

Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in 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.”¹ Remarkably, President Frederick Chiluba made this declaration without consulting his cabinet, party, or the national legislature.² 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 the 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,³ where it still sits today.

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,

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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).

2. GERO ERDMANN & NEO SIMUTANYI, *TRANSITION IN ZAMBIA: THE HYBRIDIZATION OF THE THIRD REPUBLIC* 13 (2003).

3. ZAMBIA CONST. (Constitution Act 1991) (as amended in 1995).

President Chiluba was one of a “new generation” of African leaders recently swept into office amidst popular disenchantment with decades of autocratic one-man and one-party rule. 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 the 27-year rule of Zambia’s founding leader Kenneth Kaunda. However, upon assuming office as president, the democratically elected Chiluba showed himself to be no less authoritarian, and arguably even more so, than his predecessor. 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 of these countries, this democratic “wave”⁴ 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 down⁵ and many more forced by new constitutional rules to face the prospect of electoral defeat or foreseeable exit through presidential term limits. The democratic turn in Africa has helped to revive and restore civil government to so-called “failed states”⁶ like Liberia⁷ and Sierra Leone.⁸ Thanks also to democratic politics, Africa now boasts its first elected woman president⁹ as well as a woman prime minister.¹⁰

4. See generally Samuel P. Huntington, *Democracy’s Third Wave*, in *THE GLOBAL RESURGENCE OF DEMOCRACY 3* (Larry Diamond & 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.”).

5. See, e.g., Editorial, *Malawi Freed From Its Liberator*, N.Y. TIMES, May 21, 1994, at 20.

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. *Foreign Policy* magazine, which first used the term “failed state,” publishes an annual Failed State Index, available at <http://www.foreignpolicy.com>.

7. See generally JOHN PETER PHAM, *LIBERIA: PORTRAIT OF A FAILED STATE* (2004).

8. See Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, 25 WASH. Q. 147 (2002).

9. Ellen Johnson-Sirleaf was sworn in as president of Liberia in January of 2006, following her victory in the presidential elections of November 2005. See *African First for Liberian Leader*, BBC NEWS, Jan. 16, 2006, <http://news.bbc.co.uk/2/hi/africa/4615764.stm>.

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,”¹¹ long associated with politics and government in Africa,¹² persists. Indeed, across the globe, as democratic government has spread, notably since the end of the Cold War,¹³ presidential power has tended to assume an imperial character.¹⁴ Yet, while constitutional and comparative legal scholars have shown a tremendous amount of interest in new constitutional courts in the world’s newest democracies,¹⁵ the contemporaneous phenomenon of persistent imperial presidency has been largely overlooked.

10. Luisa Dias Diogo was appointed Prime Minister of Mozambique in February 2004, after serving for five years as her country’s Finance Minister. See BBC News, *Brazing a Trail for African Women*, Nov. 23, 2005, <http://news.bbc.co.uk/2/hi/africa/4428434.stm>.

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 phrase “imperial presidency” interchangeably with “presidential supremacy,” “presidential imperialism,” “hegemonic presidency,” “presidential monarchy,” and “presidential dominance.” In parts of this Article, I also use the phrase “presidential autocracy” as a more robust variant of imperial presidency, describing a form of presidential rule where formal checks and balances, instead of merely being weakened, are simply non-existent *de jure*.

12. See, e.g., H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 74 (Douglas Greenberg et al. eds., 1993) (identifying “imperial presidentialism” as a distinctive feature of postcolonial rule in Africa).

13. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

14. 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.”) 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. See generally ARTHUR M. SCHLESINGER, JR., *WAR AND THE AMERICAN PRESIDENCY* (2005). 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. See, e.g., GRAHAM ALLEN, *THE LAST PRIME MINISTER: BEING HONEST ABOUT THE UK PRESIDENCY* (2002).

15. See generally *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinders eds., 1995).

This Article examines the phenomenon of imperial presidency in a region of the world—sub-Saharan Africa—that has been almost entirely ignored by scholars of comparative constitutionalism.¹⁶ In part, Africa's relative exclusion from comparative discourses stems from a widespread belief in the notion of "African exceptionalism"¹⁷ which is "the idea that the problems that plague Africa are uniquely African"¹⁸ and thus must be analyzed without reference to "universal categories of explanation."¹⁹ Regarding Africa's tradition of imperial presidency, for example, a common tendency is to blame it on "African culture," or more specifically, Africa's indigenous kingship tradition.²⁰ On that view, the imperial president in modern Africa is regarded merely as a contemporary or secular version of the traditional African "chief" *writ large*.²¹

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 postcolonial history and evolution of the African state; and, second, 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

16. See Mary L. Dudziak, *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."). The exception is South Africa, whose post-apartheid constitution and constitutional court have become a favorite of sorts for comparative constitutional scholars—an exception that fosters a sense of "South African exceptionalism" within Africa.

17. C.R.D. Halisi & Scott Bowman, *Theory that Matters: The Intellectual Legacy of Richard L. Sklar*, in *AFRICAN POLITICS IN POSTIMPERIAL TIMES: THE ESSAYS OF RICHARD SKLAR* lxi (Toyin Falola ed., 2002).

18. *Id.*

19. *Id.*

20. See, e.g., 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 expressly linked to that office.").

21. See, e.g., *id.*; 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).

in Africa, and two, the *persistence* of the phenomenon in the post-authoritarian²² African state.

In Part I of this Article, I present 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. I then proceed to describe how 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, and ultimately refute, the claim that Africa's longstanding tradition of presidential autocracy or supremacy is the modern reflection of indigenous modes of rule. In Part III, I trace 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 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 contemporary constitutional politics and 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 offer, within the context of the discussion in Part IV, some tentative constitutional reform proposals to mitigate the identified problems.

22. 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.

I. The African Presidency in Transition: From Presidential Autocracy to Constitutional Democracy

A. Portrait of an African President, 1960-1990

On March 6, 1957, the date marking the independence of Ghana, the country's founding leader published his memoirs under the title *Ghana: The Autobiography of Kwame Nkrumah*.²³ Nkrumah's choice of title, with its bold suggestion of "*l'état c'est moi*,"²⁴ may have seemed immodest or presumptuous at the time. But as time would reveal, it was indeed quite prescient. Presidents would come to personify their states not only in Nkrumah's Ghana, but throughout independent Africa. As Senegal's President Leopold Senghor observed at the time, "[t]he 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-Biigny [Côte d'Ivoire], in whom they see above all, the elected of God through the people."²⁵ 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.²⁶ By and large, presidential supremacy in postcolonial Africa was constitutionally sanctioned.²⁷ The president shared power with no one. Parliament, where one existed, was under the *de facto* or *de jure* control of the president's party, and its primary purpose was to provide a façade of

23. KWAME NKRUMAH, *GHANA: THE AUTOBIOGRAPHY OF KWAME NKRUMAH* (1957).

24. Meaning "I am the State," the boast is attributed to the seventeenth century French monarch Louis XIV (1643-1715).

25. *Quoted in* MARTIN MEREDITH, *THE FATE OF AFRICA—FROM THE HOPES OF FREEDOM TO THE HEART OF DESPAIR: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 162 (2005).

26. *See, e.g.,* Peter G. Forster, *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).

27. *See* NWABUEZE, *supra* note 21, at 104-35.

institutional and procedural propriety to the president's decrees. Legislative initiative was a presidential monopoly, and in many states the president had concurrent power to legislate by fiat.²⁸ Important policies intended to have legal effect were routinely announced by the president without prior recourse to the legislative process. African presidents controlled slush funds not subject to parliamentary oversight and often awarded major public works and procurement contracts on their own accord.²⁹ 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.³⁰

Presidential tenure was open-ended. The president was entitled to stand re-election an indefinite number of times. The elections, of course, were political nonevents, as the president generally stood unopposed and thus faced no credible prospect of defeat. Only in one instance, of a total of sixteen (nominally) contested presidential elections held across Africa from 1960 to 1989,³¹ did an incumbent president suffer defeat (and leave office accordingly).³² Many African presidents simply dispensed with all pretense of electoral accountability and held on to power indefinitely or made themselves "president for life."³³

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

28. *Id.*

29. MEREDITH, *supra* note 25, at 182-83.

30. 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.

31. Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, 18 J. DEMOCRACY 126, 131 (2007).

32. *Id.*

33. See NWABUEZE, *supra* note 21, at 126-27.

organization and distribution of political power (“the power map”)³⁴ 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.³⁵ 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”³⁶ applied by the courts, bills of rights became, in practice, “bills of exceptions.”³⁷ The African constitution, then, became an instrument for the legitimization of presidential autocracy, not a limitation of it.

Kenyan legal scholar Okoth Ogendo has coined the apt phrase “constitutions without constitutionalism”³⁸ to describe the apparent paradox, evident in the first three decades of African independence, of a commitment on the part of Africa’s postcolonial elites to “the idea of a constitution,”³⁹ on the one hand, and, on the other hand, a “rejection of the classical notation of constitutionalism.”⁴⁰ 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

34. See generally IVON D. DUCHACEK, *POWER MAPS: COMPARATIVE POLITICS OF CONSTITUTIONS* (Peter H. Merkl ed., American Bibliographical Center-Clio Press, Inc. 1973).

35. 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 21, at 320.

36. 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’”).

37. Kathurima M’inoti, *Why the Kenyan Bill of Rights Has Failed*, *EXPRESSIONS TODAY* (Nov. 1998) (cited in Prempeh, *supra* note 36, at 265).

38. Okoth-Ogendo, *supra* note 12, at 67.

39. *Id.*

40. *Id.*

his political 'clients,'⁴¹ 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."⁴² 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?

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,⁴³ whose long-serving dictator, Mathieu Kérékou, was forced by months of street protests and strikes to yield to demands for a "National Conference."⁴⁴ Once convened, the National Conference wrestled 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.⁴⁵ 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.⁴⁶

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

41. ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET* 10-12 (1982).

42. *Id.* at 267.

43. See Larry Diamond, *Introduction*, in *DEMOCRATIZATION IN AFRICA* xxiv (Larry Diamond & Marc F. Plattner eds., 1999).

44. *Id.* at ix.

45. See Bruce A. Magnusson, *Testing Democracy in Benin: Experiments in Institutional Reform*, in *STATE, CONFLICT, AND DEMOCRACY* 217 (Richard Joseph ed., 1999).

46. See generally MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* (1997).

for legislative and presidential office, once a rarity in Africa, are now regular occurrences. Currently, over 95 percent of the presidential elections in Africa are contested—in the 1960s only in two of twenty-six presidential elections held in Africa did a sitting president face an opponent.⁴⁷ 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.”⁴⁸

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.⁴⁹ Notably, traditional legislative and oversight functions have been restored to Africa’s now-representative and multi-party parliaments,⁵⁰ while new constitutional courts, or pre-existing supreme courts, have been emboldened by constitutional guarantees of independence and judicial review authority.⁵¹ Africa’s political authorities also must now contend with critical reporting and commentary from a newly assertive private media.⁵² Where once there was only a state-owned or government-controlled broadcaster or press, now, in many democratizing African states, multiple privately-owned independent press and electronic media houses publish and broadcast critical news and commentary that will have been suppressed as seditious only a few years ago. 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.

47. Posner & Young, *supra* note 31, at 130.

48. *Id.* at 131. See also GORAN HYDEN, *AFRICAN POLITICS IN COMPARATIVE PERSPECTIVE* 20 (2006) (“[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.”).

49. Posner & Young, *supra* note 31, at 131 (“Since 1990, more than three dozen African countries have adopted new constitutions . . .”).

50. See E. Gyimah-Boadi, *The Rebirth of African Liberalism*, in *DEMOCRATIZATION IN AFRICA* 41 (Larry Diamond & 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.”).

51. See generally H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 *TUL. L. REV.* 1239 (2006).

52. See H. Kwasi Prempeh, *Africa’s “constitutionalism revival”: False start or new dawn* 5 *INT’L J. CONST. L.* 469, 490-91 (2007); Gyimah-Boadi, *supra* note 50, at 35.

By far 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.⁵³ In the overwhelming majority of these, elected presidents must serve no more than two terms in office.⁵⁴ Term limits have already ended the presidential tenure of fourteen incumbent presidents in Africa since 1990.⁵⁵ 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. 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.⁵⁶

The prospect of presidential term limits or electoral defeat is constraining presidential incumbency in yet another important respect. The possible loss of legal immunity that typically accompanies retirement from presidential office opens up the prospect 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.⁵⁷ In Ghana, too, several close associates of former president Jerry

53. See Posner & Young, *supra* note 31, at 132 (Figure 3).

54. *Id.*

55. These are Mathieu Kérékou 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.

56. Posner & Young, *supra* note 31, 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 region.").

57. See Neo Simutanyi, *The contested role of former presidents in Zambia*, in LEGACIES OF POWER: LEADERSHIP CHANGE AND FORMER PRESIDENTS IN AFRICAN POLITICS 88 (Roger Southall & Henning Melber eds., 2006).

Rawlings, including the former first lady, are facing trial,⁵⁸ and a few have already been convicted⁵⁹ 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.⁶⁰

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.⁶¹ 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.”⁶² 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, instead, adopted a policy renouncing “unconstitutional changes of governments.”⁶³

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,⁶⁴ and the climate for personal liberty and rival political

58. *More of Rawlings' Men for Trial*, THE GHANAIAN OBSERVER, Feb. 21, 2007, available at <http://www.myjoyonline.com/archives/news/200702/1820.asp>.

59. See H. Kwasi Prempeh & Stephen Kwaku Asare, *The Public Officer as a Fiduciary and the Law on Causing Financial Loss to the Ghanaian State*, 16 CRITICAL PERSPECTIVES 1-2 (2003) (summarizing convictions of Rawlings administration officials under section 179A(3) of the Ghana criminal code and discussing the judgment in one leading case).

60. *Malawi ex-leader on graft charges*, BBC NEWS, July 27, 2006, <http://news.bbc.co.uk/2/hi/africa/5220068.stm>.

61. Posner & Young, *supra* note 31, at 134.

62. Prempeh, *supra* note 52, at 488.

63. AFRICAN UNION, CONST. ACT art. 4(p).

64. 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.’”).

activity has improved appreciably in Africa's democratizing states.⁶⁵ Still, power in the African state continues to reside disproportionately in the hands of one person—the president.⁶⁶

The 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. In Kenya, for example, members of parliament must still swear allegiance not only to the constitution, but also to the person of the President. 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 pronounce "laws" and announce major policy decisions without recourse to parliament. The presidential directive—"government by press release"—remains a common mode of governing, and presidents continue to exert discretionary control over public funds.⁶⁷ As one Nigerian commentator has observed, describing the state of constitutional politics in post-military Nigeria, the contemporary president still "wears a dictatorial toga."⁶⁸ Similar complaints about persistent presidential supremacy can be heard

65. Prempeh, *supra* note 52, at 22-23.

66. MCHUGH, *supra* note 20, at 140 (2002) ("[T]he dominant role of the Nigerian president remains pervasive, even during periods of effective democratic sovereignty and civilian control of the government."); 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"); 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); 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. STUD.* 297, 310 (2003) ("Regardless of their constitutional arrangements, it is also a fact that power is intensely personalized around the figure of the president.").

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

68. Ochereome Nnanna, *Is presidentialism a given?*, *VANGUARD*, Feb. 28, 2005, available at <http://www.vanguardngr.com/articles/2002/columns/peopleandpolitics/pp28022005.html>.

across post-transition Africa,⁶⁹ and there are growing calls for another round of constitutional revision to reduce presidential power. In November 2005, Kenyan voters rejected a draft constitution said to vest excessive power in the presidency.⁷⁰

The persistence of the hegemonic presidency in post-authoritarian Africa is puzzling—and not only 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”⁷¹—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 “an executant's role,”⁷² routinely referring for the president's pre-clearance matters formally committed to ministerial decision.

“[T]he ‘Office of the president’ became a parallel government, with considerably more executive power than the actual ministries.”⁷³ One commentator, writing about Nkrumah's Ghana, called the office of the president “the fourth branch”⁷⁴ 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

69. See, e.g., Daily Graphic, *The president is too powerful—Ala Adjetey*, Aug. 31, 2007, available at <http://www.myjoyonline.com/politics/200708/8186.asp> (Ghana). See also Stephen N. Ndegwa and Ryan E. Letourneau, *Constitutional Reform*, in *DEMOCRATIC TRANSITIONS IN EAST AFRICA* 84-100 (Paul J. Kaiser & F. Wafula Okumu eds., 2004) (describing and criticizing persistent presidential dominance in the countries of the East Africa region); David Booth et al., *Drivers of Change and Development in Malawi*, Working Paper 261 (Overseas Dev't Inst., 2006) (describing persistent ‘presidentialism’ in post-Banda Malawi).

70. BBC NEWS, *Kenyans reject new constitution*, Nov. 22, 2005, <http://news.bbc.co.uk/2/hi/africa/4455538.stm>.

71. NAOMI CHAZAN ET AL., *POLITICS AND SOCIETY IN CONTEMPORARY AFRICA* 163 (2d ed. 1992).

72. van de Walle, *supra* note 66, at 310.

73. *Id.*

74. HENRY BRETTON, *THE RISE AND FALL OF KWAME NKRUMAH: A STUDY IN PERSONAL RULE IN AFRICA* 97 (1966).

six civil servants in the country.⁷⁵ 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"⁷⁶—states that routinely lacked the requisite institutional capacities and resources to fulfill their basic social mission.

Presidential supremacy in Africa also famously brought with it a peculiar form of rule—to which the term *neopatrimonialism*, of Weberian origin,⁷⁷ was applied⁷⁸—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.

The heavy cost and abuses associated with presidential imperialism, not to mention gross abuses of human rights, supplied one of the main grievances of the 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."⁷⁹

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

75. van de Walle, *supra* note 66, at 310 (citing the World Bank as source). The presidency in Congo/Zaire also reportedly controlled between fifteen percent and twenty percent of the national recurrent budget and thirty percent of capital expenditures. *Id.*

76. See Claude Ake, *Rethinking African Democracy*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 69 (Larry Diamond and Marc F. Plattner eds., 2d. 1996) ("The coercive monolithism of most African political systems readily gives the impression of states with immense penetrative capacity, states which are everywhere doing everything. Yet African states are 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.").

77. See generally MAX WEBER, *ECONOMY AND SOCIETY* (1968).

78. See generally BRATTON & VAN DE WALLE, *supra* note 46, at 61-96 (describing neopatrimonial rule in Africa).

79. *Id.* at 246.

to avoid critical analysis of Africa's imperial presidency by treating it as simply "African culture" at work.

II. The African "Culture" Excuse; 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.⁸⁰ 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.⁸¹ The "African culture" thesis was in fact pressed into service by some of Africa's postcolonial elites to justify or explain various aspects of their authoritarian ideological and constitutional choices in the immediate period after colonialism. Notably, Tanzania's founding President, Julius Nyerere, among others, strongly defended socialism as deeply rooted in the communalistic and egalitarian ethos of traditional Africa.⁸² 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.⁸³ 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 traditional African "chief." On this view, the African presidential monarch is merely the indigenous African chief *writ large*.

80. C.f. ALEX THOMSON, AN INTRODUCTION TO AFRICAN POLITICS 61 (2004) (criticizing "tribalistic" interpretations of African politics as "worthless.").

81. 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. 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.").

82. 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."). 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).

83. See, e.g., JULIUS NYERERE, FREEDOM AND UNITY 196-97 (1966). See also Convention People's Party (CPP), *Program for Work and Happiness, 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.").

Indeed, 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.⁸⁴ 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." 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.⁸⁵ Nkrumah's formal opening of the annual session of Parliament was similarly attended by royal pomp and ceremony.⁸⁶ 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.⁸⁷ 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).⁸⁸ For this and other formal ceremonies, Nkrumah usually wore the traditional *kente* cloth of Akan kingship.⁸⁹ All of these performances were part of an elaborate "cult of personality" built around Nkrumah,⁹⁰ and were designed, in part, to secure cultural

84. 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 STUD. 313 (1977).

85. See *id.* at 315-17.

86. See LESLIE RUBIN & PAULI MURRAY, *THE CONSTITUTION AND GOVERNMENT OF GHANA* 66, n. 49 (2d ed. 1964) (details of official government program forma ceremonial opening of Parliament by President Nkrumah).

87. See *id.*

88. *Id.*

89. See Monfils, *supra* note 84, at 314-15. 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.

90. See BRETTON, *supra* note 74, at 87-89.

legitimacy or autochthony for Nkrumah's authoritarian projects. Thus, the appearance of cultural authenticity that surrounded the rule of postcolonial African leaders like Nkrumah did not come naturally or freely; it was politically engineered and cost a fair amount in investment of state resources.

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."⁹¹ This, of course, is a critique of the Westminster-style bifurcated executive, which was the form of executive government reflected in the independence constitutions of most African states. Specifically, 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 implies a ruler with powers and prerogatives that are not subject to meaningful or credible institutional checks or restraint within the constitutional system.⁹²

Certain monarchies in traditional Africa were despotic or "imperial" in the sense just described. Among the Buganda, for example, "the pure authority of the Kabaka was not mitigated by any other countervailing principle."⁹³ However, to say that this was uniformly true or representative of traditional African kingship would

91. 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 associate primacy with power. The position of a titular President . . . would not have been easy for them to grasp.").

92. See Okoth-Ogendo, *supra* note 12, at 74 (describing the primary indicum of "imperium" as "the exclusive constitutional right to direct the affairs of state.").

93. See David Apter, *The Role of Traditionalism in the Political Modernization of Ghana and Uganda*, 13 *WORLD POLITICS* 45, 52 (1960).

be to indulge a falsehood. In fact, the notion 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 and constitutional systems.⁹⁴ Two examples should suffice.

Take, for example, the Yoruba, one of largest and most important groups in Africa's most populous state, Nigeria. In precolonial times the Yoruba were organized into many separate states.⁹⁵ Each Yoruba state was a sovereign entity with its own *oba* or king at its head.⁹⁶ 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."⁹⁷ 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.⁹⁸ In one recorded instance, "a prince was rejected because he was so tall that he would have looked down on his subjects."⁹⁹

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.¹⁰⁰

94. See, e.g., K.A. BUSIA, *THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF ASHANTI* (1951); *AFRICAN POLITICAL SYSTEMS* (M. Fortes and E.E. Evans-Pritchard eds., 1940); R.S. RATTRAY, *ASHANTI LAW AND CONSTITUTION* (1911); Peter Lloyd, *The Political Structure of African Kingdoms, in POLITICAL SYSTEMS AND THE DISTRIBUTION OF POWER* (Michael Banton ed., 1965); R.S. RATTRAY, *ASHANTI LAW AND CONSTITUTION* (1911).

95. See generally ROBERT S. SMITH, *KINGDOMS OF THE YORUBA* (3d ed., 1988).

96. *Id.* at 87-90.

97. *Id.* at 92.

98. *Id.*

99. *Id.*

100. *Id.* at 91.

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 consult in the exercise his legislative 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."¹⁰¹

The Yoruba political system ensured a "delicate balance of power,"¹⁰² one in which, to paraphrase Madison, "ambition" was checked by "ambition."¹⁰³ For example, in the kingdom of Oyo, the most centralized and most powerful of the Yoruba kingdoms, the king's council, or *oyo mesi*, was headed by the *bashorun*. As chief military commander, chief kingmaker and the king's "first minister,"¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

The Akans of Ghana, one branch of which (the Nzimas) Nkrumah belonged to by matrilineage, also shared a system of rule much like the Yoruba's. First, despite occupying a sacral role within

101. *Id.* at 92.

102. *Id.* See also BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 314 (1992).

103. THE FEDERALIST NO. 51 (James Madison).

104. SMITH *supra* note 95, at 92, 99.

105. *Id.* at 93.

106. *Id.* at 92.

107. See Victor T. Le Vine, *African Patrimonial Regimes in Comparative Perspective*, 18 J. MOD. AFR. STUD. 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.").

the traditional political system, indigenous Akan monarchs were not “above the law,” as postcolonial Africa’s presidential monarchs were. In Ashanti, an Akan kingdom famed for, among other things, its federal military organization and imperial exploits,¹⁰⁸ the Golden Stool,¹⁰⁹ not the king himself (called the *asantehene*), symbolized “the highest level of political authority in the land.”¹¹⁰ In Kelsenian terms, the Golden Stool was the *grundnorm* in Ashanti;¹¹¹ its symbolic counterpart in the American political system would be the U.S. Constitution. All allegiance in the kingdom, though nominally rendered to the *asantehene* as occupant of the Golden Stool, was actually owed and sworn to the Golden Stool.¹¹² 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.¹¹³

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.”¹¹⁴ But this “was not many offices.”¹¹⁵ Instead, it was a “single composite office,”¹¹⁶ 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.¹¹⁷ An Akan king “was bound,

108. See Apter, *supra* note 93, 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 K.A. BUSIA, *AFRICA IN SEARCH OF DEMOCRACY* at 24 (1967) (describing the “delicate balance between central authority and regional autonomy” on which the Asante political structure was predicated).

109. See DAVIDSON, *supra* note 102 (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).

110. WILKS, *supra* note 109, at 30.

111. Austrian philosopher Hans Kelsen used the concept of *grundnorm* to denote the fundamental norm upon which a legal system is based. HANS KELSEN, *GENERAL THEORY OF NORMS* 252-64 (Michael Hartney trans., 1991) (1979).

112. WILKS, *supra* note 109, at 29.

113. *Id.*

114. BUSIA, *supra* note 108, at 23.

115. *Id.*

116. *Id.*

117. *Id.*

by custom, to act only with the concurrence and on the advice of his Council.”¹¹⁸

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).¹¹⁹ Thus, while postcolonial Africa’s imperial presidents accorded 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 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.”¹²⁰ Expanding on this theme, Ghanaian legal scholar S. K. B. Asante has described the Akan chief as a ruler subject to “the customary equivalent of a fiduciary’s duty of fidelity,”¹²¹ a sacred duty enforced both by secular law and by “ultimate accountability to ancestral spirits.”¹²²

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”¹²³ 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.”¹²⁴

118. *Id.*

119. See RATTRAY, *supra* note 94, at 81-82.

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

121. S.K.B. ASANTE, *PROPERTY LAW AND SOCIAL GOALS IN GHANA, 1844-1966* 24 (1975).

122. *Id.*

123. BUSIA, *supra* note 108, at 28.

124. *Id.* at 142-43.

Autocrats and tendencies toward tyrannical rule were, of course, not unknown to traditional African society. Naturally, certain rulers were corrupted by power.¹²⁵ But where such departures from constitutional and customary precepts occurred, they were understood as such—as “a violation of the system.”¹²⁶ 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.”¹²⁷

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 in their systems of rule, enough influential examples exist of African monarchical rule constrained by constitutional rules and by checks and balances. Moreover, merely because a modern republic might have had a monarchy in its past, including even its immediate past, does not condemn it to a regime of presidential absolutism. Attempts by Africa’s postcolonial rulers to defend or justify presidential imperialism in the name of “African tradition” are therefore insupportable. Ironically, while they were quick to invoke African culture as their defense for their various authoritarian projects, Africa’s nationalist elites were, in fact, quite contemptuous of African traditional institutions.¹²⁸ For Africa’s

125. *Id* at 26.

126. *Id.*; see also Fortes & Evans-Pritchard, *supra* note 94, at 13.

127. Fortes & Evans Pritchard, *supra* note 94, at 13.

128. See RICHARD RATHBONE, NKURUMAH 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 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.”).

imperial presidents, “[t]raditional social institutions and practices had value only in political ritual.”¹²⁹

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 postcolonial leaders. Heroes of the popular independence movements who 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; Houphouët-Biogy of la Côte d’Ivoire; *Mzee* Jomo Kenyatta of Kenya; *Ngwazi* Kamuzu Banda of Malawi; Kenneth Kaunda of Zambia; etc.—were the architects of the imperial presidency in postcolonial Africa.¹³⁰

Popular legend as well as the dominant nationalist historiography of the times—“the epic as political elites wanted it told”¹³¹—bestowed upon these new leaders a messianic stature for their role in wresting 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,¹³² 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.¹³³ In contrast to

129. BRETTON, *supra* note 74, at 11.

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

131. PAUL NUGENT, *AFRICA SINCE INDEPENDENCE: A COMPARATIVE HISTORY* 24 (2004).

132. See SEYMOUR MARTIN LIPSET, *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.”).

133. See AKHIL REED AMAR, *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.”). See generally Seymour Martin Lipset, *George Washington and the Founding of Democracy*, 9 J. DEMOCRACY 24 (1998).

Washington's self-abnegation, which is matched in Africa perhaps only by Nelson Mandela's,¹³⁴ Africa's founding fathers were unwilling to 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,¹³⁵ they deemed their personal Platonic Guardianship indispensable to the future progress and fortunes of their newly emancipated states. "The story of postcolonial rulership in Africa [is thus] at first largely a story of the historic nationalist leaders."¹³⁶

A. Constructing Africa's "Model" Imperial Presidency

Presidential supremacy is rarely created by a "big bang" or granted gratuitously by the framers of a constitutional republic. 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."¹³⁷ Similarly, the rise of presidential omnipotence in postcolonial Africa was not a spontaneous creature of constitutional design; it too came into being under the "pretext of an emergency." 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 rested their legitimacy on supra-constitutional sources.

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."¹³⁸ The first black-African nationalist to become Prime Minister at the head

134. Nelson Mandela served as the first President of a post-apartheid South Africa from April 1994 to June 1999. Despite his unparalleled popularity and iconic status, he declined to stand for a second term. For an account of his post-retirement life, see John Daniel, *Soldiering on: the post-presidential years of Nelson Mandela 1999-2005*, in LEGACIES OF POWER, *supra* note 57, at 26.

135. See TOM MBOYA, 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"). See also Goran Hyden, *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.'").

136. PATRICK CHABAL, POWER IN AFRICA: AN ESSAY IN INTERPRETATION 210 (1992).

137. SCHLESINGER, *supra* note 14, at ix.

138. HYDEN, *supra* note 48, at 26.

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 [was] linked with the total liberation of Africa."¹³⁹ His demonstrated commitment to that project, reflected in his persistent advocacy of a federated Union of African States,¹⁴⁰ made Nkrumah the most beloved pan-African leader of his generation. To his admirers and praise singers, he was not just Kwame Nkrumah of Ghana—he was "Kwame Nkrumah of Africa,"¹⁴¹ a style of address he used himself.¹⁴²

But while Nkrumah's dream was supranational or continental in scope, his immediate concerns and focus upon inheriting the colonial state were more local: He first had to consolidate and secure his "political kingdom"¹⁴³ 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.¹⁴⁴ Formally speaking, Ghana's independence Constitution established an English-style constitutional monarchy, with the Queen of England, represented locally by a governor-general, as the titular head of state. Effective governmental power, however, was vested in a prime minister and a cabinet drawn from the majority party in a

139. THE EDITORS OF THE SPARK, SOME ESSENTIAL FEATURES OF NKRUMAISM 71-72 (1965).

140. See NKRUMAH, *supra* note 91, at 216-22.

141. See BRETTON, *supra* note 74, at 36.

142. *Id.*

143. The term "political kingdom" comes from Nkrumah's famous statement made during the anti-colonial 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 91, at 50.

144. See WILLIAM BURNETT HARVEY, LAW AND SOCIAL CHANGE IN GHANA 141 (1966).

single-chamber legislature.¹⁴⁵ The governor-general's formal assent was required before any bill could become law, but in performing this function, the governor-general was bound by the advice of the prime minister's cabinet.

Although pre-independence demands by Nkrumah's opponents for a federal form of government had failed to carry, the independence constitution required, as a compromise, that Parliament enact legislation to establish regional assemblies in the, then, five territorial regions of as well as a House of Chiefs in each region.¹⁴⁶ The constitution enumerated certain responsibilities, 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 independence constitution also contained substantive protections for freedom of conscience and religion, for private property, as well as safeguards against racial or ethnic discrimination.¹⁴⁷ The Supreme Court of Ghana was vested with original jurisdiction in all cases challenging the validity of a law and was also empowered to declare void any law that contravened the substantive limitations on the legislative power of Parliament.¹⁴⁸

Nkrumah's objections to Ghana's independence constitution, which centered on the concessions made in favor of regionalism and the insulation of civil service personnel from political control, were well known before independence.¹⁴⁹ However, if he had rejected the constitution beforehand it would have delayed until an unknown time the grant of Ghana's independence. Thus, Nkrumah agreed to the limitations contained in the constitution as a precondition for independence and deferred his preferred constitutional design until later. The construction of Africa's first imperial presidency, however, did not begin with constitutional reform. In fact, the move toward that end preceded the grant of independence; and it began within the structures of Nkrumah's political party.

145. See RUBIN & MURRAY, *supra* note 86, at 8.

146. See HARVEY, *supra* note 144, at 141-42.

147. *Id.* at 221.

148. *Id.*

149. See THE SPARK, *supra* note 139, at 43-49.

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.

a. 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 founded the Convention People's Party (CPP) in 1940, claiming it to be "my party."¹⁵⁰ He was, from the founding of the party, its life chairman and leader.¹⁵¹ In that capacity, he chaired both the national executive committee and the more influential central committee of the party.¹⁵² 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 unilaterally change the party's Constitution as well as membership of the central committee. This was mere formality, for Nkrumah had always stood above the Constitution and party structures.¹⁵³ Within the CPP, legitimacy came solely from Nkrumah and from association with him.¹⁵⁴ The CPP loyalty oath, administered to all party members, demanded allegiance to the party and its "Leader, Comrade Osagyefo Dr. Kwame Nkrumah."¹⁵⁵ The party's ideology was "Nkrumaism,"¹⁵⁶ the full content of which was to be "worked out by Nkrumah and expounded in his writings."¹⁵⁷ As later expounded by Nkrumah, and as reflected in the 1960 Constitution and subsequent amendments,

150. See NKRUMAH, *supra* note 23, at 103.

151. See Henry L. Bretton, *Current Political Thought and Practice in Ghana*, 52 AMER. POL. SCI. REV. 46, 55-56 (1958); Dennis L. Cohen, *The Convention People's Party of Ghana: Representational or Solidarity Party?*, 4 CAN. J. AFR. STUD. 173, 185-86 (1970); Ryan, *supra* note 69, at 156.

152. Cohen, *supra* note 151, at 185.

153. APTER, *supra* note 83, at 207.

154. *Id.*

155. *Id.* at 353 n.31.

156. CPP, *Work and Happiness*, *supra* note 83, at 395, ¶ 16.

157. *Id.*

Nkrumalism 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.

b. Centralizing the State

Immediately upon Ghana's attainment of sovereign statehood, Nkrumah set out to dismantle the fetters 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."¹⁵⁸ Abolishing the regional assemblies would thus become Nkrumah's topmost political priority immediately after independence.

In September 1958, acting pursuant to the constitution, the Nkrumah controlled legislature passed a law establishing the regional assemblies. The new law, however, transferred no legislative or executive powers to the regional assemblies.¹⁵⁹ The regional assemblies were merely to offer advice to ministers and regional administrators appointed by the central government.¹⁶⁰ An opposition party boycott of the ensuing regional assembly elections gave Nkrumah's party total control of all five regional assemblies.¹⁶¹ Relying on his overwhelming majorities in both the regional assemblies and the national legislature, Nkrumah 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.¹⁶² With the repeal of that portion of the constitution, any constitutional provision could now be amended or repealed by a simple majority vote of Parliament. In effect, the constitution had been reduced to an ordinary statute;

158. THE SPARK, *supra* note 139, at 39.

159. See HARVEY, *supra* note 144, at 147.

160. *Id.*

161. *Id.* at 148.

162. *Id.* at 149.

parliamentary supremacy had replaced constitutional supremacy.¹⁶³ In March 1959, the Nkrumah-controlled Parliament approved a legislative amendment to the constitution abolishing the regional assemblies.¹⁶⁴ All legislative and executive power, including the power to amend the Constitution, was now completely centralized.

c. 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,¹⁶⁵ thus depriving the chiefly class of the economic basis of their customary power. Further subordination of the chiefs to national political control was secured by legislation making the official "recognition" of the central government a precondition for the exercise of customary authority by a chief.¹⁶⁶ 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.¹⁶⁷ Detention under the Act constituted grounds for disqualification from or forfeiture of membership in Parliament.¹⁶⁸ The preventive detention law, as well as other new revisions and additions to the criminal code targeting political dissent,¹⁶⁹ were vigorously enforced against leading or suspected members of the opposition party, severely hampering opposition activity and driving some of their leaders into exile.

d. Constitutionalizing Presidential Supremacy

The next step, once all putative rivals to the central authority had been neutralized, was to concentrate the centralized governmental power "horizontally" in the hands of a single person. To this end, a new constitution was adopted in 1960 to replace the Westminster-style independence constitution. Subordination of the legislature to the executive—and, specifically, to Nkrumah as prime minister—was, of course, already assured under the extant parliamentary

163. *Id.*

164. *Id.*

165. *Id.* at 115-20.

166. See RATHBONE, *supra* note 128, at 130.

167. See HARVEY, *supra* note 144, at 283-84. The Act is reproduced as an appendix to Harvey's book. See *id.* at 446-48.

168. *Id.* at 431.

169. *Id.* at 312-21.

constitutional system, as the Nkrumah-dominated CPP controlled a solid majority in the national assembly. Still, the logic of the parliamentary system of government meant that, "Despite the widening of his executive powers as Prime Minister since 1957, Nkrumah was still constitutionally *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."¹⁷⁰ Nkrumah's new constitution, enacted in 1960, "would insure against that contingency."¹⁷¹

The "Republican Constitution" of 1960¹⁷² 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 *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.¹⁷³ The President also had power to "prorogue" or terminate at any time a session of parliament.¹⁷⁴ The legislature 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.¹⁷⁵ The President could authorize moneys to be drawn from public funds outside the statutorily approved budget.¹⁷⁶ The President was empowered to appoint from among members of Parliament any number of ministers to constitute his government.¹⁷⁷ No legislative approval was required for these appointments and the legislature had no power to censure

170. TREVOR JONES, *GHANA'S FIRST REPUBLIC: THE PURSUIT OF THE POLITICAL KINGDOM* 27 (1976).

171. *Id.*

172. The full text of the 1960 Constitution is reproduced as Appendix II in HARVEY, *supra* note 144, at 390.

173. GHANA CONST. art. 24(1) (1960).

174. *Id.* at art. 22(2).

175. *Id.* at art. 31(2).

176. *Id.* at arts. 32, 34.

177. *Id.* at art. 15.

or remove a minister.¹⁷⁸ The President was also vested with unilateral appointment power over numerous other constitutional offices, including notably, the appointment of the chief justice and other judges of the superior courts,¹⁷⁹ the auditor general,¹⁸⁰ the attorney general,¹⁸¹ and members of the civil service.¹⁸² 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,¹⁸³ as did the attorney general,¹⁸⁴ whose position had been moved in 1959 from the civil service category to that of a political appointee.¹⁸⁵

Ghana's 1960 constitution reserved certain *sui generis* powers for the "First President."¹⁸⁶ The constitution specifically named Nkrumah as the First President,¹⁸⁷ having been deemed appointed to that office by an earlier referendum that approved a *draft* of the constitution.¹⁸⁸ The tenure of the First President was co-terminus with Nkrumah's (which was indefinite) as it "continue[d] until some other person assume[d] office as President."¹⁸⁹ 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.¹⁹⁰

As First President, Nkrumah had power under the 1960 constitution "whenever he consider[ed] it to be in the national interest to do so, [to] give directions by legislative instruments."¹⁹¹ In

178. *Id.*

179. *Id.* at arts. 44(1), 45(1).

180. *Id.* at art. 38(1).

181. *Id.* at art. 47(1).

182. *Id.* at art. 51(2).

183. *Id.* at art. 45(3).

184. *Id.* at art. 47(3).

185. BRETTON, *supra* note 74, at 48.

186. *See* GHANA CONST. art. 55 (1960).

187. *Id.* at art. 10.

188. 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 86, at 15-31.

189. GHANA CONST. art. 55(5) (1960).

190. *Id.* at art. 18(1).

191. *Id.* at art. 55(2).

effect, Nkrumah could legislate alone or alter unilaterally a pre-existing statute.

Ghana's constitution required the President, upon assuming office, to make a solemn declaration of his "adherence" to certain enumerated "fundamental principles,"¹⁹² 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 *Re Barfour Osei Akoto & 7 others*,¹⁹³ a *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 constitute a justiciable Bill of Rights.¹⁹⁴ In the Court's opinion, the solemn declaration of the Ghanaian President was "similar to the Coronation Oath of the Queen of England."¹⁹⁵ As such, this declaration imposed a "moral" (but not a legal) obligation on the President that could be enforced in the courts.¹⁹⁶ In short, the Republican Constitution of Ghana guaranteed the citizens of Ghana no rights whatsoever.

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 "[t]he 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 *de jure* one-party state crowned Nkrumah as Ghana's "presidential monarch."¹⁹⁷

2. *Exporting the "Nkrumah Model"*

Since pioneering African independence in 1957, Ghana has "served as a social laboratory for the continent as a whole."¹⁹⁸ Not only was Nkrumah's Ghana "in many respects the bellwether for the

192. *Id.* at art. 13.

193. *Re Akoto et al.*, G.L.R. (pt. II) 523 (1961).

194. *Id.*

195. *Id.*

196. *Id.*

197. APTER, *supra* note 83, at 371.

198. PAUL NUGENT, *BIG MEN, SMALL BOYS AND POLITICS IN GHANA* 10 (1995).

continent,"¹⁹⁹ but more importantly, Nkrumah himself "came to set the tone, ideologically and organizationally, for much of the rest of Africa."²⁰⁰ Besides being the first to lead his country to independence in sub-Saharan Africa, Nkrumah's influence in this regard must have stemmed 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 six continuous years (1951-57) *before* Ghana became fully sovereign.

Thus, as independence followed Ghana's lead and spread to the rest of Africa, 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.²⁰¹ 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,"²⁰² characterized by "enhanced" or "reinforced" presidential power.²⁰³ Importantly, these emerging presidential regimes tended to follow the pattern set by Nkrumah.²⁰⁴ Particularly in those African states that shared Ghana's common British 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."²⁰⁵

Thus, for example, the nationalist governments of independent Kenya and Uganda both unilaterally discarded the regionalist or federalist features in their independence constitutions;²⁰⁶ Tanzania

199. F.A.R. BENNOIN, *THE CONSTITUTIONAL LAW OF GHANA* 87 (1962).

200. HYDEN, *supra* note 48, at 26.

201. See BERKET H. SELASSIE, *THE EXECUTIVE IN AFRICAN GOVERNMENTS* 39 (1974).

202. *Id.*

203. *Id.*

204. NWABUEZE, *supra* note 21, at 114

205. *Id.*

206. *Id.* at 146-59.

and Uganda moved quickly to abolish the customary law powers of traditional chiefs, with Zambia following suit in short order;²⁰⁷ 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, 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 does not explain the political pattern outlined in the foregoing narrative, what “rational” explanation might account for the *continent-wide* move toward presidential supremacy 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 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 briefly discuss 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 presidential power. 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

207. *Id.* at 161-71.

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.

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 *local/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 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."²⁰⁸ As Senegalese President Senghor observed,

In Africa, the Fatherland is the *Serer* country, the *Malinke* country, the *Sonhrai*, the *Mossi*, the *Baule*, the *Fon* country. The Nation unites Fatherlands in order 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.²⁰⁹

The challenge was to shift loyalties from traditional kin-based conceptions of identity to the "new artificial entity, the nation-state."²¹⁰ 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."²¹¹

Invariably this honor belonged (almost exclusively) to the "father of the nation"—the founder and leader of the nationalist

208. CHAZAN ET AL., *supra* note 71, at 79.

209. IMMANUEL WALLERSTEIN, *AFRICA AND THE POLITICS OF INDEPENDENCE* 88-89 (1961).

210. *Id.* at 99.

211. See APTER, *supra* note 83, at 368; WALLERSTEIN, *supra* note 209, at 99.

movement through whose heroism and guidance independence had been won; or such, as least, was how popular legend saw it. "The 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."²¹² Only they commanded that "aura of legitimacy"²¹³ that made them "a readily available, easily understood, symbol of the new nation."²¹⁴

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.²¹⁵

Similar projects of "national synonymity"²¹⁶—the idea that "the country is the man and the man is the country"²¹⁷—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 [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."²¹⁸ The ideology of national integration was thus marshaled to underwrite the project of personal rule.

212. MBOYA, *supra* note 82, at 9.

213. Martin L. Kilson, *Authoritarian and Single-Party Tendencies in African Politics*, 15 *WORLD POLITICS* 262, 266 (1963).

214. WALLERSTEIN, *supra* note 209, at 99. See also TOM MBOYA, *FREEDOM AND AFTER* 83 (1963).

215. BRETTON, *supra* note 74, at 12.

216. A.H.M. Kirk-Greene, *His Eternity, His Eccentricity, or His Exemplarity: A Further Contribution to the Study of H. E. the African Head of State*, 90 *AFR. AFF.* 163, 167 (1991).

217. *Id.* at 168.

218. *Id.*

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.²¹⁹ What was needed was "unity behind [the] leadership."²²⁰ Significantly, under the conception of unity and nationhood pressed by Africa's postcolonial leaders—which was more along the lines of the European "nation-state" model²²¹—not only did national interests and national identity (even if inchoate) supersede all local or subnational identities, but only claims on the behalf of the nation were deemed valid.²²²

The national integration rationale also proved hostile to multi-party politics—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 societies of the industrialized West.²²³ The argument continued that as postcolonial Africa was still pre-industrial and thus presumably classless, rival political parties served no constructive interest aggregation or representational function in the African context.²²⁴ Rather, since "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.²²⁵ In fact, in many instances, notably in Nkrumah's Ghana, the national leadership seemed convinced that that dire prospect was already at hand.²²⁶ Thus, 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—ostensibly to forestall the

219. CPP, *Work and Happiness*, *supra* note 83, at 394.

220. NYERERE, *supra* note 91, at 54.

221. See BUSIA, *supra* note 108, at 115 n.5 (1967) (describing the European nation-state model preferred by Africa's postcolonial leaders).

222. *Id.* at 115-19.

223. See, e.g., MBOYA, FREEDOM AND AFTER, *supra* note 214, at 85.

224. *Id.*

225. See CPP, *Work and Happiness*, *supra* note 83, at 394.

226. NKUMAH, *supra* note 91, at 68 (referring to the opposition in Ghana as "violently destructive" and separatist).

disintegrative tendencies allegedly inherent in multi-party competition.

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.²²⁷ “Development” became the rallying cry of the times, and it trumped all else. As Nyerere stated, defending his introduction of a preventive detention law, “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?’”²²⁸

The development 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.”²²⁹ 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, and internal markets. Even “[i]n Ghana, which boasted some of the finest educational institutions in Africa, over 70% of the population was

227. See, e.g., NYERERE, *supra* note 91, at 54.

228. See, e.g., DENNIS AUSTIN, *POLITICS IN AFRICA* 69 (1984) (quoting statement by President Nyerere of Tanzania that, “[d]evelopment 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?’”).

229. BUSIA, *supra* note 108, 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.”).

illiterate on the eve of independence.”²³⁰ At the other extreme, Congo, when it gained independence from Belgium in 1960, had only 16 post-secondary school graduates, for a population of 13 million.

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.²³¹ Development assumed the character of a national emergency.²³² The challenge was frequently expressed in terms of a “war”²³³—a war to conquer “those very real enemies—ignorance, poverty and disease.”²³⁴ The development rationale, and its associated metaphors, carried obvious authoritarian implications.

Explaining why Tanzania’s proposed new constitution had institutionalized presidential dominance and 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 any 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 the 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 resistances which are inherent in all societies.²³⁵

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

230. CHAZAN ET AL, *supra* note 71, at 28.

231. See MBOYA, *supra* note 82, at 15.

232. See, e.g., CPP, *Work and Happiness*, *supra* note 83, at 394, ¶ 11.

233. See, e.g., NKUMAH, *supra* note 91, at 103; NYERERE, *supra* note 91, at 286.

234. MBOYA, *supra* note 214, at 159 (quoting Nyere).

235. Julius Nyerere, *How much Power for a Leader?*, 7 AFR. REP. 5 (1962).

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.²³⁶

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 controlling 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.²³⁷ 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.”²³⁸ 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.”²³⁹ Socialism thus furnished an additional justification for the one-party state and for authoritarian political leadership.

236. NKUMAH, *supra* note 91, at 83.

237. 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 MBOYA, *supra* note 214, at 166-68 (“[The] main difference [between African social and cultural structure and the European structure] . . . is that [the African] is communal by 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.”).

238. NKUMAH, *supra* note 91, at 119.

239. CPP, *Work and Happiness*, *supra* note 83, at 393-94.

2. *Historical and Comparative Rationales*

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.”²⁴⁰ The African 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”²⁴¹ 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 Africa’s postcolonial leaders had little difficulty regressing to the former, more established authoritarian path when confronted with the “dual” legacy of the colonial regime, or what one commentator has called an “authoritarian-democratic paradox,”²⁴²—namely, a dominant autocratic heritage embedded in the practices, usages, laws, and institutions of the colonial state on 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. 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”²⁴³—he “alone [was] responsible for the colony’s administration. His authority in the colony [was] practically autocratic.”²⁴⁴ The powers of

240. CRAWFORD YOUNG, *THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE* 283 (1994).

241. Crawford Young, *Africa: An Interim Balance Sheet*, in *DEMOCRATIZATION IN AFRICA*, *supra* note 43, at 64.

242. Peter J. Schraeder, *Political Elites and the Process of Democratisation in Africa*, in *THE DEMOCRATISATION OF DISEMPOWERMENT: THE PROBLEM OF DEMOCRACY IN THE THIRD WORLD* 44, 46 (Jochen Hippler ed., 1995).

243. JOHN MENSAH SARBAH, *FANTI NATIONAL CONSTITUTION* 229 (2d ed. 1968).

244. *Id.*

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 *lèse-majesté* incurs."²⁴⁵ 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.²⁴⁶ Where the Legislative Council had an "unofficial" or representative majority, the Governor "had certain 'reserved powers' by which he could invalidate legislation."²⁴⁷

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."²⁴⁸ Importantly, African nationalists' own harsh experience of colonial justice, and of the political uses of the judicial system, impressed on them the belief that "a Court [was] primarily . . . the institution through which a government, Colonial or otherwise, imposed its policy behind the cloak of magisterial propriety."²⁴⁹

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

245. Christopher Fyfe, *The Legacy of Colonialism—Old Colony, New State*, 25 PHYLON 247, 247 (1964) (*lèse-majesté* is a crime against the dignity of a reigning sovereign).

246. *Id.* See also Michael Crowder, *Whose Dream was It Anyway? Twenty-Five Years of African Independence*, 86 AFRICAN AFFAIRS 7, 15 (1987); NKRUMAH, *supra* note 91, at 16.

247. NKRUMAH, *supra* note 91, at 17.

248. NKRUMAH, *supra* note 23, at 111.

249. GEOFFREY BING, *REAP THE WHIRLWIND: AN ACCOUNT OF KWAME NKRUMAH'S GHANA FROM 1950 TO 1966* 215 (1968). Bing, a former British Labour MP, was Nkrumah's first Attorney General.

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 powers and methods of government which the [c]olonial authorities had employed."²⁵⁰

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, General de Gaulle, Adolph Hitler, Josef Stalin, Mao Tse-tung. These "strong men at the helm," or 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), Jawaharlal Nehru (India), and Gamel Nasser (Egypt), a new generation of postcolonial nation-builders—the "Bandung Generation"²⁵¹—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."²⁵²

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

250. *Id.* at 222.

251. PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES 466-505 (1991) (discussing the "Bandung Generation").

252. NKROMAH, *supra* note 23, at vii-viii.

years in Roosevelt's "New Deal" America as a young student,²⁵³ launched what he called "The New Deal" for the Gold Coast's cocoa farmers soon upon becoming Leader of Government Business in the colony.²⁵⁴ Later, as President of Ghana's first republic, Nkrumah would use the example of Roosevelt's unsuccessful court-packing plan to justify a proposed amendment to the Ghana constitution that empowered him to dismiss judges of the superior courts.²⁵⁵ 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,"²⁵⁶ 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, apparently, was the task of achieving social and economic transformation required strong and decisive presidential leadership, unrestrained by judicial, or indeed any constitutional, checks.²⁵⁷ 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, 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.

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 to a series of postwar political, military and constitutional

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

254. *Id.* at 153.

255. See BRETTON, *supra* note 74, at 91-92 (quoting statement by Nkrumah's government on the 1964 amendment to the Constitution of Ghana).

256. See Robert B. Seidman, *Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy*, 1969 WISC. L. REV. 83, 105 (quoting Tanzanian Government position).

257. See, e.g., NWABUEZE, *supra* note 21, 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.").

crises,²⁵⁸ the constitution of 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”²⁵⁹ coincided roughly with the independence of her African colonies during the 1960s.²⁶⁰ The constitution of the Fifth French Republic thus served as the blueprint for the independent constitutions of African’s francophone states.²⁶¹ 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 constitutional system—*présidentialisme renforcé*—that merely reinforced the hyper-presidentialism of the Gaullist original.²⁶²

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

258. On the origins of the Fifth Republic and de Gaulle’s role generally, see JEAN LACOUTURE, *DE GAULLE: THE RULER, 1945-1970* (Alan Sheridan trans. 1992) (specifically chapter 16).

259. See BUSIA, *supra* note 108, at 51.

260. See SELASSIE, *supra* note 201, at 19-20.

261. See A.S. Alexander Jr., *The Ivory Coast Constitution: An Accelerator, not a Brake*, 1 J. MOD. AFR. STUDS. 293, 296-97 (1963) (noting French Fifth Republic-origins of 1959 constitution of Ivory Coast).

262. *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.”).

the Parliament, the constitution of Ghana suggests the influence of the Constitution of the Fifth Republic of France.”²⁶³

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.

* * *

In invoking both the national integration and the development rationales for their authoritarian projects, Africa’s postcolonial leaders had the additional authority of credible academic opinion on their side.²⁶⁴ Of course there were prescient voices, like that of W. Arthur Lewis, that argued the contrary position,²⁶⁵ 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 *choices* made by Africa’s postcolonial leadership. In the end, the implantation of presidential autocracy in Africa cannot be explained as a “co-production,”²⁶⁶ responsibility for which must be shared with

263. RUBIN & MURRAY, *supra* note 86, at 32. See also APTER, *supra* note 83, 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 . . .”).

264. See, e.g., WALLERSTEIN, *supra* note 209, 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, *Social Change in Africa*, 36 INT’L AFFAIRS 447, 456 (Oct. 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.”).

265. See W. ARTHUR LEWIS, *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.”).

266. 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

others beyond Africa's postcolonial elites.²⁶⁷ That the atmosphere and conditions of the early postcolonial period created an "autocratic temptation" of sorts may be readily conceded.²⁶⁸ But circumstance, or "opportunity," alone does not dictate agency or outcome. While leaders like Julius Nyerere²⁶⁹ were sincere and disciplined in their commitment or belief, in Africa, 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 1953,²⁷⁰ and also expressed the opinion, prior to Ghana's independence, that "emergency measures of a totalitarian kind" might need to be employed "in the period following independence."²⁷¹

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

economic change from the start." FREDERICK COOPER, *AFRICA SINCE 1940: THE PAST OF THE PRESENT* 118 (2002). Given the deep and direct entanglement of international financial institutions and external donors and financiers in the management of the postcolonial economy, Cooper's insight is hard to refute. With respect to the choice of political or regime forms, however, African elites have demonstrated a substantial degree of autonomy and initiative, even if "outside forces" have helped prop up dictatorships for their own strategic interests.

267. See MEREDITH, *supra* note 25 at 164, 250 (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 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.").

268. See, e.g., K.A. 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.

269. In the end, Julius Nyerere admitted the failure of his *Ujamaa* policies and stepped down from the presidency, allowing multi-party elections to be held even without popular pressure from the Tanzanian people.

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: "There are but two or three of us who know what we are doing." RICHARD WRIGHT, *BLACK POWER: A RECORD OF REACTIONS IN THE LAND OF PATIOS* 63 (1953).

271. NKUMAH, *supra* note 23, at x.

projects, it is not clear that any of that initial progress required “emergency measures of a totalitarian kind.”²⁷² 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*. Africa, indeed, has had no “authoritarian advantage” to report.²⁷³

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.²⁷⁴ 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, 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 the discussion in Part II has 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

272. *Id.* at p.x.

273. See Cyril Daddieh, *Beyond Governance and Democratization in Africa: Toward State Building for Sustainable Human Development*, 1 J. SUSTAINABLE DEV’T 10 (Winter/Spring 1999) (“[F]orty years of authoritarianism had failed to produce a single case of authoritarian development regimes (growth with development) à la Taiwan, [South] Korea, and China or even authoritarian growth regimes (growth without development or welfare) à la Brazil under the military junta.”).

274. See, e.g., COOPER, *supra* note 266, at 156 (“By the 1970s in most African states, the development slogan had become either tragedy or farce . . .”).

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. Significant, the influential, larger-than-life architects of Africa's imperial presidency have exited the political scene, some of them forced 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 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.²⁷⁵

On paper, and compared to 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 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

275. See *Kenyans Reject New Constitution*, BBC NEWS, Nov. 22, 2005, <http://news.bbc.co.uk/2/hi/africa/4455538.stm>.

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.”²⁷⁶ 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 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. This confirms 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,”²⁷⁷ 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.”²⁷⁸ 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 constitutions. All of these limitations associated with constitutions generally are true of Africa’s new and revised constitutions.

The content of Africa’s contemporary constitution design 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

276. Bertrand de Rossanet, *The Ghanaian Constitutionalism of Liberty*, 60 THE REV. 47, 47 (1998).

277. SCHLESINGER, *supra* note 11, at 13.

278. *Id.*

ignorance”²⁷⁹ 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 democratic transition and accompanying constitutional reforms were mixed and, often, opportunistic. In many instances, regime opponents and ‘new democrats’ were themselves “recycled elites” cut from the same political cloth as the discredited incumbents.²⁸⁰ 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

279. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1972).

280. See Richard Joseph, *Africa: States in Crisis*, 14 J. DEMOCRACY 159, 165 (2003) (“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 governments.”); see also Nicolas van de Walle, *The Impact of Multi-Party Politics in Sub-Saharan Africa*, 1 FORUM FOR DEV. STUD. 5 (2001), available at <http://se2.isn.ch/serviceengine/FileContent?serviceID=EINIRAS&fileid=072A78A5-CF08-6BDE-FE22-846467BA8E13&lng=en> (identifying past regime affiliations of some of Africa’s “new” leaders).

nominally federal system of 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. 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 extent, 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 . . .”²⁸¹ 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

281. van de Walle, *supra* note 280, at 31.

Westminster parliamentary form, in which executive power is exercised by a cabinet headed by a prime minister, preclude “prime ministerial” dominance within the constitutional system.

At any rate, while most African constitutions have retained the executive presidency, only a few can be said to be patterned after the classical presidential form, in which the president operates within a constitutional framework of institutional checks and balances—which is not to suggest, knowing U.S. constitutional history to prove the contrary, that the ‘pure’ form of presidentialism is invulnerable to presidential imperialism either. Of Africa’s newly emerging democracies, Nigeria and Liberia, with their popularly elected presidents and separate two-house legislatures, come closest to imitating the U.S. form. Most contemporary African constitutions, however, tend toward the “hybrid” model.²⁸² 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.²⁸³ 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).²⁸⁴ Thus, rather than restrain presidential power, the hybrid form has tended to facilitate or embolden it. Still,

282. See Muna Ndulo, *Presidentialism in the 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 . . .”).

283. See Mpazi Sinjela, *Constitutionalism in Africa: Emerging Trends*, 60 THE REV. 23, 27 (1998) (“The constitutional reforms in Francophone African countries have . . . signal[led] a return to the independence constitutions model[led] after that of France.”); see also HYDEN, *supra* note 48, at 108.

284. See Momba, *supra* note 66, 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.”).

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 and Congo (Brazzaville), 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."²⁸⁵ 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.²⁸⁶ 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. However, by constitutional command, they 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 inquiries into the conduct of executive departments and officials. Thus, on paper at least, most

285. Ndegwa & Letourneau, *supra* note 69, at 96.

286. *See id.*

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 the imperial presidency 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."²⁸⁷ For example, despite the fact that, under the typical African constitution, the election of the speaker of the legislature is a power vested collectively in the legislators themselves, in practice legislative majorities (usually of the president's party) have tended to yield to the president's known preference for the position. 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.²⁸⁸

Other examples of 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 standing 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?

In structuring the formal relationship between the president and parliament, contemporary constitutional policy in Africa has typically followed a passive or "open-ended" approach, dividing governmental

287. SCHLESINGER, *supra* note 11, at ix.

288. 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. *See* Momba, *supra* note 66, at 114-115.

powers between the executive and the legislature and leaving laws and policies to be made through the dynamic *political* interaction between the president and the legislature. The implicit assumption is that, once granted countervailing power in a constitution, Africa's legislatures will, in fact, use their power to check presidential overreaching.

Within the extant 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 farfetched. The African president has at his disposal such vast *extraconstitutional* (political) resources and advantages vis-à-vis the legislature (and legislators), that, except in the event of "divided government," expectations that Africa's current legislatures might act to check or restrain presidential power have generally failed to materialize. More than explicit constitutional design, it is these political resources and advantages held by African presidents that continue to underwrite presidential imperialism in contemporary Africa. These inherent advantages come from diverse sources.

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. Legislative elections, though vigorously contested, are treated as "sideshows" to the main event,²⁸⁹ which is the presidential election. The reason is simple: the presidency is where "rents" and "patronage" resources—contracts, jobs, licenses, waivers, budgets, aid, perks, etc.—continue to be lodged. As a result, majority parties in Africa, both old and new, have tended to behave like "mutual benefit societies," using control of the state more for factional patronage than for enacting and implementing public-regarding policy preferences. Thus, where, as is typically the case, the presidential party also commands a parliamentary majority (either

289. van de Walle, *supra* note 66, at 315.

290. LORD, *supra* note 14, at 83

291. *Id.*

292. See, e.g., Momba, *supra* note 66, at 115 ("[T]he ruling party has not taken kindly to Members of Parliament who have exercised independent stances in the national assembly.").

alone or through voting coalitions), it is expected that the party's members of parliament will toe the president's line. In consequence, the Burkean conception of political parties as providing "a sort of extraconstitutional check on the executive or would-be executive,"²⁹⁰ primarily by pre-committing the party's candidates for presidential office to a policy-oriented "party program that is tolerably representative of the views and interests of important segments of society,"²⁹¹ does not describe current practice in Africa. In Africa's zero-sum political environment, where partisan rivalry is primarily over control of patronage, not about ideology or policy, the majority party's legislative support for the president is assured as long as the president is willing to use the prerogatives of his office to advance the *material* interests of the party and its members.

As a result, "conscience voting" by majority-party legislators is strongly disfavored, especially if it means voting against the will of the party's president.²⁹² In some cases, the problem has been exacerbated or sanctioned by the constitutional text itself. In Malawi, for example, one influential view of section 65 of the country's constitution would make cross-party voting against the wishes of one's party grounds for forfeiture of one's seat in parliament.²⁹³ The Sierra Leonean constitution is more explicit: A legislator's seat may be declared vacant "if by his conduct in Parliament by sitting and voting with members of a different party, the Speaker is satisfied after consultation with the Leader of the Member's party that the Member is no longer a member of the political party under whose symbol he was elected to Parliament."²⁹⁴

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.²⁹⁵ In Ghana, recent presidents have used similar power granted to them by Ghana's constitution to appoint a large number of his party's MPs (and nearly all of the most influential

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

294. SIERRA LEONE CONST. art. 77 (1).

295. See Ndulo, *supra* note 282, at 786.

ones) to his cabinet and administration.²⁹⁶ In fact, in such hybrid regimes, the ambition of many legislators, in contesting election to parliament, is to secure subsequent presidential appointment to the executive branch, not to build a legislative career. The promise or prospect of such an appointment is thus an important carrot with which presidents in Africa's hybrid systems are able to bend even the backbenchers in parliament to the executive's wishes.

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.²⁹⁷ 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.²⁹⁸ The executive branch

296. 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, Mar. 2005.

297. 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.

298. See Thandika Mkandaware, *Crisis Management and the Making of "Choiceless Democracies,"* in STATE, CONFLICT, AND DEMOCRACY IN AFRICA 125 (Richard Joseph ed., 1999) ("Democratic states that are built on the ruins of authoritarian rule often retain some of the previous state's institutions, which linger on due to social inertia and structural rigidities.").

in Africa has too long been accustomed to 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 treasury²⁹⁹—with the legislature's role limited to approving or rejecting the president's proposed budget in its entirety. 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

299. See, e.g., GHANA CONST. art. 108 (1992).

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. Moreover, for Africa's legislators, under pressure from their constituents to meet incessant demands for help with individual educational, medical or funeral expenses,³⁰⁰ "constituency service" often trumps oversight and other traditional legislative responsibilities as the legislator's most important expected role.³⁰¹ As it is the African executive that controls patronage resources, a conception of the legislator's role that puts a premium on constituency service, above all else, makes legislators easily vulnerable to executive capture or co-optation.

The fact that Africa's are disproportionately financed, not from direct taxation but from "rents"—whether in the form of revenues from the extraction of natural resources, marketing board profits from primary commodity exports, or external donor assistance—undermines the prospect of a "fiscal social contract" between government and the citizenry and thus further diminishes the influence of the legislature (vis-à-vis the executive) in the area of public finance.³⁰² Indeed, the ministry of finance, not parliament or its finance or budget committee, has remained the main route through which external donors and multilateral financiers engage with and channel aid and assistance to African governments.³⁰³ Even parliament itself must depend, by and large, on the good graces of the finance minister—and thus of the president—for adequate resources for both legislators and the legislative institution itself. 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.

300. See Joel Barkan, *Legislative Development in Africa 3-4* (2007) (unpublished manuscript) (copy with author).

301. *Id.*

302. 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. See Robert Bates, *The Economic Bases of Democratization*, in *STATE, CONFLICT AND DEMOCRACY*, *supra* note 45, at 83-89.

303. See Thandika Mkandaware, *supra* note 298 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 . . .").

Fourth, presidential supremacy in Africa continues to benefit politically from a widespread and persistent belief among influential sections of the African polity that what Africa lacks but sorely needs is a “strong” or “visionary” *leader*. The famous assertion by Nigerian novelist and essayist, Chinua Achebe, that, “The trouble with Nigeria is simply and squarely a failure of leadership,”³⁰⁴ sums up the feeling of many contemporary Africans about the source of—and, thus, the solution to—their national crises of governance and underdevelopment.³⁰⁵ Tolerance for presidential autocracy or “bad leaders” may have worn thin in Africa’s democratizing polities, but, insofar as overcoming underdevelopment remains the primary concern of most Africans, belief in the beneficent uses of preponderant presidential power remains fairly strong. In fact, among influential segments of the African elite, Lee Kuan Yew’s “Singapore Story,” popularized in recent years by his influential memoirs,³⁰⁶ appears to have revived or stirred up an “autocrat envy” of sorts.³⁰⁷

Problematizing the African crisis in a personalistic or leader-centered way (as opposed to focusing on policy and institutional development) thus continues to work to underwrite vast presidential power in the name of visionary and reform-minded leadership. This is not to say that leadership does not matter. Africa’s leadership deficit is real. But it is a deficit that extends far beyond the presidential office; it afflicts, to an even more debilitating degree, all the institutions of state and local government, and the postcolonial tradition of presidential hegemony has much to blame for this. Moreover, quiet apart from oversimplifying the Singapore story, the problem with the leader-centered view of Africa’s crisis is that there is as yet no known science for replicating, sustaining or

304. CHINUA ACHEBE, *THE TROUBLE WITH NIGERIA* 1 (1983).

305. See, e.g., Simon Robinson, *Africa’s Game of Follow the Leader*, *TIME*, Nov. 26, 2005.

306. See generally LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965-2000* (2000). For another perspective of the Singapore story, highlighting the crucial roles played by other, less-well-known members of the Singaporean political class, see LEE’S LIEUTENANTS: SINGAPORE’S OLD GUARD (Lam Peng Er & Kevin Yi Tan, eds., 1999).

307. See, e.g., Ruhakana Ruganda, *A Changing Uganda: A Government Perspective*, CHALLENGES AND CHANGE IN UGANDA (Woodrow Wilson Center, 2005) (“What Uganda needs now, in order to bring about the transformation of its economy, is a visionary leadership such as that of Mr. Lee Kuan Yew in Singapore.”), available at www.wilsoncenter.org/topics/pubs/Uganda2.pdf.

institutionalizing a Lee Kuan Yew in contemporary Africa (or anywhere else, for that matter). In fact, as Africa's painful experience with messianic ideologies (including the dismal record of the "new generation" of leaders) amply demonstrates,³⁰⁸ trusting in heroic leadership—and thus allowing any one person to aggrandize or wield disproportionate power in the name of "development"—is not only short-sighted, it often disappoints³⁰⁹—and at great cost to institutional development and civil liberties.

Except as to term limits, however, this cautionary tale from Africa's postcolonial experience is not adequately reflected in contemporary constitutions in Africa. As currently designed, Africa's democratic constitutions rely too greatly on the vagaries of day-to-day politics, on legislative self-assertion, or else on presidential self-restraint to tame the pervasive tendencies and temptations toward presidential imperialism. In so doing, contemporary constitutional design in Africa not only ignores the persistence of structural rigidities from the past, it appears to rest on a view of power and of human nature that is anything but realistic.

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

308. See generally George B.N. Ayittey, *Why Africa is Poor*, in SUSTAINABLE DEVELOPMENT: PROMOTING PROGRESS OR PERPETUATING POVERTY (Julian Morris ed., 2002).

309. See Thomas Carothers, *The 'Sequencing' Fallacy*, 18 J. DEMOCRACY 12, 15 (2007) ("Bluntly stated, for every Lee Kuan Yew of Singapore there have been dozens or even hundreds of rapacious, repressive autocrats posing as reformers . . .").

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 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. 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.”³¹⁰ 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.

310. van de Walle, *Impact of Multi-Party*, *supra* note 280, at 30.

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 might be better restrained through constitutional texts that favor bright-line rules over discretionary or permissive language, when it comes to defining the scope of executive power. The idea here is for Africa's constitutional framers to be more definite or specific in their delineation or enumeration of the scope and limits of presidential power, rather than write the constitutional text in a way that renders it unduly vulnerable to gamesmanship by power-obsessed presidents and patronage-seeking legislators. As the recent success of constitutionally imposed presidential term limits has shown, constitution-based bright line rules, not extra-constitutional political bargaining, are a more reliable way to check inordinate presidential ambition in Africa's new democracies.

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 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. 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 effective way to end presidential tenure constitutionally 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 do, 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 regulation in the constitutional text.

Changing the orientation and behavior of parliamentary parties is also critical to restoring effective balance of power in legislature-president relations. The challenge here is to overcome 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. 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 vaguely-worded provisions requiring parties to “conform to democratic principles.”³¹¹ 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.

311. GHANA CONST. art. 55(5) (1992).

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.³¹² 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”³¹³ in Africa might also stem from the view, widespread especially within African legal communities, that weak-kneed judiciaries were largely to blame for the failure of early postcolonial 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,”³¹⁴ is one that is shared, curiously, by many.³¹⁵ Judgments rendered by Africa’s early courts in cases like *Re*

312. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate & Thorsten Allinder eds., 1995). See also RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000).

313. 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.

314. Chidi Anslem Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, 8 AFR. SOC’Y OF INT’L & COMP. L. PROC. 124, 136-37 (1996).

315. 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.”).

Akoto (from Nkrumah's Ghana) and *Ex parte Matovu*³¹⁶ (from Milton Obote's Uganda) are often cited to support this opinion.³¹⁷ 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.³¹⁸ Yet, despite these early indications of constitutionalism-friendly judicial activism in contemporary Africa, 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.³¹⁹ The finance ministry's control of the treasury, which in many African countries has been reinforced immensely by current "cash budget" laws,³²⁰ 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 of influencing 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.³²¹

316. *Uganda v. Comm'r of Prisons: Ex Parte Matovu* [1966] E.A.L.R. 514. (upholding unilateral and extraconstitutional abolition of Uganda's 1962 constitution by then prime minister Milton Obote and his subsequent installation of a new 1966 constitution).

317. See, e.g., Nana Asante Bediatuo, *The Presidential Model and Constitutionalism in Ghana*, STATESMAN (n.d.) available at http://www.thestatesmanonline.com/pages/news_detail.php?newsid=3856§ion=9 (charging the Ghana Supreme Court in the *Re Akoto* case with "complete abdication of inherent judicial responsibility.")

318. Prempeh, *supra* note 51, at 1241-42 & n.15 (referring to selected cases).

319. See, e.g., S.K. Asare, *Accounting for Judicial Performance in an Emerging Democracy—Lessons from Ghana*, 4 U. BOTSWANA L.J. 57 (2006) (discussing internal problems undermining judicial effectiveness in Ghana).

320. 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.

321. This risk is heightened in many African countries by the extraordinary administrative power chief justices exert over their court systems and judicial personnel. In Ghana, for example, a longstanding judicial convention, with no basis in the national constitution, 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. See P.S.

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,”³²² in Lord Denning’s famous 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”³²³—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 archaic common law doctrine regarding the validity of so-called “claw-back clauses,”³²⁴ have continued to uphold against constitutional challenges anti-press and anti-free speech statutes enacted during the period of one-party rule.³²⁵ Thus narrowing the legal space for robust journalism in African democracies.

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 problem is heightened by the fact that,

ATIYAH, LAW AND MODERN SOCIETY 17 (2d ed. 1995) (criticizing power of the Lord Chancellor to “choose (in effect) which judges will hear cases” on the Court of Appeal or House of Lords of England). 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 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.

322. 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 have 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.

323. See Prempeh, *supra* note 36.

324. See Chris Ogbondah, *Democratization and the Media in West Africa: An Analysis of Recent Constitutional and Legislative Reforms for Press Freedom in Ghana and Nigeria*, 6 W. AFR. REV. 8 (2004).

325. See Prempeh, *supra* note 51, at 1310-22 (discussing problems of jurisprudence in Africa’s common law judiciaries).

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 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,³²⁶ in force since 1967, has been enforced over fifteen times in the post-Banda era, to arrest or prosecute journalists for insulting the president. Similarly, Zambia's Public Order Act, which dates back to the colonial period, has been used repeatedly in the post-Kaunda era to frustrate the associational and related activities of parties opposed to the government of the ruling Movement for Multiparty Democracy. Under circumstances such as these, the policy of 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 one that is fraught with the risk of a regressive jurisprudence.

A more effective approach to constitutional design in contemporary Africa is to repeal *ex ante*—that is, by 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. Including rights-friendly or power-restraining "interpretive instructions" along with bills of rights, as the South African constitution does,³²⁷ is yet another effective way to guide

326. 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).

327. Section 39(1) of the South African constitution states that:

When interpreting the Bill of Rights, a court, tribunal or forum

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and

judicial review of constitutional provisions in a direction consistent with the values and norms of liberal constitutionalism.

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.

In sum, when it comes to the allocation and specification of power within the state, there is far too much wishful thinking, and not enough hard-nosed realism, embedded in Africa's current constitutions. The Madisonian insight, that a republican constitution is a constitution for the governance of a political community by "men," not "angels,"³²⁸ is one that appears not to have been heeded by Africa's constitution makers. The singular success of presidential

(c) may consider foreign law.

Section 36 also provides that:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.

In addition, section 233 requires a court, when interpreting legislation, to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

328. THE FEDERALIST NO. 51, at 246-47 (James Madison) (David Wooton ed., 2003).

term limits in reversing the tradition of presidential self-perpetuation in contemporary Africa carries an important lesson for constitutional design in Africa: flat prohibitions and bright line rules, not grants of open-ended or discretionary authority, hold far better prospects for taming presidential power and advancing constitutionalism in Africa's emerging democracies.

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 Saaka³²⁹ 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,³³⁰ and measured against what when on in that earlier period.

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 omnipotence.

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

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

330. Yakubu Saaka, *Recurrent Themes in Ghanaian Politics: Kwame Nkrumah's Legacy*, 24 J. BLACK STUDS. 263, 263 (1994).

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*.

The Great Man theory³³¹ has had its day in Africa. It has not served Africa well. Africa needs to move beyond reliance on the illusion of heroic leadership. What Africa needs, above all, are strong, capable states³³²—"service states" that are built on a foundation of effective, law-governed and functioning *institutions* and that serve, not lord over, the citizenry. 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 themselves and more dependent on institutions."³³³ Africa's current transition to democracy offers an opportunity for precisely that kind of presidential statesmanship."³³⁴

331. The Great Man Theory views history as "the biography of great men." See THOMAS CARLYLE, *ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY* (1843). For much of its postcolonial history, the story of Africa has indeed been the story of its "Big Men."

332. Ake, *supra* note 76, at 88 ("The state in Africa needs to become both leaner and stronger in order to carry out successfully its essential developmental tasks.").

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

334. See Ellen Johnson Sirleaf, *The Challenges of Leadership in Post-Conflict Africa: The Case of Liberia*, The 2006 Oppenheimer Lecture at the International Inst. for Strategic Studies, London (May 31, 2006), available at <http://www.iiss.org/conferences/recent-key-addresses/oppenheimer-lecture---ellen-johnson-sirleaf> (it behooves Africa's new generation of leaders to "take the lead in dismantling the imperial Presidency").

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