among the colony’s diverse subject populations. While the struggle to end colonialism managed to arouse an appreciable degree of national consciousness particularly among the colony’s sparse urban populations, the rivalrous politics of late-colonial nationalism also exposed the persistence and resilience of pre-colonial loyalties and identities.

   To put it in some comparative perspective, the factionalism that arose within Africa’s nationalist class in the late colonial period roughly paralleled the fault lines that had separated America’s eighteenth century founding fathers into “federalists” (in favor of a strong national government) and “anti-federalists” (defending state/regional
autonomy). Invariably in Africa, the triumphant nationalist party—the party that inherited the colonial state—was the party of “strong national government.” It was thus the vision and conception of the “nation-state” held by this faction of the nationalist elite that would prevail in the postcolonial period.

Africa’s new states, however, began sovereign life with a critical deficit of legitimacy, as “the national and institutional bonds that linked people together on the eve of independence were tenuous at best.”209 “In Africa,” as Senegalese president Senghor observed, “the Fatherland is the Serer country, the Malinke country, the Sonhrai, the Mossi, the Baule, the Fon country. The Nation unites Fatherlands in other to transcend them. It is not, like the Fatherland, a natural phenomenon . . . In order to achieve its object, the Nation must inspire all its members, all its individuals to seek in it, beyond their Fatherlands, their faith.”210 The challenge was to shift loyalties from traditional kin-based conceptions of identity to the “new artificial entity, the nation-state.”211 For this project of nation building, Africa’s new states needed unifying “symbols,” and not just flags and national anthems or soccer teams but an embodied symbol to which the people would feel a high degree of common attachment and emotive draw. The answer came in the form of the “heroic leader.”212

Invariably this honor belonged, almost exclusively, to the “father of the nation”—the founder and leader of the nationalist movement through whose heroism and guidance independence had been won—such, as least, was how popular legend saw it. “The

209 CHAZAN ET AL., supra note 67 at 79.


211 Id. at 99

212 See APTER, GHANA IN TRANSITION, supra note 77 at 368; WALLERSTEIN, supra note 210 at 99.
momentum that brought them to power [was] still strong. Their record or sacrifice [was] still fresh in the minds of the people who continue[d] to have the same faith and confidence in them as they did when they called them to unite against colonial rule.”

Only they commanded that “aura of legitimacy” that made them “a readily available, easily understood, symbol of the new nation.”

As Nkrumah’s leading ideological mouthpiece, The Spark, explained, referring to the Ghanaian context: “The charismatic personality of President Nkrumah is one of the props on which the new nation of Ghana is built. It is not mere personality worship. It is the most practical way of providing the new ship of state with a stable keel. If a young nation cannot anchor itself down to a few basic concepts and rules of practice, there is an air of drifting which is most injurious to national evolution. And these principles must be crystallized in a person with whom, as a result of his personal efforts and sacrifices, the broad masses associate the yearnings for a better life.”

Similar projects of “national synonymity”—the idea that “the country is the man and the man is the country”—were implemented in the rest of independent Africa. Thus, in short order, “Kenya was Kenyatta. Kenyatta was Kenya; Houphouet-Biogny [stood] for Cote d’Ivoire, Zambia

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215 WALLERSTEIN, supra note 210 at 99. See also TOM MBOYA, FREEDOM AND AFTER 83 (1963).

216 Quoted in BRETON, supra note 70 at 12.


218 Id. at 168
[was] Kaunda, and Sekou Toure was, for better or worse, Guinea. Tanzania was Nyerere and Nyerere stood for Tanzania. Hastings Banda [was] Malawi and Malawi . . . symbolized Banda.”219 The ideology of national integration was thus marshaled to underwrite the project of personal rule.

The national integration rationale was similarly deployed to justify the two main structural underpinnings of presidential supremacy in Africa: the centralized unitary state and the one-party system. Africa’s postcolonial leaders expressed grave misgivings about demands for, or concessions made in certain independence constitutions in favor of, regionalism or federalism. Such demands were disparaged as tribalism-inspired and thus an invitation to separatism.220 What was needed was “unity behind [the] leadership.”221 And under the conception of unity and nationhood pressed by Africa’s postcolonial leaders—which was more along the lines of the European “nation-state” model222—not only did national interests and national identity, even if inchoate, supersede all local or subnational identities, only claims on the behalf of the national were deemed valid.223

The national integration rationale also proved hostile to multi-party politics—and for roughly the same reasons that it ruled out federalist or regionalist ideas. Multi-party competition, its African detractors argued, made sense only in the class-stratified

219 Id.

220 CPP, Work and Happiness, supra note 77 at 394.

221 NYERERE, FREEDOM AND DEVELOPMENT, supra note 96 at 54.

222 See K.A. BUSIA, AFRICA IN SEARCH OF DEMOCRACY 115 n. 5 (1967) (describing the European nation-state model preferred by Africa’s postcolonial leaders) (citation omitted).

223 Id. at 115-119.
societies of the industrialized West.\textsuperscript{224} As postcolonial Africa was still pre-industrial and thus presumably classless, rival political parties, the argument continued, served no constructive interest aggregation or representational function in the African context.\textsuperscript{225} Rather, as “tribe,” not class, supposedly represented the only real cleavage in postcolonial society, political party rivalry would work to entrench social division by encouraging partisan mobilization and politicization of ethnicity.\textsuperscript{226} In fact, in many instances, notably in Nkrumah’s Ghana, the national leadership seemed convinced that that dire prospect was already at hand.\textsuperscript{227} Thus, ostensibly to forestall the disintegrative tendencies allegedly inherent in multi-party competition, Africa’s new leaders moved quickly after independence to suppress opposition and install one-party regimes—making sure, of course, to secure first their own personal control over the ruling party.

b. The “Development” Rationale

For Africa’s postcolonial leaders, the national integration project was only an instrumentality; the real goal was material in nature: it was to transform the inherited colonial economy and uplift the social and economic condition of the newly liberated African populations.\textsuperscript{228} “Development” became the favorite buzzword of the times, and development trumped everything else.\textsuperscript{229}

\textsuperscript{224} See, e.g., MBOYA, FREEDOM AND AFTER, supra note 215 at 85.

\textsuperscript{225} Id.

\textsuperscript{226} CPP, Work and Happiness, supra note 77 at 394.

\textsuperscript{227} NKRUMAH, AFRICA MUST UNITE, supra note 96 at 68-71 (referring to the opposition in Ghana as “violently destructive” and separatist).

\textsuperscript{228} See, e.g., NYERERE, FREEDOM AND DEVELOPMENT, supra note 96 at 54.
The challenge was enormous. Although Europe’s moral defense of its colonization of Africa had been suffused with theories of trusteeship and benevolent paternalism, the driving force behind the colonial project in Africa “was not primarily a concern for the welfare of the peoples of Africa as for trade and the possession of materials known or believed to exist in Africa.” Where the colonial administration invested in “development” projects, such as railways, harbors, roads, health services or schools, the territory or population that was served was severely limited and the purpose primarily instrumental; it was to enable or facilitate the extraction of minerals and external trade and to help meet the limited local staffing needs of colonial administration. Thus, African states entered independence with massive deficits in all the critical areas of need: health care; education; technology; communications; jobs; housing; internal markets. Even “[i]n Ghana, which boasted some of the finest educational institutions in Africa, over 70% of the population was illiterate on the eve of independence.” And at the other extreme, Congo, when it gained independence from Belgium in 1960, had only 16 postsecondary school graduates, for a population of 13 million.

229 See, e.g., DENNIS AUSTIN, POLITICS IN AFRICA 69 (1984) (quoting statement by President Nyerere of Tanzania that, “Development must be considered first . . . . Our question with regard to any matter—even the issue of fundamental freedom—must be ‘How does this affect the progress of the Development Plan?’”).

230 BUSIA, supra note 117 at 37-38. See also Ali Mazrui, Nkrumah: The Leninist-Czar, 26 TRANSITION 8 (1966), reprinted in 75/76 TRANSITION 106, 112 (“The paramount motivation behind the old imperial expansion was the economic exploitation of the countries that were annexed. All arguments about spreading Christianity and Western civilization—or ending the Arab slave trade—were merely camouflage for the imperial profit motive.”)

231 CHAZAN ET AL, supra note 67 at 28.
The pressure on postcolonial governments to deliver results was equally enormous—and urgent. Nkrumah’s famous pre-independence declaration, “Seek ye first the political kingdom and all else shall be added unto you,” summed up the terms of the social contract that Africa’s nationalist leaders had made with their peoples: with independence would come substantial social and material improvement for all.232

Development assumed the character of a national emergency.233 The challenge was frequently expressed in terms of a “war”234—a war to conquer “those very real enemies—ignorance, poverty and disease.”235 The development rationale, and its associated metaphors, naturally carried authoritarian implications.

Explaining why Tanzania’s proposed new constitution had dispensed with “checks and balances,” President Nyerere invoked the development rationale with characteristic eloquence:

“Our Constitution differs from the American system in that it avoids a blurring of the lines of responsibility, and enables the executive to function without being checked at every turn. For we recognize that the system of ‘checks and balances’ is an admirable way of applying brakes to social change. Our need is not for brakes—our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the

232 See MBOYA, CHALLENGE OF NATIONHOOD, supra note 136 at 15.

233 See, e.g., CPP, Work and Happiness, supra note 77 at 394, para. 11.

234 See, e.g., NKRUMAH, AFRICA MUST UNITE, supra note 96 at 103; NYERERE, FREEDOM AND DEVELOPMENT, supra note 228 at 286.

235 MBOYA, FREEDOM AND AFTER, supra note 215 at 159 (quoting Nyerere).
resistances which are inherent in our societies.”236 Ghana’s Nkrumah similarly justified
the extraordinary powers granted him under the 1960 Constitution by invoking the
development rationale: “The increased authority given to the President is to enable him to
exercise the positive leadership that is so vital to a country seeking to pull itself up by its
bootstraps. If I may change the metaphor, it is in some ways the work of Sisyphus,
except that instead of a stone our task is to roll a whole people uphill. There are some
jobs in the world that can be best done by a committee, others need a managing
director.”237 There was little question who would be in the managing director’s seat.

Development underwrote presidential autocracy in another important respect,
namely, in the model of development that Africa’s leaders selected. Almost invariably,
the choice was in favor of socialism—or, as its “Africanized” adaptation came to be
known, “African Socialism.” The guided arm of the state, not the invisible hand of the
market, would thus be responsible for the allocation and management of resources and
for the production and distribution of a wide array of goods and services needed by
Africa’s peoples. For East Africa’s political leadership especially, the choice of
socialism was dictated by their view of African society (and traditions) as classless and
communal in nature and thus not amenable to capitalist modes of production.238

236 Julius Nyerere, How much Power for a Leader, 7 AFRICA REPORT 7 (1962).
237 NKRUMAH, AFRICA MUST UNITE, supra note 96 at 83.
238 See, e.g., REPUBLIC OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA
(Government Printer 1965) (“The sharp class divisions that once existed in Europe have no . . . parallel in
African society. No class problem arose in the traditional African society and none exists today among
Africans.”). See also TOM MOYA, FREEDOM AND AFTER 166-68 (1963) (“[The] main difference [between
African social and cultural structure and the European structure] . . . is that [the African] is communal by
Nkrumah, on the other hand, felt drawn to socialism by default, as “colonial rule precluded that accumulation of capital among our citizens which would have assisted thorough-going private investment in industrial construction.”\textsuperscript{239} Whatever the justification, the choice of a socialistic model cast the African state in a central role not only economically, but also politically: it called for “a strong, stable, firm and highly centralized government” and for “power [to] be concentrated in the country’s leadership.”\textsuperscript{240} Socialism thus furnished an additional justification for the one-party state and for authoritarian political leadership.

2. Historical and Comparative Rationales

\textit{a. The Colonial Experience and Its Legacy}

By far the most influential historical antecedent for presidential autocracy in postcolonial Africa came from its immediate predecessor: the colonial state. “Although we commonly describe the independent [African] polities as ‘new states,’ in reality they were successors to the colonial regime, inheriting its structure, its quotidian routines and practices, and its more hidden normative theories of governance.”\textsuperscript{241} The African nature. Most African tribes have a communal approach to life. . . . The practice of African socialism involves trying to use what is relevant and good about these customs to . . . build an economy which reflects the thinking of the great majority of the people.”; \textsc{Julius Nyerere}, \textsc{Ujamaa: The Basis of African Socialism} (1971) (“The foundation, and the objective, of African socialism is the Extended Family.”)

\textsuperscript{239} \textsc{Nkrumah}, \textit{Africa Must Unite}, \textit{supra} note 96 at 119.

\textsuperscript{240} \textsc{CPP}, \textit{Work and Happiness}, \textit{supra} note 77 at 393-94.

\textsuperscript{241} \textsc{Crawford Young}, \textit{The African Colonial State in Comparative Perspective} 283 (1994).
colonies had been ruled, all along, along hierarchical autocratic lines. Only as independence appeared inevitable and proximate did the colonial authorities seek a “dignified retreat from empire”\(^{242}\) by introducing constitutional forms modeled after the metropolitan constitutional systems. Consequently, the parliamentary-style constitutions on the basis of which the African colonial state was ushered into the community of sovereign nations had no local parliamentary or liberal tradition to back them, as none had been fostered under colonial rule. Thus confronted with the “dual” legacy of the colonial regime, or what one commentator has called an “authoritarian-democratic paradox,”\(^{243}\)—namely, a dominant autocratic heritage embedded in the practices, usages, laws, and institutions of the colonial state one the one hand, and, on the other hand, a transitory “democratic” bequest (in the form of the independence constitution) which lacked a supporting tradition in colonial rule—Africa’s postcolonial leaders had little difficulty regressing to the former, more established authoritarian path. Of particular consequence for the nature of postcolonial rule was the power and position of the colonial Governor within the colonial system.

The colonial Governor constituted a “one man government.”\(^{244}\) He “alone [was] responsible for the colony’s administration. His authority in the colony [was] practically

\(^{242}\) Crawford Young, *Africa: An Interim Balance Sheet, in Democratization in Africa, supra* note 39 at 64.


autocratic."²⁴⁵ The powers of the Governor were not subject to any checks or brakes from below. Not only did the colonial subjects lack a constitutional avenue for removing him, “those who attacked him also risked the displeasure lese-majesté incurs.”²⁴⁶ In many African colonies, the Governor ruled by decree or proclamation, and where the colonial constitution included an Executive or Legislative Council, these played only an advisory or deliberative role and were usually dominated by officials of the Governor’s administration.²⁴⁷ Even where the Legislative Council had an “unofficial” or representative majority, the Governor “had certain ‘reserved powers’ by which he could invalidate legislation.”²⁴⁸

The colonial judiciary, too, was not independent of the colonial administration. To the contrary, the colonial judge was part and parcel of the Governor’s administration. He served as an adviser to the Governor and assisted with the drafting of laws and policies. The colonial chief justice even acted as governor in the latter’s official absence. The Governor had power to deny access to the colonial courts for persons seeking to challenge the executive or legislative acts of the colonial administration. As Nkrumah would later recall, “the judiciary and the executive under a colonial regime are one and the same thing.”²⁴⁹ Importantly, African nationalists’ own harsh experience of colonial justice, and of the political uses of the judicial system, impressed on them the belief that

²⁴⁵ Id.
²⁴⁷ Id. See also Michael Crowder, Whose Dream was It Anyway? Twenty-Five Years of African Independence, 86 AFRICAN AFFAIRS 7, 15 (1987); NKRUMAH, AFRICA MUST UNITE, supra note 96 at 16.
²⁴⁸ NKRUMAH, id. at 16.
²⁴⁹ NKRUMAH, AUTOBIOGRAPHY, supra note 22 at 111.
“a Court [was] primarily . . . the institution through which a government, Colonial or otherwise, imposed its policy behind the cloak of magisterial propriety.”

Lastly, many of the oppressive laws that would later provide the tools of repression for postcolonial Africa’s rulers had their origin in legislation enacted and enforced by the colonial state. Notably, the preventive detention, sedition, and press censorship laws that became a routine part of the legal paraphernalia of Africa’s postcolonial rulers had been first introduced and used during the colonial period. In short, the postcolonial state and its practices, including, notably, its tendency toward presidential authoritarianism, showed remarkable continuity with the colonial tradition and, in particular, with the extraordinary power of the Governor within colonial society. In one sense, then, independence meant, for Africa’s new rulers, the “right to use . . . the same tools and methods of government which the colonial authorities had employed.”

b. Prevailing Comparative Models of Executive Power

The installation of imperial presidential rule in postcolonial Africa was also influenced and aided indirectly by the models of political governance and of executive power prevalent in the world’s leading political systems during the period of Africa’s decolonization. Africa’s nationalist and postcolonial leaders received their political socialization in a world dominated by the heroic leader. Theirs was, in a real sense, the world of the modern imperial leader: Franklin Delano Roosevelt, Winston Churchill,

250 GEOFFREY BING, REAP THE WHIRLWIND: AN ACCOUNT OF KWAME NKROMAH’S GHANA FROM 1950 TO 1966 215 (1968). Bing, a former British Labour MP, was Nkrumah’s first attorney general.

251 Id. at 222.
General de Gaulle, Adolph Hitler, Josef Stalin, Mao Tse-tsung. These “strong men at the helm,” or else their record and legacies, dominated politics in their respective countries as well as on the world stage at the time of Africa’s nationalist emergence. And outside of the big post-war powers, an emergent “Third World” was forming around the vision of leaders like Tito (Yugoslavia), Sukarno (Indonesia), Jawaharal Nehru (India) and Gamel Nasser (Egypt), a new generation of postcolonial nation-builders—the “Bandung Generation”—whose style and orientation, like the African leaders who would soon join their ranks, were staunchly nationalistic, anti-imperialistic, socialistic, and authoritarian. Nkrumah, by his own account, counted Nehru, Lenin, Mussolini and Hitler among the twentieth century leaders whose “methods” and “ideas” of political mobilization he “found much of value.”

In their quest for comparative and historical precedents, Africa’s postcolonial leaders also took favorable notice of the fact that, in the United States, Franklin Delano Roosevelt’s bold presidential leadership, and in particular his government-led New Deal policies, had successfully rescued the country and economy from the ravages of the Great Depression. In fact, Nkrumah, who had lived for ten years in Roosevelt’s “New Deal” America as a young student, launched what he called “The New Deal” for the Gold Coast’s cocoa farmers soon upon becoming Leader of Government Business in the colony. Later, as President of Ghana’s first republic, Nkrumah would use the example

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253 NKRUMAH, AUTOBIOGRAPHY, supra note 22 at vii-viii.

254 Id. at 24-47 (describing his years in the United States).

255 Id. at 153.
of Roosevelt’s failed court-packing plan to justify a proposed amendment to the Ghana constitution that empowered him to dismiss judges of the superior courts. 256 Similar reliance was placed on the Roosevelt era by the authorities in Nyerere’s Tanzania when they decided to omit a judicially enforceable Bill of Rights from their country’s 1965 constitution. In that instance, they referred to the “bitter conflict which arose in the United States between the President and the Supreme Court as a result of the radical measures enacted by the Roosevelt Administration to deal with the economic depression in the 1930’s”257 to justify their denial of judicial review powers to the country’s courts.

For Africa’s postcolonial leadership, the lesson of Roosevelt’s “New Deal” presidency, as the examples from Ghana and Tanzania illustrate, was that the task of achieving social and economic transformation required strong and decisive presidential leadership. 258 The contemporaneous rise of China under Mao Tse-tung and of the Soviet Union under Stalin, as well as the impressive postwar reconstruction of Europe under the direction of General Marshall, might have further confirmed for Africa’s postcolonial leaders the centrality of the state as an agent of development as well as the indispensability of strong leadership for Africa’s impoverished new nations.

256 See Bretton, supra note 70 at 91-92 (quoting statement by Nkrumah’s government on the 1964 amendment to the Constitution of Ghana).


258 See, e.g., Nwabueze, supra note 20 at 110 (“Just as the economic depression of the early 1930s called forth Franklin Roosevelt’s New Deal measure, which was perhaps the highest point presidential power had attained in peace-time America, so also does the poverty of African societies aggregate power to the presidency.”)
In the area of postcolonial constitutional design, an influential comparative model at the time came from General de Gaulle’s Constitution of the Fifth French Republic. Adopted in 1958 in response a series of postwar political, military and constitutional crises,\(^{259}\) the Fifth French Republic restored and reinforced the executive authority that, under the previous constitution, had been suppressed in favor of legislative supremacy. The most important feature of the constitution of the Fifth Republic was a presidency with extraordinary powers—including, notably, sweeping powers to deal with national emergencies, the right to dismiss Parliament, and the right to legislate by referendum and thus bypass the legislature. The legislature under the Fifth French Republic possessed only specifically enumerated and limited powers. All “residual” power was retained by the executive.

France’s move toward a “monarchical republic . . . with a dominant executive and a weak, almost powerless parliament”\(^{260}\) coincided roughly with the independence of her African colonies during the 1960s.\(^{261}\) The constitution of the Fifth French Republic thus served as the blueprint for the independent constitutions of African’s francophone states.\(^{262}\) In time, following the trend pioneered by Nkrumah in Ghana, Africa’s francophone states amended their independence constitutions to eliminate the dual executive inspired by the French model, creating, in the process, a president-centered

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\(^{260}\) See Busia, in Search of Democracy, supra note 117 at 51.

\(^{261}\) See Selassie, supra note 202 at 19-20.

constitutional system—*présidentialisme renforcé*—that merely reinforced the hyper-presidentialism of the Gaullist original.263

The influence of de Gaulle’s Constitution of 1958 on postcolonial African constitutionalism arguably extended beyond francophone Africa. Contrary to Nkrumah’s suggestion that the constitutional regime he had installed in 1960 Ghana was autochthonous, Leslie Rubin and Pauli Murray, co-authors of a contemporaneous treatise on the 1960 Constitution of Ghana, argued that, “[i]n vesting the President with wide powers, and conferring extraordinary powers on the First President, with a corresponding reduction in the powers of the Parliament, the Constitution of Ghana suggests the influence of the Constitution of the Fifth Republic of France.”264

In short, the trajectory of events and developments in the political and constitutional life of postcolonial African states, and in particular the emergence of presidential imperialism, was not entirely endogenous in its sources of influence. Contemporaneous political and constitutional trends and historical experiences (and personalities) globally, and especially the examples of presidential supremacy in the influential states of the post-war world, helped to “normalize” similar tendencies and choices by Africa’s postcolonial leaders.

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263 *Id.* at 297 (describing “one-man executive” of the 1960 Ivorian constitution as “no longer encumbered by the trappings of the parliamentary system . . . , votes of confidence, censure and dissolution.”)

264 RUBIN & MURRAY, *supra* note 91 at 32. See also *APTER, GHANA IN TRANSITION*, *supra* note 77 at 355 (“Ironically enough, if one were to look for formal parallels in Europe, the constitution which most resembles Ghana’s is that of De Gaulle . . . .”)
It must be added that, in invoking both the national integration and the development rationales for their authoritarian projects, Africa’s postcolonial leaders had the additional authority of credible Western academic opinion on their side.\footnote{See, e.g., \textit{WALLERSTEIN, supra} note 210 at 163 (“The structural prerequisites for [a multiparty parliamentary system] do not yet exist to a sufficient degree in Africa . . . The one-party system in the African context is often a significant step toward the liberal state, not a first step away from it.”); L.P. Mair, \textit{Social Change in Africa}, 36 INT’L AFFAIRS 456 (October 1960) (“Since the unity of the new [African] States is so precarious, it may well be that their rulers cannot at present afford that tolerance of opposition which is the ideal of representative democracy . . . The crucial problem for the new governments seems likely to be how to be authoritarian enough to maintain stability and carry through their modernizing policies, and yet not so obviously oppressive as to provoke active or passive resistance.”).} Of course there were prescient voices, like that of W. Arthur Lewis, that argued the contrary position,\footnote{See W. ARTHUR LEWIS, \textit{POLITICS IN WEST AFRICA} 89 (1965) (“As for our political scientists, they fall all over themselves to demonstrate that democracy is suitable only for Europeans and North Americans, and in the sacred names of ‘charisma’, ‘modernization’ and ‘national unity,’ call upon us to admire any demagogue who, aided by a loud voice and a bunch of hooligans, captures the state and suppresses his rivals.”)} but theirs was decidedly a faint minority and, of course, went unheeded. At any rate, there is no necessary causal link between either the “internal” conditions or “external” influences identified above and the specific \textit{choices} made by Africa’s postcolonial leadership. In the end, the implantation of presidential autocracy in Africa cannot be explained as a “co-production,”\footnote{Africa historian Frederick Cooper has observed that “economic problems in Africa have long been coproductions.” Thus “to talk about ‘African economies’ as if they were truly African, while international financial institutions and transnational corporations are ‘givens’ to which Africans must adjust, is to stifle thinking about economic change from the start.” \textit{FREDERICK COOPER, AFRICA SINCE 1940: THE PAST OF}} responsibility for which must be shared with others beyond Africa’s
postcolonial elites. It was, in many respects, a solo act.\textsuperscript{268} That the atmosphere and conditions of the early postcolonial period created an “autocratic temptation” of sorts may be readily conceded.\textsuperscript{269} But circumstance, or “opportunity,” alone does not dictate agency or outcome. In Africa’s case, as elsewhere, personal ambition, and oftentimes a sense of “manifest destiny” or indispensability, supplied an important motive that drove some of Africa’s leaders toward the autocratic path. Nkrumah, for example, expressed such “indispensable man” sentiments as far back as 1953,\textsuperscript{270} and also expressed the opinion, prior to Ghana’s independence, that

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\textsuperscript{268} See \textit{M EREDITH, supra} note 24 at 164 (quoting one Lansine Kabina describing Guinea as “a one-man show, in which [President Sekou] Toure was the sole actor, while others danced, applauded or sang in his honor according to him whim”). \textit{Also id.} at 250 (“Nyerere took on the drive to socialism virtually single-handedly. There was no inner group around him committed to socialism; no body of thinking within the ruling party; no working-class agitation; no militant peasantry; no popular expectation of radical change. It was Nyerere’s own aspirations, his own ideology, that determined government policy.”)

\textsuperscript{269} See, e.g., K.A. \textit{BUSIA, THE CHALLENGE OF AFRICA} 141 (“In Africa, where parliamentary institutions are new, and where there is such a massive preponderance of conditions favoring authoritarian rule, the battle for personal liberty and democracy is a hard one.”) Dr. Busia was Opposition Leader in Nkrumah’s Ghana before he went into exile to escape a detention order.

\textsuperscript{270} Richard Wright, the African American novelist, records that in a conversation with Nkrumah during Wright’s visit to the Gold Coast in 1953 Nkrumah stated that, “There are but two or three of us who know what we are doing.” \textit{RICHARD WRIGHT, BLACK POWER: A RECORD OF REACTIONS IN THE LAND OF PATIOS} 63 (1953).
“emergency measures of a totalitarian kind” might need to be employed “in the period following independence.”

In the end, the justifications offered for presidential authoritarianism—and its accompaniments of a one-party regime and unitary centralism—were not confirmed by the results. While some countries, such as Tanzania and Nkrumah’s Ghana, recorded modest to impressive strides particularly in the areas of education and health, as well as, in Ghana’s case especially, in the area of public works projects, it is not clear that any of that initial progress required “emergency measures of a totalitarian kind.” To the contrary, populist autocracy stifled the growth of an independent middle class and caused African states to lose or waste scarce professional and intellectual talent at precisely the time when these new societies needed most such critical human resources. In the end, even the initial burst of progress could not be sustained. Nor was the African state or economy transformed; both have remained distinctly neocolonial.

Instead of development and social improvement, most African states and populations have suffered perennial economic crises, diminished living standards, and sharp inequalities in wealth and regional development. And instead of national integration, over-centralized one-man rule has often deepened social cleavages, caused political instability, and, in some cases, fueled civil war and national disintegration. In fact it was the inescapable failure and unsustainability of the authoritarian project that ultimately precipitated the crisis of legitimacy—and the crisis of governance—across Africa at the end of the 1980s. Why, then,

271 NKRUMAH, AUTOBIOGRAPHY, supra note 22 at x.

272 See, e.g., COOPER, supra note 267 at 156 (“By the 1970s in most African states, the development slogan had become either tragedy or farce . . . .”).
despite its dismal record and the recent popular backlash against personal rule, does presidential imperialism persist in contemporary Africa?

IV. Why Imperial Presidency Persists: Pitfalls and Limitations of Contemporary Constitutional Design in Africa.

As I have argued and sought to demonstrate, Africa’s postcolonial tradition of imperial presidency is not an organic outgrowth of indigenous “African culture” or traditional systems of government. Rather, as a form of rule, it was purposefully and systematically constructed at the dawn of African independence by Africa’s nationalist elites to answer certain specific regime needs at the time, and its “successful” implantation in the early postcolonial period was conditioned or facilitated by certain historical and external factors.

The times have changed, however. While development remains Africa’s foremost challenge, the autocratic temptation of the early decades of African independence appears to have given way to a democratic imperative. The notion that what Africa needs is a “developmental dictatorship” – a trading of democratic representation and individual liberties for material progress—appears to have been replaced by the notion of a “developmental democracy” – the idea that, “for better or worse, Africa is doomed to democracy as the only viable framework within which it must seek to promote political reforms and economic development.”

Equally significant, the influential, larger-than-life architects of Africa’s imperial presidency have exited the political scene, some of them forced

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273 See CHABAL, supra note 137 at 143.
274 Id (citation omitted).
275 Adebayo Olukoshi, State, Conflict, and Democracy in Africa: The Complex Processes of Renewal, in STATE, CONFLICT AND DEMOCRACY, supra note 41 at 457.
out dishonorably. All of these changes have made the period after 1989 a “constitutional moment” of sorts for postcolonial Africa, the first such moment since the momentous independence decade of the 1960s. The post-1989 constitutional reforms across sub-Saharan Africa were thought to have reflected this “paradigm shift” in thinking about politics and governance in Africa. In light of this expectation, the continued survival of presidential imperialism in contemporary Africa raises questions about the nature, relevance, content and depth of the recent transitions and related constitutional reforms.

Renewed calls in Africa’s emerging democracies for fresh constitutional reforms suggest growing disappointment and dissatisfaction with the round of constitutional revisions that accompanied the democratic transition. The main focus of these complaints has been the persistence or re-emergence of presidential imperialism, a grievance that was successfully mobilized most recently in Kenya to defeat a president-backed draft constitution.276

Is faulty constitutional design, then, to blame for the re-emergence of the imperial presidency in the post-authoritarian African state? Are there factors extrinsic to the contemporary Africa constitution that might explain the persistence of presidential supremacy in Africa? Is the phenomenon remediable? If so, can constitutional design help?

On paper, and in comparison with predecessor constitutions, the constitutions of contemporary African states appear to announce the dawn of a new era of constitutionalism. Africa’s “new and improved” constitutions abolish de jure one-party

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rule and rule by decree; protect the right of political parties to compete in regularly scheduled presidential and legislative elections; restore traditional lawmaking and oversight functions to legislatures; replace indefinite presidential tenure with term limits; empower the courts to rule on the constitutionality of challenged executive or legislative acts; and protect from arbitrary violation or abuse a set of rights and liberties associated with modern democracy, including, the right to freedom of association, free speech and press freedom. In addition, in several African states, there is now a “fourth branch of government” on the constitutional scene, comprising a variety of specialized independent commissions or public agencies that are charged with bringing credibility and political detachment to the performance of such critical functions as conducting and managing public elections, investigating cases and allegations of public corruption, protecting the independence and fairness of the media, investigating and remedying human rights abuses, and auditing and reporting on the allocation and use of public funds. In light of the above, it is easily understandable why a literal reader of one typical African constitution would describe it as “a remarkable document of liberty.” How, then, in the face of these constitutional reforms, has presidential supremacy managed to survive in contemporary Africa? Must one conclude, given the persistence of the imperial presidency in Africa, that constitutions and constitutional design do not matter?

Constitutions do matter, of course—given auspicious political circumstances. Some of the changes that have followed in the wake of constitutional reform in many African states, including, notably, the incremental, and in some cases remarkable, improvement in the quality of personal liberty and media freedom, the successful

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legislative blocking of presidential bids for extended terms of office, and the instances of orderly regime succession upon the expiry of term limits or electoral defeat, confirm that constitutional rules can induce, or at least condition, certain positive social and political outcomes. At the same time, there is much that a textual or literal reading of a constitution—any constitution—cannot reveal about the reality and dynamics of constitutional politics. A constitution may be “an extraordinary document,”278 as Schlesinger believed the U.S. Constitution to be. But it is still “only a document, and what the Constitution ‘really’ meant—i.e., meant in practice—only practice could disclose.”279 Moreover, even as documents, constitutions are neither exhaustive nor foolproof regarding the matters they regulate. Omissions and contradictions are frequently embedded in the text of the constitution. All of these limitations associated with constitutions generally are true of Africa’s new and revised constitutions.

Contemporary constitution design in Africa should also be viewed within the context of the primary or immediate impulse that drove the recent transition. Africa’s recent constitutional reforms did not occur behind a Rawlsian “veil of ignorance”280 involving a cast of moral actors embarked on a principled and idealistic quest for a “just” social and constitutional order. Both on the side of the coalition of regime opponents, civic leaders, and democracy and human rights activists that led the popular push for reform and on the side of the besieged incumbents who needed to find a credible way forward out of the crisis of legitimacy they were confronted with, the motives behind the

278 SCHLESINGER, IMPERIAL PRESIDENCY, supra note 11 at 11.

279 Id.

280 See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).
democratic transition and accompanying constitutional reforms were mixed and, often, opportunistic. In many instances, regime opponents and ‘new democrats’ were mostly “recycled elites” cut from the same political cloth as the discredited incumbents. In some cases too, where an authoritarian regime was strong enough at the time of transition to have retained control of the transition timetable and the reform agenda, as was the case in Ghana, Tanzania and Uganda, the ensuing constitutional revisions were often done with regime continuity in mind. Overall, then, the reform ambition and possibilities were limited. In the main, the objective was to democratize—and thereby re-legitimate—government by creating an opportunity and a mechanism for political contestation and possible regime change or power alternation through the ballot box. In general, Africa’s current constitutions must be seen as reflecting this limited ambition. Inevitably, then, certain important aspects or features of the ancien régime did not make it onto the reform agenda.

The most important omission in this regard is the centralization of the postcolonial state. Contemporary constitutional design in Africa is notable for its failure to tinker with or alter in any way the territorial distribution of power within the state. Despite the resilience of sub-national identities and the strength of “local patriotism,” it is hard to find a serious constituency or strongly held sentiment for federalism among Africa’s influential elites. The obvious exception is Nigeria, where regional resistance to the centralizing impulses of successive national (military) elites remains strong, even though the country has maintained since independence a nominally federal system of

281 See Richard Joseph, *Africa: States in Crisis*, 14 J. DEMOCRACY 159, 163 (2005) (“In Nigeria, the roster of presidential candidates in the April 2003 elections included many who have held executive, parliamentary, and other political positions over the decades of predatory military and civilian
government. Generally, however, elite consensus across Africa appears to be firmly behind preserving the unitary state model, and contemporary constitutional design reflects this implicit consensus. While decentralization, and thus the idea of local self-government within a unitary state model, has growing support, recent constitutional reforms in Africa have done little to transform or empower local government. Local administration, not local government, still best describes the role played by local councils and officials within the contemporary African state. In short, one of the structural pillars upon which presidential hegemony in postcolonial Africa was built, namely, the highly centralized unitary state, remains firmly in place.

As a consequence, African governments are, doctrinally speaking, still governments of general powers, not of enumerated or limited powers. In other words, unless the applicable constitution precludes or prohibits it from doing so, the government of the typical African state, because it has yielded none of its sovereign power to a sub-national entity, generally has plenary authority to act or legislate on all matters. In such a constitutional system, where there is no “vertical” countervailing power (other than periodic elections) to restrain the central government, the extent of presidential power—and thus whether the presidency will show imperial tendencies—will depend, by and large, on the “horizontal” distribution and balance of power between the presidency and the other branches and agencies of the central state, notably the legislature and the judiciary. How, then, have Africa’s new constitutions handled the horizontal dimension of the power map of the state? The focus of our discussion will be on the executive-
legislature relationship, and, to a limited extend, on judicial power and the institutions of the “fourth branch of government”—the so-called agencies of horizontal accountability.

A. Legislature-Executive Relations in Contemporary Africa

In the recent transition from authoritarianism to democratic politics in Africa, “not a single democratizing state chose to move [from a presidential] to a parliamentary form of government.”283 Of course, the vesting of executive power in a president does not, by itself, connote or preordain presidential supremacy. Nor, as Singapore’s experience under Lee Kuan Yew or Britain’s experience under Margaret Thatcher or Tony Blair demonstrates, does the Westminster parliamentary form, in which executive power is exercised by a cabinet headed by a prime minister, preclude “prime ministerial” dominance.

At any rate, while most African constitutions have retained the executive presidency, few can be said to be patterned after the classical presidential form, which is not to suggest, knowing the U.S. constitutional history to prove the contrary, that the latter is invulnerable to presidential imperialism. Of Africa’s newly emerging democracies, Nigeria and Liberia come closest to imitating the U.S. form, with an elected president, a two-house legislature, and a cabinet of ministers appointed by the president with the approval of the legislature but who cannot serve simultaneously in either house of the legislature. Most contemporary African constitutions, however, tend toward the

283 Van de Walle, Impact of Multi-Party, supra note 281 at 31.
“hybrid” model. In francophone and lusophone Africa, this has been accomplished primarily by restoring the position of prime minister, thus returning, essentially, to the bicephalous executive of the Gaullist model. In the anglophone African states that have adopted the hybrid form, such as Zambia, Uganda and Ghana, a nationally elected president typically governs with a cabinet of ministers all or a majority of whom may (or, in the case of Ghana, must) be selected from among current members of parliament.

Regardless of the specific form it takes, hybridization in contemporary African constitutional design has meant blending the “pro-executive” features of the parliamentary form (such as drawing the president’s ministers from the current membership of parliament) with the “pro-executive” features of the presidential form (such as a veto-wielding unitary president; fixed term of office for the president; and a presidential cabinet whose tenure does not depend on the support of parliament). The impulse behind the hybrid form in contemporary African constitutional design is ostensibly to reduce the prospect of conflict or friction between the president and parliament. Thus, rather than restrain presidential power, the hybrid form has tended to

284 See Muna Ndulo, Presidentialism in Southern African States and Constitutional Restraint on Presidential Power, 26 VT. L. REV. 769, 772 (2002) (“In most African states the basic structure of the political system is neither parliamentary nor presidential; it is a hybrid.”)

285 See Mpazi Sinjela, Constitutionalism in Africa: Emerging Trends, 60 THE REVIEW 23, 27 (1998) (constitutional reforms in francophone Africa have “signaled a return to the independence constitutions modeled after that of France.”). See also HYDEN, supra note 139 at 108.

286 See Momba, supra note 62 at 117(“[T]he hybrid system was engineered to give the president all of the powers that go with presidential systems without a relative independence of legislature often associated with ‘pure’ presidential systems.”)
facilitate or embolden it. But the fact that presidential imperialism remains a fact of political life even in a state like Nigeria, where the executive and legislative branches are formally separated à la the American constitutional form, suggests that the hybrid constitutional design alone cannot account for the persistence of the presidential hegemony in contemporary Africa.

Indeed from a textual or formal standpoint, few of Africa’s new constitutions can be said to compel or enact an imperial presidency. The constitutions of Angola and Cameroon, which grant the president unilateral authority over appointments to a broad range of key executive, judicial and other constitutional offices and empower the president to bypass the legislature and legislate or govern without the legislature’s participation even in non-emergency situations, are exceptional among contemporary African constitutions in virtually imposing or preordaining an imperial presidency. Tanzania follows closely, as the “structure of the national presidency of Tanzania has not changed substantially since 1985 when Nyerere left office.”287 The Tanzanian president is still empowered to declare a state of emergency and make key appointments to cabinet positions and the offices of prime minister and chief justice, all without obtaining the approval of the legislature.288 Outside of these glaring examples of constitutionally-implied presidential hegemony, modern African constitutions generally do not affirmatively grant the president exclusive or unilateral authority to act or govern. Presiding over governments of general powers, contemporary African presidents no doubt have immense authority to govern. However, by constitutional command, they

287 Ndegwa & Letourneau, supra note 65 at 96.
288 Id.
typically must now seek and secure prior legislative approval in the form of an Act of Parliament (or a binding resolution of parliament) for all of their intended actions that would have the force of law, including, notably, proposed legislation or subsidiary legislation, proposed budgets or supplementary budgets, proposed foreign borrowing or international transactions, nominations to ministerial and judicial offices, and proposed amendments to the constitution. In addition, the legislature has power under several African constitutions to impeach the president or launch parliamentary inquires into the conduct of executive departments and officials. Thus, on paper at least, most contemporary African constitutions appear to empower parliaments to check presidential power.

Are African newly representative legislatures, then, to blame for not failing to rein in presidential imperialism in post-authoritarian Africa? Formalistically speaking, the answer is yes—at least in some cases. Arthur Schlesinger’s insight, based on his study of the rise of imperial presidency in the United States, is equally true of contemporary Africa: the phenomenon is “as much a matter of [legislative] abdication as of presidential usurpation.” Examples of such legislative abdication or self-subordination to the presidency abound in contemporary Africa. In Ghana, for example, parliament approved legislation in 2001 that empowers the president to create, merge, or abolish ministries and departments of the executive branch at will, without the need to obtain specific legislative approval for each such governmental expansion or reorganization. This is equivalent to giving the U.S. president a one-time authorization to create and staff any number of new departments of the federal government or to abolish an existing department without an Act of Congress. In effect, the Ghanaian president is legislatively empowered to expand
the presidency and the executive branch *ad infinitum*, without regard to the budget cycle and without recourse to the legislature for approval. What explains this capitulation of Africa’s new legislatures to the presidency they are supposed to check? Might constitutional design help correct this tendency?

In structuring the formal relationship between the president and parliament, contemporary constitutional design in Africa has typically adopted a passive or “open-ended” approach, whereby a power or responsibility is granted jointly to the president and the legislature and the two are expected to work collaboratively to enact the appropriate legislation or make the decision committed to their joint determination. Typically, the president is granted the power to initiate and parliament the power to approve. What is important is that, under this constitutional plan of power allocation, approval or prior authorization by parliament is generally a necessary predicate for presidential action. Under such a constitutional scheme, presidential supremacy will usually occur *constitutionally* only with the acquiescence of parliament.

Within the *current* African political context, however, a constitutional plan that went even as far as to provide juridical equality between the president and the legislature (leaving the two branches to “deal” or decide matters jointly), would still, in its practical operation, tend to skew the balance of power toward presidential dominance. The reason is not far fetched. The African president has at his disposal such vast *extraconstitutional* resources and advantages, and which he is able to draw upon in his dealings with the legislature (or, indeed, with any other institution of state) that, except in the event of “divided government,” expectations that Africa’s current legislatures will act to check or

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289 SCHLESINGER, IMPERIAL PRESIDENCY, *supra* note 11 at ix.
restrain presidential power have generally failed to materialize. It is important to identify where these presidential advantages come from.

*First*, contemporary Africa’s political parties are themselves presidentialist in their orientation. The capture of the presidential office, above everything else, is what primarily drives multi-party rivalry—and indeed the formation of parties—in much of contemporary Africa. Few idealistic or ideological political parties are represented in Africa’s new multi-party parliaments. Africa’s parliamentary parties have been known to support or advocate certain “good governance” reforms while in opposition, only to disavow or reject the same proposal once they have won political power. For instance, Zambia’s Movement for Multiparty Democracy (MMD), while an opposition party, put forth proposals to remove certain “dictatorial” clauses from the country’s 1991 constitution. However, as the party that now had “the privilege of being in Government,” the MMD defended the 1991 constitution as “adequate” and stated that it considered “presidential democracy” to be “the best system of government” for the country. Similarly in Ghana, the New Patriotic Party (NPP), while in opposition (from 1993 to 2000), strongly opposed the constitutional power of the president to appoint “district chief executives” (mayors) for the country’s hundred-plus local

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291 See *Momba, supra* note 62 at 110-11.

292 *Id.* at 111 (quoting party official).

293 *Id.*

294 *Id.*

295 *Id.*
government units, advocating, instead, popular local election. Yet, as the governing party since 2001, the NPP has not only retained the presidential appointment of mayors, it has also backed the creation of several more districts, thereby expanding mayoral patronage opportunities for its president. Similar flip-flops have happened when governing parties have lost power and gone into opposition.296

The intense rivalry—or, more aptly, “warfare”—between Africa’s parties is driven not by a desire on each side to gain power so as use it in the disinterested pursuit of the national interest or to implement a distinctive set of policies and programs; it is to capture for the winning party the spoils of power and thereby deny the same opportunity to its rivals.297 Indeed, once in power, Africa’s governing parties, both old and new, have tended to operate like “mutual benefit societies,” using control of the state more for patronage than for enacting and implementing their policy preferences. Relations between the main rival parties in parliament are often characterized by such mutual loathing that the prospect of Africa’s parliamentary parties forming a bipartisan consensus to defend the legislature’s institutional prerogatives vis-à-vis the president seems remote. Thus where, as is typically the case, the presidential party also commands a parliamentary majority (either alone or through voting coalitions), it is expected that the party’s members of parliament will toe the president’s line. “Conscience voting” by

296 For example, in Ghana, the National Democratic Congress, which was in power from 1993 to 2000, enacted legislation that criminalized “willfully causing financial loss to the state” and also implemented a bold privatization program. Since becoming the opposition party in 2001, however, it has turned against the law it enacted (because it has been used to prosecute some of its former ministers) and also protested its rival successors’ attempts to privatize certain state enterprises.

297 See Monga, supra note 39 at 49-50.
majority legislators, even if it can be defended as consistent with values and ideas
publicly espoused in the party platform or manifesto, is strongly disfavored if it would
mean opposition to the president’s stated or intended agenda. In Malawi, one
influential (if mischievous) view of section 65 of the country’s constitution would even
make cross-party voting against the wishes of one’s party grounds for forfeiture of one’s
seat in parliament.

The president’s political leverage over his party’s legislators is particularly
enhanced in the hybrid constitutional form where the president has the power to
constitute his administration largely or entirely from the ranks of members of parliament.
In Zambia, President Chiluba appointed as nearly half the total number of MPs to
ministerial or other executive branch positions within his administration. Ghana’s
President John Kufuor has used similar power granted him by Ghana’s constitution to
appoint a large number of his party’s MPs (and nearly all of the most influential ones) to
his cabinet and administration. In short, the Burkean conception of political parties as
providing “a sort of extraconstitutional check on the executive or would-be executive,”
primarily by pre-committing the party’s candidates for political office to a policy-

298 See, e.g., Momba, supra note 62 at 115 (“the ruling party has not taken kindly to Members of Parliament
who have exercised independent stances in the national assembly”).

299 See Nixon S. Khembo, The Multiparty Promise Betrayed: The Failure of Neo-Liberalism in Malawi,
XXIX AFRICA DEVELOPMENT 80, 81-82 (2004).

300 See Ndulo, supra note 284 at 786.

301 See, e.g., Ghana Center for Democratic Development, Revisiting the matter of the size of the President’s
ministerial team, 6/1 DEMOCRACY WATCH 12, March 2005.

302 CARNES, supra note 15 at 83.
oriented “party program that is tolerably representative of the views and interests of important segments of society,” does not describe current practice in Africa. In Africa’s zero-sum political environment, where partisan rivalry is primarily over personalities and patronage, not about ideology or policy, the majority party’s legislative support for the president is assured as long as the president uses the prerogatives of his office to advance the material interests of the party and its members.

One important vehicle through which presidential dominance of the legislature is often assured is the office of Speaker. Although virtually all of Africa’s constitutions entrust the election of the speaker to legislators, presidential parties in control of the legislature, particularly in hybrid systems, have tended to yield to the president’s (privately disclosed) preference for the job of speaker. As the speaker determines what business may be done and what matters said in the legislative chamber, de facto presidential control over the speaker’s gavel significantly inhibits the ability of the legislature, and in particular opposition parties, to ensure executive accountability. In Zambia, for example, a petition to initiate impeachment proceedings against President Chiluba failed despite meeting the minimum constitutional requirements, because the speaker refused to convene the legislature for that purpose. In short, the idea of a legislature as a check on executive power is not realistically attainable when the parliamentary majority sees itself, as many do in Africa’s multi-party parliaments, simply as the legislative arm of the presidency.

303 Id.

304 See Momba, supra note 62 at 114-115.
Second, the respective institutional histories of the presidency and parliament in postcolonial Africa place Africa’s newly representative legislatures at a clear disadvantage. Unlike the executive branch, which can count on a history of unbroken organizational existence, many of Africa’s parliaments have suffered substantial gaps in their institutional lives since independence; those that have a record of continuous existence operated largely in single-party regimes and, therefore, have little experience of autonomy. The absence of a tradition of parliamentary existence or autonomy means that most of Africa’s current legislatures lack a clear conception of their institutional prerogatives, and have little in the way of helpful precedents from their past to fall back on. It also explains, in part, why despite its lawmaking and budget authorization functions, the typical African parliament does not have its own legislative drafting staff, a budget office, or a research department. The technical expertise and the supporting bureaucracy in these areas have long been part and parcel of the executive branch, and that is where they remain to this day. In short, while the contemporary African presidency inherits a well developed and bold (if ancien régime-derived) conception of the nature and scope of its executive power, its legislative counterpart has a self-limiting and uncertain conception of the legislature’s role.

Given the divergent histories and backgrounds of the presidency and the legislature in Africa, current president-legislature relations reflect strong elements of path dependency. The executive branch in Africa has too long been accustomed to

305 The Kenyan parliament had a tradition of vibrant deliberation and intra-party factionalism even during the one-party era. But its substantive powers were still marginal vis-à-vis the president.

306 See Thandika Mkandawire, Crisis Management and the Making of “Choiceless Democracies,” in STATE, CONFLICT, AND DEMOCRACY IN AFRICA 125 (Richard Joseph ed. 1999) (“Democratic states that are
governing without external (domestic) restraint, and the legislature not used to checking or disciplining the executive, that, on their own, neither institution is likely to change the familiar pattern. The force of path dependency also means that longstanding patterns of presidential behavior about which the current constitution might be silent come to be accepted as normal and appropriate and thus continue to be followed uncritically. For example, presidents in contemporary Africa, following past practice, routinely appoint MPs to serve as directors on corporate boards in the public commercial sector, despite the obvious conflict of interests inherent in such cross-branch appointments. Conventions and modes of operation established in the president-dominated ancien régime continue to shape political behavior and inter-branch politics in the present—and to the detriment of effective presidential accountability.

Third, although in theory African legislatures hold the power of the purse, as they must approve and pre-authorize the executive’s taxing and spending proposals for each fiscal period, in practice control over the national budget and treasury resides with the president and his minister of finance. Importantly, under most African constitutions only the executive may initiate, introduce or amend a bill that has the purpose or effect of raising taxes or imposing a charge on the national treasury. The commonly cited rationale for denying parallel legislative initiative to individual legislators in matters affecting public finances is to discipline the legislature and curb legislators’ presumed appetite for fiscally irresponsible constituent- or special-interest-driven “pork barrel”

politics. The effect of such exclusion, however, is to grant the president monopoly control over “pork”.

In light of Africa’s longstanding postcolonial tradition of neopatrimonialism or clientelism centered around the presidency, a constitutional policy that grants the president monopoly over the allocation of “pork” entrenches presidential supremacy within the state. Indeed insofar as exclusive executive control of the scope and size of the national budget extends to the legislature’s own institutional budget, it enables the president to manipulate and undermine the formal independence and checking functions of the legislature simply by starving it of needed resources or reducing parliament and its leadership to supplicants who must plead with and curry favor with the president in order to obtain the resources they need to operate.

The fact that Africa’s cash-strapped governments must depend on external donors and multilateral financial institutions to meet their recurring budget deficits further renders fanciful any notion of parliament as the institution that holds the power of the purse. African governments’ perennial budget dependence on external donors and financiers has, in fact, strengthened the hand of the executive vis-à-vis the legislature.\textsuperscript{308} African presidents and their finance ministers have become the \textit{de facto} “fundraisers” for their countries, appearing at G-8 and Beijing China-Africa summits and visiting Western capitals to solicit funds to finance investment and government budgets. Importantly, too, the finance ministry has remained the main route through which external donors and

\textsuperscript{308} Robert Bates has argued that only when African rulers are compelled to negotiate with their own populations for the public revenues they need to govern will a genuine transition from authoritarianism be possible. \textit{See} Robert Bates, \textit{The Economic Bases of Democratization, in State, Conflict and Democracy}, supra note 41 at 83-89.
multilateral financiers engage with and channel aid and assistance to African
governments.309 In the process, Africa’s parliaments have remained marginal players in
the area of public finance. With the executive effectively controlling access to the
nation’s purse strings, it is the executive, not parliament, that is best able to call the tune.

Fourth, presidential power in Africa, which was expected to be restrained by
democracy,310 may actually have been emboldened by the recent democratization of
presidential office. Especially since general elections in Africa are essentially about
control of the presidency,311 Africa’s newly elected presidents have come to possess
vastly superior democratic legitimacy. The fact of possessing singularly the “people’s
mandate to govern” is one more political resource that Africa’s post-authoritarian
presidents are able to deploy at the expense of divided legislatures. In this regard,
Africa’s emerging democracies bear some resemblance to Guillermo O’Donnell’s
“delegative democracies.”312 Presidential power in Africa is particularly strong in those
situations where recent democratization has been accompanied by regime change and by
a discernible improvement in the climate for personal liberties and media freedom. In

309 See Thandika Mkandawire, supra note 305 at 125. (“Aid in Africa has historically existed within
essentially authoritarian structures, and a whole tradition of interaction between foreign donors and African
governments has been premised on this institutional practice. Aid relationships remained unencumbered by
the complexities of national debate or consensus building in the recipient country . . . .”).

310 See, e.g., van de Walle, Impact of Multi-Party, supra note 281 at 5, 7.

311 See, e.g., van de Walle, Presidentialism, supra note 62 at 310-11 (describing presidential elections as the
“main drama” and legislative elections a “sideshow” in contemporary Africa).

312 See generally Guillermo O’Donnell, Delegative Democracy, in THE GLOBAL RESURGENCE OF
DEMOCRACY 94 (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996).
other words, by ridding African presidentialism of the most notorious and observable features of its authoritarian baggage, recent democratization has arguably strengthened, not weakened, the presidency.

In sum, the contemporary African president enters the political arena with such immense political resources and advantages vis-à-vis parliament that the passive policy reflected in Africa’s new or revised constitutions, which is to allocate power and responsibility jointly to the president and parliament and then leave the ultimate outcomes to be determined according to the dynamics of politics, merely affirms pre-existing presidential dominance.

As currently designed, then, Africa’s democratic constitutions do not effectively address or redress the inherent tendency toward presidential imperialism. The design defect, however, is, in most cases, one of omission, rather than commission. If Africa’s constitutions do not affirmatively mandate or compel an imperial presidency, they also do little to prevent or minimize the tendency toward that result.

1. Is “Divided Government” the Remedy?

The one real possibility that exists, within Africa’s contemporary constitutional systems, for a legislature effectively to “check” or restrain presidential action is in the event of a “divided government”—that is, when the presidency and the legislature fall under the control of rival parties. In many African constitutions a “run off” election or second round of balloting is required to select a president when the first round of presidential elections has failed to produce a winner with an absolute majority. In others,
such as Angola, the term of office of president is not co-terminus with the legislative term. Either scenario could give rise to divided government.

The possibility is not just theoretical. There have been instances of divided government in post-transition Africa. Madagascar, Benin, Niger and Congo are among the African states where, following elections, the president failed to secure a clear majority or a working coalition in the national legislature. While this state of affairs enabled the legislatures in question to “check” presidential action (literally speaking), the record shows that divided government is not a desirable antidote to the problem of presidential imperialism in Africa.

In the United States, where the tradition is well established, divided government, though associated with “gridlock” in Washington, has little chance of producing a paralysis in the running of the country as a whole. For one thing, the United States operates a federal constitutional system, where most of the everyday concerns of citizens (e.g., education, public safety, mass transportation, and sanitation) fall within the jurisdiction and responsibility of state and local governments with independent taxing power. Thus, in the U.S., partisan gridlock at the federal level, even where it leads to a temporary shutdown of the business of the federal government itself, as happened during the Clinton Administration, will not create a nationwide governance crisis or administrative nightmare. The same cannot be said about divided government in Africa.

First, Africa’s postcolonial history of president-controlled one-party regimes and military juntas effectively precluded an experience of divided government. Thus, Africa lacks a tradition of workable divided government. Second, African states remain highly centralized unitary states. Thus all public administration, including regional and local
administrations, must rely on one central government for operational resources and
direction. Under these circumstances, divided government is a sure recipe for nationwide
governmental paralysis and potentially destabilizing political crisis. Such indeed is the
lesson of Africa’s recent experience with divided government.

In both Congo and Niger, the governmental paralysis generated by divided
government eventually gave the military cause to intervene and bring an end to their
country’s young democratic project. In Benin, divided government “paralysed reform for
many months and compromised the government’s capacity to undertake further policy
reform.”313 And latterly in Malawi, where President Bingu wa Mutharika and his former
party (which has a working majority in parliament) have parted ways over the party’s
objections to the president’s stance against corruption, parliament’s refusal to bring the
president’s budget to a vote threatens to precipitate a constitutional and political crisis.

Because divided government in the African context tends to be crippling in its
impact on the orderly administration of the state, a reliance on that prospect as a way to
check presidential imperialism in Africa is misplaced. Restraining presidential power
should not be purchased at the cost of enfeebling government or paralyzing the
administration of the country. In fact, rather than leave open the possibility of divided
government, constitutional design in Africa should minimize or eliminate that prospect.
Instead, presidential power must be restrained by the adoption of a more prescriptive-
cum-proscription approach to defining the scope of executive power.

For example, if presidential appetite for excessive ministerial appointments is the
problem at hand, a more effective constitutional remedy in the African context might be

313 van de Walle, Impact of Multi-Party, supra note 281 at 30.
to prescribe a numerical limit to the size of the president’s ministerial contingent, as relying on parliament to use its approval or legislative power to rein in the president has proven ineffectual. Indeed it is precisely this approach—of express prescription or proscription—that is reflected in the provisions on presidential term limits in several of Africa’s current constitutions. Rather than leave presidential tenure open-ended, in the hope and expectation that the normal democratic process would end a president’s tenure, consensus in Africa has firmed behind the view that indefinite presidential terms are undesirable and that the most foolproof way to prevent tendencies toward an indefinite presidency is to prescribe in the constitution the maximum number of terms a president may serve. And that is exactly what most of Africa’s new constitutions have done, and the results bear out the wisdom of that approach. Other undesirable but entrenched tendencies in the use of presidential power, such as unilateral presidential creation of ministries or cross-branch appointment of legislators, might respond best to similar direct proscription or prescription in the constitutional text. In effect, the idea, generally, is for Africa’s constitutional framers to be more definite and specific in their delineation or enumeration of the scope and limits of presidential power, rather than write the constitutional text in a way that makes it permissive of presidential imperialism.

Changing the orientation and behavior of parliamentary parties is a much more difficult challenge. A common problem is the absence of “internal democracy” in Africa’s political parties. Dissenters and nonconformists, particularly within Africa’s governing parties, are routinely sanctioned, and oftentimes expelled, by their party leadership—and often for opposing the party’s president. Internal party constitutions and rules tend to be highly authoritarian in their impulses and effects, giving party oligarchs
the ability to limit participation and discussion within the party. Africa’s political parties are not nearly as interested in expanding their regular membership as they are in gaining voters during election season. Encouragingly, certain African constitutions, notably Ghana’s and Uganda’s, contain provisions addressing the issue of internal party democracy, thus signaling that political parties are not to be regarded as private clubs outside the reach of public regulation and control. However, the vague generalities in which these provisions are couched have failed to provide sufficiently specific guidance for compliance or enforcement. Constitutional design in Africa can help address the problem of internal party democracy by imposing clear and specific obligations and restraints on parties and, then, granting party members (as well as independent election commissions) the right to enforce such constitutional obligations through judicial or administrative action. For example, specific constitutional rules regulating the process of party candidate selection for presidential and legislative elections and defining the scope and limits of parties’ disciplinary powers and procedures would better promote internal democracy within Africa’s political parties than precatory textual provisions requiring parties to “conform to democratic principles.”

Opening up Africa’s political parties to greater participation and influence by rank-and-file membership is necessary to tame the oligarchic tendencies in parties that make it easier for presidents to control the party and its legislative representatives.

B. The Judiciary and the “Fourth Branch” of Government

What about the courts, ombudsmen, auditors-general, anticorruption agencies, and other extra-parliamentary institutions in the current African constitutional landscape?

Why have these other institutions of horizontal accountability been unable to rein in presidential imperialism in post-authoritarian Africa? We begin with the courts.

In a sense, the contemporary African approach to promoting constitutionalism has been simply to “judicialize” it. Thus a disproportionate weight of the burden of limiting presidential power in post-authoritarian Africa is left to constitutional litigation and judicial enforcement of the constitution. Bills of rights and constitutional courts and supreme courts with constitutional review authority are thus de rigueur in post-transition Africa. Correspondingly, Africa’s constitutional review courts have been thrust into the role of “guardians of the constitution,” and a number of Africa’s new constitutions have liberalized standing requirements in order to encourage the public to challenge offending governmental actions.

In part, the judicialization of constitutionalism in Africa follows a global pattern. But it also reflects the disproportionate influence of Africa’s lawyers, both individually and as a class, in the agitation for reform and the ensuing process of constitution making and revision. Belief in the possibilities of “juridical constitutionalism” in Africa might also stem from the view, widespread especially within African legal communities, that weak-kneed judiciaries were largely to blame for

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315 See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate & Thorsten Allinder eds., 1995).

316 I use the term to describe a constitutional policy that relies primarily on the prospect of constitutional litigation and judicial enforcement of rights as the primary means of restraining government. See Prempeh, Marbury in Africa, supra note 47 at 1295.
the failure of early post-colonial constitutionalism in Africa. The opinion expressed recently by an African human rights lawyer, that “the first generation of the Constitutions and Bills of Rights in Common Law Africa was destroyed not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the persons and institutions mandated by those Constitutions to perform them,” is one that is shared, curiously, by many. Judgments rendered by Africa’s early courts in cases like Re Akoto (from Nkrumah’s Ghana) and Ex parte Matovu (from Milton Obote’s Uganda) are often cited to support this proposition. Following from this assessment, Africa’s courts, now bearing explicit constitutional review powers and blessed with formal independence, are expected to rise to their new responsibility as the first line of defense against executive overreaching.

In some respects, the optimists have not been disappointed. Africa’s newly empowered courts have ruled against obstinate presidents in several important cases litigated since the beginning of the 1990s. Yet, despite these early indications of


318 See e.g., T. Peter Omari, Kwame Nkrumah: The Anatomy of an African Dictatorship 13 (1970) (“Three things must be held responsible for . . . the Ghanaian’s loss of liberty under [the 1960] Constitution—President Nkrumah, the Justices of the Supreme Court and Parliament. Of these three, the judiciary must take most of the blame.”)


320 See Prempeh, Marbury in Africa, supra note 47 at 1241-42 & n.15 (referring to selected cases).
constitutionalism-friendly judicial activism in contemporary, Africa’s courts are still too enfeebled to be counted upon reliably to check presidential power.

Judiciaries across Africa suffer many of the same handicaps that undermine legislative effectiveness. 321 The finance ministry’s control of the treasury, which in many African countries has been immensely reinforced by current “cash budget” laws, 322 essentially places the judiciary at the financial mercy of the executive. Routine and gross under-funding of Africa’s courts often cause chief justices to adopt various informal routes to court influence with the executive in order to obtain the resources necessary to keep the courts functioning. Turning the judicial leadership into supplicants before government politicians carries an obvious risk to judicial independence.

This risk is heightened in many African countries by the extraordinary administrative power of that the chief justice exerts over their court systems and judicial personnel. In Ghana, for example, a longstanding judicial convention, with no clear mooring in any constitution, past or present, but which likely stems from a similar power once exercised by the Lord Chancellor of England, allows the chief justice to select single-handedly any five justices of the supreme court to sit in judgment on any case filed before the court. This power of the chief justice extends to cases in the lower courts and cases on appeal to the intermediate court. Because of the exceptional vulnerability of


322 Many African governments, under pressure from their international financiers, have moved to “cash budgets,” which means that the amount of lawfully appropriated funds that is actually disbursed or released to a designated agency depends on the inflow of tax revenues during the relevant period.
African chief justices to executive influence (for the reasons stated earlier), the vast administrative powers of a chief justice within the judicial establishment, especially the power to assign and reassign cases, opens the door to improper executive pressure.

Sensible constitutional design might help alleviate or eliminate this last problem, by, for example, a clear constitutional stipulation requiring that all cases before the supreme court be heard by all non-disqualified justices of the court or, if panels must be used, that a predetermined and blind method of panel selection be applied. Additionally, it would minimize the judiciary’s exposure to undue political influence to require, at least with respect to the appointment of the chief justice, that the nomination, which is typically made by the president, be approved by a super-majority of the members of parliament, thereby raising the prospect of meaningful minority party participation in the process of judicial selection. Judges who owe their appointments to both the majority and minority parties are less likely to feel the pressure to pay back a political debt to any one faction of the political class.

But even if judicial independence in contemporary Africa were secure, reliance on the judiciary to restrain presidential power would run into yet another problem. This is the problem of jurisprudence—of the body of judicial doctrine and associated presumptions embedded in extant case law. Often what might appear to the uncritical eye as a problem of “bad judges” (of “timorous souls,” Lord Denning’s famous

323 Lord Denning’s famous statement in Candler v. Crane, Christmas & Co., [1951] 1 All ER 426, that the progressive development of the common law requires judges to be “bold spirits,” not “timorous souls,” appears to influenced immensely the thinking of Africa’s common law lawyers (for whom Denning the Jurist is a sort of folk hero) and especially on their views regarding judicial responsibility for the demise of constitutionalism in postcolonial Africa.
words) is, in reality, a problem of “bad jurisprudence”—of judicial doctrine and attitudes about power and rights that derive from sources and contexts doctrinally at odds with the present constitutional order. The result, in the African context, is what I have called a “jurisprudence of executive supremacy”\textsuperscript{324}; a jurisprudence that is unduly deferential to executive power and, at best, skeptical of “novel” claims rooted in modern conceptions of constitutionalism. Thus, for example, courts in anglophone Africa, relying on established “common law” doctrine and presumptions, have continued to uphold against constitutional challenges anti-press and anti-free speech statutes passed during the period of one-party rule.\textsuperscript{325}

In a sense, this is the judicial aspect of the problem of path dependency in post-authoritarian Africa, of holding over to the present era a pattern of judicial inclination and decision-making developed and learned in the era of “constitutions without constitutionalism.” The traditional over-reliance on “promotion from within” to fill judicial openings in the highest courts, coupled with the tendency toward national insularity on the part of African judiciaries,\textsuperscript{326} exacerbates this problem.

Here, too, a passive, open-ended approach to constitutional design is unhelpful as a restraint on persistent abuse of executive power. Despite recent democratic and constitutional reforms, Africa’s statute books and criminal codes are filled with volumes of repressive laws enacted in the early postcolonial period and by successive authoritarian

\textsuperscript{324} See Prempeh, New Jurisprudence, supra note 32.

\textsuperscript{325} See Prempeh, Marbury in Africa, supra note 47 at 1310-22 (discussing problems of jurisprudence in Africa’s common law judiciaries).

regimes. And Africa’s “democratic” governments or their compliant law enforcement agents have not been shy to use or enforce some of these laws. In Malawi, for example, a Protected Emblems and Names Act, in force since 1967, has been enforced over fifteen times in the post-Banda era, to arrest or prosecute journalists and other public figures charged with insulting the president—presumably, still the ultimate “protected emblem and name” in newly democratic Malawi. Similarly, Zambia’s Public Order Act, which dates back to the colonial period, has been used repeatedly in the post-Kaunda era to handicap the activities of parties opposed to the government of the ruling Movement for Multiparty Democracy.

Simply enumerating a list of constitutional rights and then leaving it to future constitutional litigation and judicial review to declare these laws unconstitutional or to bring them in conformity with the demands of constitutionalism is thus a proposition fraught with the risk of a regressive jurisprudence. Moreover, judicial review is, at best, a reactive institution; a lawsuit must first be brought before the power of the courts can be activated. And, here too, despite more liberal standing rules, challenging governmental action, particularly by persons outside the political class, remains uncommon in contemporary Africa. The tradition of pro bono public-interest lawyering is also underdeveloped in most African countries. Under these circumstances, a more effective approach to constitutional design in contemporary Africa is to repeal ex ante—that is, by

327 The Act provides as follows: “Any person who does any act or utters any words or publishes any writing calculated to or liable to insult, ridicule or to show disrespect to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine of 1,000 pounds and to imprisonment for two years.” See RUTH WALDEN, INSULT LAWS: AN INSULT TO PRESS FREEDOM (2000).
express provision in the text of the constitution—those specific pieces or classes of repressive legislation (such as press censorship, sedition and criminal libel laws, and others tending toward the same purpose or effect) upon which past authoritarian regimes relied for control. The advantage of this approach is that it settles in advance the matter of the unconstitutionality of these laws, thereby eliminating the risk of a future court upholding as constitutional their continued enforcement by the state.

The challenges facing Africa’s new “fourth branch of government” are no less daunting. The most obvious is the familiar problem of institutional dependence on the good graces of the executive for adequate funding and resources. By the very nature of their constitutional or legislative mandates, these institutions—ombudsmen, human rights commissions, inspectors-general, auditors-general, etc—are more likely than even the judiciary to be perceived by the executive as “hostile”. This naturally complicates their resource deficiency problem. Moreover, these agencies of horizontal accountability often have no independent enforcement authority; their mandates usually limit them to investigating and reporting findings to parliament and/or the executive. Prosecutorial discretion in contemporary Africa generally remains the constitutional monopoly of the Attorney-General, who is invariably a politician and a member of the president’s cabinet holding office at the pleasure of the president.

Even where they have a reasonable measure of constitutionally protected independence, the exact juridical status or position of some of the newer of Africa’s “fourth branch” agencies within the constitutional landscape has remained uncertain or contestable. For example, Ghana’s constitutionally established anticorruption and human
rights commission\textsuperscript{328} has been frequently demoralized by a series of judicial rulings that have denied enforcement, and often even minimal deference, to the investigation-based findings and decisions rendered by the commission.

In light of the entrenched tripartism of modern constitutional thought and design, the idea of “non-judicial,” “non-executive” extra-parliamentary bodies with countervailing power is bound to present doctrinal and political difficulties, and not just for Africa’s courts or politicians but for the “fourth branch” institutions themselves. Given the fact that these institutions of horizontal accountability are designed to maintain oversight of the executive in specialized areas of governance, a sensible conception of their role is to regard them as complements or auxiliaries to the legislature. Under this role conception, parliament, not the president, becomes the body best qualified to exercise the constitutional power to appoint or remove officers of these fourth-branch oversight agencies (through super-majority voting rules). The current arrangement under most African constitutions, whereby the president is the appointing authority for the constitution’s “fourth-branch” oversight bodies, is at cross purposes with the intended mission of these bodies and with their need for detachment from improper executive influence.

In sum, there is far too much wishful thinking, and not enough hard-nosed realism, embedded in Africa’s current constitutions. The success of presidential term limits in contemporary Africa carries an important lesson for constitutional design in Africa: flat prohibitions and prescriptions, not open-ended provisions, hold far better prospects for taming presidential power and advancing constitutionalism in Africa.

\footnote{GHANA CONST. ch. 18 (1992) (establishing Commission for Human Rights and Administrative Justice).}
CONCLUSION

Writing about Ghana in 1994, a year into its fourth republic and almost three decades after the overthrow of its first leader, political scientist Yakubu Saaka\(^{329}\) observed, disapprovingly, that, “Nkrumah and what his era established are the fundamental basis of contemporary politics in Ghana. . . . [T]he most important facets of Ghanaian politics, it seems, have been conditioned by the Nkrumah period. Parliamentary affairs and conduct, . . . the position of the judiciary vis-à-vis the other arms of government, perceptions of the presidency and its incumbent; all these and similar considerations, actions, and orientations are viewed, judged, and measured against what when on in that earlier period.”\(^{330}\) Indeed Ghana’s current political order, including certain provisions of its constitutional text, retains important imprints from Nkrumah’s first republic. Modern Africa’s pioneer state thus still lives with “the problem of Nkrumaism without Nkrumah.”\(^{331}\)

\(^{329}\) Professor Yakubu Saaka was himself a deputy minister in the short-lived, pro-Nkrumah government of the People’s National Party (1979-1981).


\(^{331}\) Id. The Ghana Young Pioneer Movement, Nkrumah’s monolithic organization for Ghanaian youth, contained the famous refrain “Nkrumah never dies . . . . He forever lives.” Post-Nkrumah political culture in Ghana bears out that boast. See also Hyden, supra note 136 at 18 (“Despite all of the personal faults of a man like Nkrumah, and the wrong assumptions he might have made, his ideas might well have a powerful influence on Africa for years to come.”)
What is true of Ghana remains regrettably true of its sister states in the rest of Africa. Despite recent popular rejection of presidential autocracy in several African states and the resultant reconstitution of government along democratic lines, politics and government in Africa’s democratizing polities, and in particular the exercise of presidential power, continue to follow the path and patterns of the *ancien régime*, even if the overt excesses of the past have abated to some extent. Recent constitutional reforms have installed electoral democracy in many of Africa’s once autocratically-governed states. But progress toward constitutionalism remains hostage to persistent presidential imperialism. What is to be done?

Arthur Schlesinger, Jr., who invented the term “imperial presidency” and remained critical of its persistence in contemporary America until his recent death, also dismissed “constitutional tinkering”\(^\text{332}\) as a “form of escapism,”\(^\text{333}\) “a flight from the hard question, which is the search for a remedy.”\(^\text{334}\) In Schlesinger’s view, the “real task” lies with “statecraft.”\(^\text{335}\) Schlesinger is right; to an extent. Blame for the America’s imperial presidency does not lie with faulty constitutional design. The same may be said of Africa’s problem of persistent presidential imperialism. Its rise in the early postcolonial period was not always or initially the product of constitutional design, and its persistence, in defiance of recent constitutional reforms, attests to the limitations of constitutional design. But in Africa constitutional design facilitated the implantation of imperial


\(^{333}\) Id.

\(^{334}\) Id.

\(^{335}\) Id.
presidency and its persistence today is also due, in part, to the fact that recent
constitutional changes have been far from ambitious. Moreover in the United States,
unlike Africa, long-established political traditions and institutional counterweights exist
and have served, occasionally, as viable correctives to overt exercises of presidential
muscle. In Africa, then, the project of constitutional design, though not a cure-all, has not
exhausted its potential. There is yet room, therefore, for another generation of
constitutional reforms in Africa’s emerging democracies.

Contemporary constitutional design in Africa has been especially inattentive to
the reality that the extant political tradition of imperial presidency has acquired a life of
its own and thus will not easily be overcome by passive or open-ended constitutional
provisions. Presidential imperialism has survived recent counter-authoritarian transitions
and regime change in Africa partly because Africa’s new constitutions have, oftentimes
by omission, left presidents free to exploit to their advantage their reservoir of political
resources and prerogatives embedded in the traditions and practices of the ancien régime.
Innovative and aggressive constitutional reform can help tame and redress some of the
perverse tendencies toward presidential autocracy carried over from the past. In
particular, presidential patronage must be sharply curtailed, internal party democracy
must be safeguarded and strengthened, and Africa’s legislatures, judiciaries, and
emergent “fourth-branch” oversight institutions must be given the opportunity to develop
their capabilities. Forward-looking constitutional design can help with each of these
critical projects.

Presidential imperialism has been a costly experiment for African states. Its rise
at the time of the Africa’s founding, when African states needed most to build strong
institutions and a vibrant parliamentary tradition, frustrated incremental and sustainable political and economic development. Its persistence now, at a time when Africa’s nascent democracies have an opportunity to make a fresh start, continues to hold back Africa’s progress. For Africa, “the political forms of the past carry a guarantee of failure.”\textsuperscript{336} Africa no doubt needs strong and \textit{responsible} leadership. But Africa’s leadership deficit extends far beyond the presidential office; it afflicts, to a more debilitating degree, the legislature, the judiciary, political parties, the civil service, indeed all institutions of state, as well as business and civil society. Diffuse and diverse, not monolithic or personalistic, leadership is what Africa needs but lacks, and presidential imperialism remains an obstruction to the attainment of that end.

Beyond leadership, however, what Africa needs, above all, are “strong” states,\textsuperscript{337} states built on effective, mission-centered, law-governed and functioning \textit{institutions} that serve the citizenry, everywhere. Presidential leadership, however benign or visionary, cannot substitute for such institutions. Rather, presidential leadership must support and strengthen, not stymie the institutions of state—the institutions that must endure long after leaders have left. As former Brazilian president Fernando Henrique Cardoso has observed, “Perhaps the best use that statesmen can make of political acumen in such moments [of transition] is precisely that of making their nations less reliant on

\textsuperscript{336} Crawford Young, \textit{Democratization in Africa: The Contradictions of a Political Imperative}, in \textit{ECONOMIC CHANGE AND POLITICAL LIBERALIZATION IN SUB-SAHARAN AFRICA} 248 (Jennifer Widner, ed. 1994).

\textsuperscript{337} Ake, \textit{supra} note 88 (“The state in Africa needs to become both leaner \textit{and} stronger in order to carry out successfully its essential developmental tasks.”) (italics in original).
themselves and more dependent on institutions.” 338 Africa’s current transition to democracy offers an opportunity for precisely that kind of presidential statesmanship. Indeed, as Liberian president Ellen Johnson Sirleaf has recently underscored, Africa’s presidents themselves “must take the lead in dismantling the imperial Presidency.” 339

338 Fernando Henrique Cardoso, Scholarship and Statesmanship, 16 J. DEMOCRACY 5, 12 (2005).