

Real Constitutional Change in Sub-Saharan Africa after the Third Wave of Democratisation: A Comparative Historical Inquiry

Verandering van reële constituties in Afrika bezuiden de Sahara na de derde golf van democratisering: een vergelijkend historisch onderzoek.

(met een samenvatting in het Nederlands)

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Dedication

I dedicate this thesis to millions of Africans that have been victims of authoritarian rule.

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The success achieved in this project is credited to various individuals and institutions who affected me and it for good. I mention them, though reluctantly, as I fear I may leave out some. Excluding myself as is customary, key persons that deserve mention are my supervisors: Professors Philip Langbroek and Theunis Roux. In spite of their commitments, they created time to vigorously interrogate my ideas and how I presented them. With them, this journey has been less onerous than it should have been. I shall eternally remain grateful to them for their patience, firmness, understanding, inspiration, encouragement and guidance- not to mention occasional annoyance- to which the success of this exercise should be attributed. Any error encountered herein is most likely because I ignored or overlooked any one or more of their comments.

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Abstract

This thesis explains the transformation and endurance of constitutional orders in Sub-Saharan Africa after the democratic diffusion dubbed the “Third Wave of Democratisation”. The effect of this diffusion was felt in Africa starting in the late 1980s and saw the collapse of autocratic and military regimes as well as restoration of multi-party politics. In the early 1990s, several countries in Sub-Saharan Africa riding on the impetus supplied by the Third Wave embarked on constitution-making or amendment processes with an aim to undo authoritarian constitutionalism. Unfortunately, this venture did not lead to transformation of legal and political orders from authoritarian to democratic constitutionalism. With the exception of a few countries, such as Cape Verde, South Africa and Benin, most countries still evince *de facto* authoritarianism. In order to understand this state of affairs, this study resorted to considering these polities’ real rather than formal constitutions and their change as it seems apparent that the constitutions minted after or at the behest of the Third Wave fell prey to sham constitutionalism. Through a comparative historical probe involving Cameroon, Kenya and Benin as case studies, this study has established that formal constitutional change had more modest potential of transforming political systems than thought. Instead it has revealed that disestablishment of authoritarian rule in Sub-Saharan African was predicated on the existence or non-existence of certain actor-based conditions which were in turn shaped by context-specific underlying structural factors. The insufficient, though necessary conditions for real constitutional change are (a) change to incumbent power holders, (b) existence of effective democracy-demanding groups and (c) candid promotion of democracy by international actors. Whereas, thus, change to formal powers was perceived to be a panacea to constitutional maladies that afflicted Sub-Saharan African countries prior to 1989, this study has established that at best, changes that secure a normatively attractive formal constitution can at optimal serve the purpose of guarding against democratic regression. This seems, also, to be the effective reach of judicial review to African constitutional orders. The study recommends that incentives – such as amnesty – should be afforded to incumbent power holders to see themselves safe when out of power and post-election alliances should be proscribed to address co-optation of opposition factions that dilute the strength of pro-democracy forces. Constitutional orders stand to benefit from formal constitutional change directed at removing claw-back rights clauses and empowering judicial review through strengthening of institutional autonomy and security of review bodies. In this way, an environment conducive for democratisation and repellent to regression is likely to be secured.

List of Abbreviations & Acronyms

CDF	Constituency Development Fund
CDU	Cameroon Democratic Union
CHA	Comparative Historical Analysis
CKRC	Constitution of Kenya Review commission
CORD	Coalition for Reform and Democracy
CPMD	Cameroon People's Democratic Movement
CRM	Cameroon Renaissance Movement
ECOWAS	Economic Community of West African States
FNSC	Front for the National Salvation of Cameroon
<i>HCR</i>	<i>Haut Conseil de la Republique</i>
ICG	International Crisis Group
IPPG	Inter-Parties Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KBC	Kenya Broadcasting Corporation
KPU	Kenya People's Union
KTN	Kenya Television Network
MDR	Movement for the Defense of the Republic
NARC	National Rainbow Coalition
NC	National Conference
NDP	National Development Party
NUDP	National Union for Democracy and Progress
ODM	Orange Democratic Movement
PNU	Party of National Unity
SDF	Social Democratic Front
SDF	Social Democratic Front
SSA	Sub-Saharan Africa
TWD	Third Wave of Democratisation
UNC	Cameroon National Union

UNSTB

Union Nationale des Syndicats des Travailleurs du Benin

UPA

Union of African Population

UPC

Union of the Peoples of Cameroon

List of Constitutions

Constitution of France, 1971

Constitution of Liberia, 1986

Constitution of the Democratic Republic of Congo, 2005

Constitution of Kenya, 2010

Constitution of the Republic of Benin, 1990

Constitution of the Republic of Cameroon, 1972

Constitution of New Zealand, 1986

Constitution of South Africa, 1995

Constitution of China, 1982

Constitution of the United States of America, 1789

List of Cases

Aids Law Project v Attorney General & 3 others [2015] eKLR

DCC 30-94 of 1 October 1994

DCC 31-94 of 1 October 1994

DCC 34-94 of 23 December 1994

DCC 06-074 of 8 July 2006

DCC-08-072 of 25 July 2008

DCC 99-013 of 10 February 1999

DCC 02-014 of 19 February 2002

DCC 06-076 of 27 July 2006

DCC 09-081 of 30 July 2009

DEL-P 01-045

Geoffrey Andare v Attorney General & others, Nairobi, High Court Petition 149 of 2015 [2016] eKLR

Grutter v Bollinger 539 U.S. 306.

In the matter of the principle gender representation in the National Assembly and the Senate [2012] eKLR Advisory Opinion No. 2 of 2012).

Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR.

Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR

Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR

Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi [2011] eKLR

Obergefell v Hodges 410 U.S. 113, (1973).

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR

Roe v Wade 539 U.S. 306.

Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others [2017] eKLR

International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013

EG & 7 others v Attorney General; DKM & 9 others (Interested Parties) Nahashon Omwoha Osiako & 66 Others v Attorney General, [2017] Eklr

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CHAPTER ONE: SETTING THE STAGE – CONSTITUTIONAL TRANSFORMATIONS IN SUB-SAHARAN AFRICA

1.1 Introduction

This thesis is concerned with explaining real constitutional change in Sub-Saharan Africa (“SSA”) after the Third Wave of Democratisation (“TWD”). Its subject matter, the real constitution, is the de facto norms that explain how power is acquired, used and controlled within a polity. Its elements include, but are not limited to, the enforced aspects of a written constitution, formal principles recognised as being part of the constitution (such as the separation of powers), judicial decisions, quasi-constitutional legislation, conventions, informal politics and powers as well as political practices. Synonymous terms include the “effective”,¹ “de facto”,² “empirical”,³ “small-c”,⁴ “working”,⁵ “material”,⁶ or “political”⁷ constitution. The real constitution is related to but distinguishable from the written constitution to the extent that the written one – in particular, its enforced aspects – is a part of the real constitution. Depending also on the constitutional effect that it produces, real constitutions can be authoritarian, democratic or hybrid, and like written constitutions, they can either be stable and resilient, or unstable.⁸ When a constitution changes from one type to another, say authoritarian to hybrid, real constitutional change is registered.

There are two ways in which this study of real constitutional change can be conceived. In one sense, it is about the stability, or endurance, of authoritarian real constitutions in SSA over the years in spite of the TWD. Looked at differently, it is about the instability/regression of democratic and hybrid real constitutions after the

¹ See. e.g. Hans Kelsen, *Principles of International Law* (The Lawbook Exchange Ltd, New Jersey, 2003), 323 (‘noting that “the effective constitution of the state may be not identical with its written constitution’); Zhang Yongle and Daniel Bell (eds) Editors Introduction, (trans.) Edmund Ruden, Su Lui, *The Constitution of Ancient China* (2018: New Jersey, Princeton University Press) 6.

² John Denvir, *Freeing Speech: The Constitutional War Over National Security* (The New York University Press, New York, 2010).

³ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 3.

⁴ William N. Eskridge, Jr, ‘America’s Statutory “Constitution” (2007) 41 (1) *UC Davis Law Review* 6.

⁵ Karl Lewellyn, ‘The Constitution as an Institution’ (1934-1935) *Oregon Law Review* 108.

⁶ Michael Goldoni and MA Wilkinson, ‘The Material Constitution’ (2018) 81 (4) *Modern Law Review* 567.

⁷ Graham Gee and Grūgoire C. N Webber, ‘What is a Political Constitution,’ (2010) 30 (2) *Oxford Journal of Legal Studies*, 273.

⁸ See discussion in Chapter 4.

gains associated with the TWD and the prospects for democratisation and consolidation that accompanied it. As will be shown, most political orders in SSA, in both the pre- and the post-independence period, were characterised by authoritarian constitutions. Whereas 1989, which is the time when the effects of the TWD were felt in Africa, was a watershed moment in African constitutionalism in the sense that it marked the beginning of a widespread shift to formal/de jure democratic constitutions, only a few African countries have thus far ended up with democratic real constitutions.⁹ Instead, most political orders in the region either transitioned to “hybrid” constitutions, epitomized by electoral authoritarianism, or simply reverted to their pre-1989 state. With the exception of a few countries, such as Ghana and Senegal, the state of affairs has largely remained as it was in the early 1990s. Samuel P. Huntington’s 1991 article, to which the phrase “Third Wave of Democratisation” is linked, claimed that “Sudan and Nigeria had reverted to authoritarian rule”¹⁰ just after their encounter with the TWD. While the prospects for change of the real constitution from authoritarian to democratic seemed good in the early 1990s, most political orders that transitioned to democratic or hybrid regimes failed to consolidate and relapsed.

The reasons behind this outcome – the endurance of authoritarian real constitutions/the instability of democratic and hybrid real constitutions in SSA – are yet to be satisfactorily investigated and understood. Generally, the Global South as a whole, let alone SSA, has been left out of mainstream comparative constitutional law research.¹¹ Whereas there is some commitment, especially by African scholars, to

⁹ Muna Ndulo, *Constitutions and Constitutional Reforms in African Politics* (2019) Politics (Oxford Research Encyclopedia available at <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1324#acrefore-9780190228637-e-1324-biblitem-0054> accessed 20 August 2020; Henry K. Prempeh, ‘Constitutional Autochthony and the Invention and Survival of “absolute presidentialism” in postcolonial Africa,’ in Frankenberg, G. (Ed.) *Order from Transfer: Comparative Constitutional Design and Legal Culture*, (Edgar Edwards, 2013) 209. (“through the instrumentality of “existing law” clauses that preserve the legal order between regime changes, the statutory and administrative bases of executive power in Africa have remained remarkably stable over time. In many respects, then, the contemporary African president remains very much the lineal descendant of the absolute president of the 1960s and, indeed, of the colonial governor before him. If, then, the power of the contemporary African president is to be contained or curbed, what is needed is not just democratic reform and constitutional tinkering; what is needed, above all, is a purposeful unpacking and undoing of the vast legislative and administrative bequests from the past, many of them dating back to the colonial and immediate postcolonial periods.”).

¹⁰ Samuel P. Huntington “Democracy’s Third Wave” (1991) 2 (2) *Journal of Democracy* 12 at 16.

¹¹ See Henry K. Prempeh, Africa’s ‘Constitutional Revival’: False Start or New Dawn?’ in Eunice Sahle (ed) *Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Development and Dilemma* (Palgrave, 2017) 16.

understanding the maladies afflicting African constitutional orders, those working in law have a bias towards formal constitutional norms. The underlying assumption behind their research, that formal constitutions are optimally operative, is clearly untenable given the grave problem of “sham” constitutionalism in SSA constitutional orders.¹² Those in political science – and by extension sociology – take a much broader look at the contexts in which formal constitutions operate but in their case eschew legal texts and norms, their main concern being politics, interests and power/institutional relations. Although several explanations have been advanced for SSA’s democratic failures and few successes, they do not satisfactorily address the problems associated with endurance of authoritarian constitutionalism after the TWD. This study accordingly adopts an interdisciplinary, socio-legal approach to mitigate the drawbacks of these two approaches.

This Chapter accordingly sets the stage for the study by contextualising the problem associated with change and stability of constitutions in both the pre- and post-1989 period. Section 1.1 starts by describing the consolidation of authoritarian norms and practices in the pre-1989 epoch. Section 1.2 then takes a closer look at the general effect of the TWD and as an important constitutional moment on the continent. As noted, the TWD turned out to be a missed opportunity for real constitutional change in many political orders. Section 1.3 thus portrays a state of affairs after the TWD. The last section, 1.4 sketches the problem while 1.5 offers an outline.

1.1.1 The pre-1989 constitutional conditions and tragedies

Any tale about constitutional disenchantments in Africa cannot be complete if divorced from colonialism and its influence. Prior to the colonial encounter, African societies had some real constitutions – if the claim by Dieter Grimm that all societies have had some form of constitution empirically speaking is anything to go by.¹³ Such constitutions, Ellis informs us, “were not, of course, generally written, but they existed

¹² David Law and Mila Versteeg, ‘Constitutional variations Among Strains of Authoritarianism,’ in Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2014) 165 at 181.

¹³ Dieter Grimm, (note 3 above) 1.

nonetheless".¹⁴ Political power was exercised in various forms in African socio-political arrangements. As Ellis has put it further: "Africa had a great variety of political systems, including so-called stateless societies, kingdoms, military dictatorships and other arrangements" in the pre-colonial epoch.¹⁵ In these formations, the idea that rights existed remains controversial,¹⁶ and though it is thought that there was a deep-rooted idea of governance by communal consensus,¹⁷ it is problematic to claim that pre-colonial real constitutions were democratic.¹⁸ Adjudged on the basis of the popular selection of their leaders, the absence of democracy is apparent. As Ellis portrayed it:

If we define the word 'democracy' as it is generally understood in modern Europe and North America, to mean the activity of two or more political parties competing for power within the framework of a nation-state by means of periodic elections for which the whole adult population is eligible, then democracy did not exist either in Africa or Europe until the twentieth century.¹⁹

The ideas associated with democracy, as we understand them today, consequently developed out of the West but were not wholly alien to Africa.²⁰ As hinted, certain forms of consensus guided socio-political coordination and were undergirded by unwritten rules and customary practices. There were also ways through which communities could participate in decision-making processes through various structures, such as kinships and headmen. Examined loosely, this form of participation can be analogized to deliberative democracy that is an aspect of democratic constitutional orders in present times. The main claim made here, though, is that pre-

¹⁴ Stephen D. Ellis, "Democracy in Africa, Achievements and Prospects" in Douglas Rimmer (eds) 'Action in Africa: the experience of people involved in government, business & aid,' (London, James Currey, 1993) 133.

¹⁵ *Ibid.*

¹⁶ Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Kluwer Publisher International, The Hague, 2001) 1.

¹⁷ Stephen Ellis (note above 14) at 133.

¹⁸ Menes Tau, 'The Historical Evolution Of Democracy in Africa,' (2014) The Grandmother, <<http://grandmotherafrica.com/the-historical-evolution-of-democracy-in-africa/>> accessed 20 June 2018. ("Selfish or sluggish rulers were accepted as part of the order of nature, and when, now and then, under strong leaders like Sundiata Keita or Sumanguru Kante, there was better justice, or under a prudent ruler less risk of foreign invasion, like Narmer, these brighter intervals in the Ghana Empire, The Mali, The Songhai and the Asante and Dohoney Kingdoms, were remembered as a peasant remembers an exceptionally good harvest. The monarch was more or less restrained by custom and tradition and by the fear of provoking general discontent").

¹⁹ Ellis note 14 above, at 133.

²⁰ Damola Adejumo-Ayibiowu, "Western style 'democracy' in Africa is just a way of pushing the neoliberal agenda," *Open Democracy* (2019) <<https://www.opendemocracy.net/en/oureconomy/western-style-democracy-in-africa-is-just-a-way-of-pushing-the-neoliberal-agenda/>> accessed 20 June 2018.

colonial governance structures in SSA cannot be said to have been democratic in the modern sense.

In spite of this assessment, it is defensible to claim that authoritarian norms and practices associated with modern African governance are not a relic of the pre-colonial era, but instead of the colonial project. Democracy as we understand it today, as well as the legal and political systems through which it is pursued, were imported to Africa by colonial administrations in very contorted forms.²¹ As Fombad put it:

Maintaining social peace at all cost in order to exploit the colonies to their fullest, mattered more than the niceties of constitutional governance. Under no colonial system in Africa was political organisation based on principles of constitutionalism such as the separation of the branches of government or checks and balances.²²

In the African set up, and following the defeat of the Germans, the protagonists in this venture were Britain, France, Belgium, Spain and the Portuguese. The Portuguese had made an inroad in SSA earlier than either the Germans or the other colonial forces and had dominated the continent for about two centuries.²³ Their main concern, at first, was exploration, with political involvement starting following their interest in West African resources, especially gold.²⁴ Generally speaking, the Portuguese did not disrupt the constitutional arrangements they encountered and their activities were, in any case, confined to “small isolated enclaves on the coast used for trading purposes”.²⁵

The main disruption of political affairs in African polities is attributed to Belgian activities in Central Africa and later to German invasions.²⁶ Belgium’s King Leopold, whom Martin Meredith described as “a greedy and devious European Monarch”, is the

²¹ See, Filip Reyntjens, ‘Authoritarianism in Francophone Africa from the Colonial to the Postcolonial State,’ (1988) 7 *Third World Legal Studies* 59; Charles M. Fombad, ‘The Evolution of Modern African Constitutions: A Retrospective Perspective,’ in Charles M. Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016), 13-57.

²² Charles M. Fombad, ‘Constitutional literacy in Africa: challenges and prospect’ (2018) 44 (3) *Commonwealth Law Bulletin*, 492 at 496.

²³ Okoro Ijoma, ‘Portuguese Activities in West Africa Before 1600 The Consequences,’ (1982) 11 *Transafrican Journal of History* 136-146 (11 pages).

²⁴ Harry H. Johnston, the Portuguese in West Africa (1913) XII (XLVI) *African Affairs*, Volume XII, Issue XLVI, January 1913, Pages 113–119.

²⁵ Martin Meredith, *Fortunes of Africa: A 5,000 Year History of Wealth, Greed and Endeavour* (2014, London: Simon & Schuster UK Ltd)

²⁶ See A Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Houghton Mifflin Company, Boston, 1998).

actor thought to have ignited the quest for “a slice of this *magnifique gbteau africain*”.²⁷ In pursuit of national prestige and wealth, Leopold rendered the continent a subject of “fierce European competition”, a venture regulated in meetings held in various European cities and most prominently in Berlin.²⁸ The *General Act of the Berlin Conference*, that was subsequently supplemented by the *Brussels General Act of 1890*, was adopted and set out the objects of the enterprise, at least in formal terms.²⁹

The distorted way through which democracy was instituted in Africa emerges through a reflection, not only on the violent takeover of African public life, but also on the gap between the formal terms of the General Act of the Berlin Conference and its actual implementation. The Act had a section devoted to “Protection of Natives”³⁰ through which colonial authorities bound “themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade”.³¹ Other commitments in it included one that expressly guaranteed “Freedom of conscience and religious toleration” to the natives as well as protecting natives against the slave trade through “all the means at its disposaland for punishing those who engage in it”.³²

When these formal prescriptions were implemented though, these commitments were ignored. At the end of the scramble for Africa, over 10,000 different political entities or units had been forcefully merged into as few as 40.³³ In the process, African communities that collaborated with the Europeans were assured of their safety and support, while those that resisted suffered the wrath of the invading authorities with sophisticated weaponry.³⁴ History attests that hundreds of natives died, millions were

²⁷ Martin Meredith, *Fortunes of Africa: A 5,000 Year History of Wealth, Greed and Endeavour* (London: Simon & Schuster UK Ltd, 2014) at x)

²⁸ *Ibid.*

²⁹ Matthew Craven, “Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade” (2015) 3 (1) *London Review of International Law* 31–59.

³⁰ *General Act of the Berlin Conference*, Article 6.

³¹ *Ibid.*

³² *General Act of the Berlin Conference*, Article 9.

³³ See, Ehiedu E. G. Iweriebor, ‘The Colonisation of Africa,’ <<http://exhibitions.nypl.org/africanaage/essay-colonization-of-africa.html>> ; also see Felix Ekechi, ‘The Consolidation of Colonial Rule, 1885–1914,’ in Toyin Falola (ed), *Colonial Africa, 1885–1939*, vol. 3 of *Africa*, (Durham Carolina Academic Press, 2002).

³⁴ Generally, see, Worger, William, Nancy Clark, and Edward Alpers, eds. *Africa and the West: A Documentary History from the Slave Trade to Independence*. Phoenix: Oryx Press, 2001; See also, Evanson N. Wamagatta African Collaborators and Their Quest for Power in Colonial

tortured and brutalized and many were displaced from their ancestral homes, especially those who resisted.³⁵ Provision of security and support against other ethnic formations or groups became a particularly common reward for leaders and communities that acquiesced to colonial occupation.³⁶ Leaders of these collaborating communities had access to land, labour or even guns and became entitled to other forms of white privilege.³⁷ Aggrandizement and personal survival, exemption from taxes and labour thus became some of the motivations behind collaboration.³⁸ Through this mode of engagement, a set of unwritten constitutional conventions developed, namely that support for the political establishment of the day results in communal or individual safety and advancement. These understandings, it is contended, have shaped the neopatrimonial and patronalistic informal politics that characterise real constitutions in SSA.

The colonial era also saw the introduction of Western law to serve the colonial enterprise.³⁹ In particular, a substantial quantity of penal laws and their enforcing institutions were installed to manage African insurrections and behaviours.⁴⁰ Penal institutions were linked to support for the political establishment to the extent that laws gave immense powers to the colonial administration to address challenges resulting from resistance activities in colonies.⁴¹ There exists for instance a “notorious” ordinary colonial law in almost all countries in SSA addressing “Public Order.”⁴² Kenya’s

Kenya: Senior Chief Waruhiu wa Kung'u's Rise from Obscurity to Prominence, 1890-1922 *The International Journal of African Historical Studies* Vol. 41, No. 2 (2008), pp. 295-314 (20 pages).

³⁵ See e.g. Kevin Shillington, *Encyclopaedia of African History: 3-Volume Set* (New York, Taylor & Francis, 2005) 456.

³⁶ See Adams Bazi, <https://www.wattpad.com/3133162-african-response-to-european-colonial-rule>. See also the various essays in B.A. Ogot (eds) *General history of Africa, V: Africa from the sixteenth to the eighteenth century* (Berkeley, University of California Press 1992)

³⁷ See Wamagatta (above).

³⁸ William J. Duiker, Jackson J. Spielvogel, Cengage Advantage Books: *World History, Volume 2, since 1500* (Wadsworth Learning Centre: 2013, Boston) 731; Ronald Robinson, ‘Non-European Foundations of European Imperialism: Sketch for a Theory of Collaboration,’ in Roger Owen and Bob Sutcliffe (eds) *Studies in the Theory of Imperialism* (London: Longmans, 1972), 132-3.

³⁹ David Killingray, ‘The Maintenance of Law and Order in British Colonial Africa,’ (1968) 85 *African Affairs* 433.

⁴⁰ see also Sandra Fullerton Joireman, ‘Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy,’ (2001) 39 (4) *The Journal of Modern African Studies* 571-596.

⁴¹ Florence Bernault, ‘The Shadow of Rule: Colonial Power and Modern Punishment in Africa,’ in Frank Dikötter, Ian Brown (eds) *Cultures of confinement: A history of the Prison in Africa, Asia and Latin America* (Cornell University Press, Ithaca NY, 2007) 55, at 61.

⁴² Chris Ogbondah, ‘Political Repression and Human Right’s Abuses in Nigeria,’ in Bala A. Musa, Jerry Komia Domatob (eds) *Communication, Culture, and Human Rights in Africa* (University Press of America, 2011) 113, at 124

present-day legislation was enacted in 1950,⁴³ Sierra Leone's in 1965,⁴⁴ and Zambia's in 1955, just to list a few.⁴⁵ This legislation was used to suppress African resistance towards colonial rule and remains in statute books as a fount of legal authority for governments to stifle the exercise of democracy-supporting rights, such as the freedom of assembly and demonstration. A commentator explaining its effect in Cameroon remarked that the "public order" comprises elements such as maintenance of the political status quo.⁴⁶ Another author writing on Nigeria described it as "antiquated, anachronistic, repugnant, oppressive and anti-democratic."⁴⁷ At a time when the colonies were not run on the basis of written constitutions, these laws, and many colonial institutions, were a formal fount of constitutional commands for the prodigiously authoritarian conduct on the part of the colonial administration. These apparatuses largely remained part of the legal order in most African legal systems even after the official end of colonialism.⁴⁸

The colonial enterprise turned out to be a short spell in African history, coming to an end from the late 1950s in most areas. With the exception of Lusophone countries that attained their independence largely through armed struggles, written constitutions were introduced as part of the negotiated closure of colonial rule.⁴⁹ As their authoritarian, extractive project faltered, the colonial powers tried to introduce democracy and its associated institutions through written constitutions.⁵⁰ The idea of written constitutions in Africa is consequently linked to European decolonisation.⁵¹

⁴³ Public Order Act, Chapter 56 Laws of Kenya.

⁴⁴ *Public Order Act*, (No. 46 of 1965).

⁴⁵ *Public Order Act* (Chapter 113, Laws of Zambia)

⁴⁶ Cited in Emmanuel Fru Doh, *Anglophone-Cameroon Literature: An Introduction* (Lexington Books, 2015) 10.

⁴⁷ Ogbondah (note 42 above) at 124.

⁴⁸ Killingley (note 39 above). See also, John Hatchard, *Individual Freedoms & State Security in the African Context: The Case of Zimbabwe* (London: James Currey, 1993) 125; Maya Berinzon and Ryan Briggs, '60 years later, are colonial-era laws holding Africa back?' January 2017, *The Washington Post*, <<https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/60-years-later-are-colonial-era-laws-holding-africa-back/>> accessed 21 June 2019.

⁴⁹ On decolonization of Lusophone Countries, see, Antynio Tom6s, 'Introduction: decolonising the "undecolonisable"? Portugal and the independence of Lusophone Africa (2016) 42 (1) *Social Dynamics* 1-11. See also Goran Hyden, *African Politics in Comparative Perspective* (2nd ed, New York Cambridge University Press, 2013) 107.

⁵⁰ See, Issa G. Shivji "Three generations of constitutions and constitution-making in Africa: An overview and assessment in social and economic context" in M S Rosen (ed) *Constitutionalism in transition: Africa and Eastern Europe* (Helsinki Foundation, Warsaw: 2003) 79.

⁵¹ Issa G. Shivji *The Concept of Human Rights in Africa* (1989: Codesria London)

These “first generation constitutions”, as Issa Shivji has classified them,⁵² were in most cases negotiated between the colonial administration and African elites of the time. These included Kenyatta in the case of Kenya, Nkrumah in the case of the Gold Coast (the present-day Ghana), Senghor in the case of Senegal and Houphouet-Boigny in the case of Ivory Coast.⁵³ Though this process had started earlier, especially in South Africa, massive decolonisation took place between 1959 all through to 1969 in a wave that started with Ghana, then known as the Gold Coast, in 1957, and which was followed by Guinea in 1958. The decolonisation process and the years when the first formal constitutions were enacted are set out in the table below.

Table 1: Years when modern formal constitutions were introduced in African constitutional orders

Colonial power	Countries
United Kingdom	South Africa (1910); Ghana (1957); Somalia (1960); Nigeria (1960,1961); Sierra Leone (1961); Tanzania (1961); Uganda (1962); Kenya (1963); Sultanate of Zanzibar (1963); Malawi (1963); Zambia (1964); The Gambia (1965); Rhodesia (1955); Zimbabwe (1955); Botswana (1960); Lesotho (1966); Mauritius (1968); Swaziland (1968); Seychelles (1976)
Italy	Somalia (1960)
France	Tunisia(1956); Morocco (1956); Guinea(1958); Cameron (1960); Togo(1960); Mali(1960); Senegal (1960); Madagascar (1960); Benin (1960); Niger (1960); Burkina Faso (1960); Ivory Coast (1960); Chad((1960); Central Africa Republic (1960); Republic of Congo (1960); Gabon (1960); Mauritania (1960); Algeria (19620;

⁵² Issa G. Shivji, *Where is Uhuru? Reflections on the Struggle for Democracy in Africa* (Fahamu Books Cape Town, 2009) 50.

⁵³ See Decolonization of Africa, <<https://www.saylor.org/site/wp-content/uploads/2011/04/Decolonization-of-Africa.pdf>> accessed 10 October 2017.

	Comoros (1975); Djibouti (1977)
Spain	Equatorial Guinea (1968)
Belgium	Democratic Republic of Congo (1960); Burundi (1962); Rwanda (1962)
Portugal	Guinea Bissau (1974); Mozambique (1974); Cape Verde (1975); Sao Tome and Principe (1975); Angola (1975)

*Source: Decolonisation in Africa.*⁵⁴

It is essential to qualify that, even though scholarship links the emergence of present-day written constitutions in Africa to decolonisation, other countries, such as Liberia and Ethiopia, did not follow the general path taken by the rest of the countries, as they were not colonised. In the case of Liberia, it had a formal constitution as early as 1847.⁵⁵ Settler slaves who initially settled at Cape Mesurado proclaimed their independence through a declaration that principally imitated the American Declaration of Independence and the 1787 US Constitution.⁵⁶ Through their declaration, they bestowed upon themselves the rights that they had been denied in the United States.⁵⁷ It is courtesy of the 1847 Constitution that Liberia proclaims itself as Africa's first republic.⁵⁸ In the case of Ethiopia, it had successfully resisted an initial attempt at Italian colonisation through the battle of Adwa under Menelik.⁵⁹ It created a formal constitution after decolonisation had started in South Africa and Egypt.⁶⁰ Ethiopia, previously the Ethiopian Empire, is traced to the 1137 Zangwe dynasty and has had a

⁵⁴ Decolonization of Africa (note 53 above).

⁵⁵ The preamble reads in part that:

“Realizing from many experiences during the course of our national existence which culminated in the Revolution of April 12, 1980, when our Constitution of July 26, 1847 was suspended, that all of our people, irrespective of history, tradition, creed, or ethnic background are of one common body politic”. See *Constitution of Liberia*, 1986.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Frank Sherman, *Liberia: The Land, Its People, History and Culture* (New Africa Press, 2011) 301.

⁵⁹ Generally, see, Raymond Jonas, *The Battle of Adwa* (Harvard University, 2011).

⁶⁰ Anthony Mockler, *Haile Selassie's War* (Oxford University Press, 2003). See Alex Boraine, 'Truth and Reconciliation Commission in South Africa Amnesty,' in Jon Elster *Retribution and Reparation in the Transition to Democracy* (New Yew, Cambridge University Press, 2006) 299.

longstanding history of an organized and strong political unit.⁶¹ It adopted its first formal constitution around 1931, courtesy of Emperor Haile Selassie.⁶² Prior to that, Ethiopia was governed by a canonical law, *Fetha Nagast*, the “Law of Kings”, parts of its real constitution prior to 1931, which had been compiled by an Egyptian Coptic Christian writer around 1240.⁶³

African elites with whom the colonial governments negotiated these constitutions had goals that were at odds with those of the colonial governments. It was mostly at the instance of departing colonial powers that liberal constitutions were introduced into African political orders at the time of independence.⁶⁴ For Africans, their main concern at the time was “political freedom”⁶⁵ as captured by Kwame Nkrumah’s (in)famous statement: “Seek ye first the political kingdom and all things shall be added unto you.”⁶⁶ For the colonial powers, though, their main anxiety was to protect the interests of white settler populations.⁶⁷ It is this group – settler populations – that was considered to be the constituency with a “local demand” for a Bill of Rights.⁶⁸ As a result, most independence constitutions protected democracy either directly or indirectly. With the exception of Tanzania and Ghana, where there was no “local demand”,⁶⁹ most Anglophone countries had a bill of rights.⁷⁰ In Tanzania, then known as Tanganyika, an attempt at introducing a bill of rights, as a result of a local demand, by convincing the Tanganyika Government that the Bill of Rights aimed at protecting individuals and not the “minorities”, was unsuccessful and it was, indeed, not until 1984 that one was inserted into Tanzania’s Constitution.⁷¹ In the case of Francophone countries, the independence Constitutions of Niger, Benin (formerly Dahomey), Mali,

⁶¹ Hagai Erlikh, *The Cross and the River: Ethiopia, Egypt, and the Nile* (Lynne Rienner, London, 2002) 36-38.

⁶² See Mockler (note 60 above).

⁶³ Edmond J. Keller, *Revolutionary Ethiopia: From Empire to People's Republic* (Indiana University Press, 1991) 48-52.

⁶⁴ See Gardner Thompson, *African Democracy: Its Origins and Development in Uganda, Kenya and Tanzania* (Kampala, Fountain Publishers, 2015) 405.

⁶⁵ See Henry K Prempeh, ‘Africa’s “Constitutional Revival: False Start or New Dawn?’,’ (note 11 above) 16.

⁶⁶ Christophe Wondji and Ali A. Mazrui, *General History of Africa: Africa Since 1935* (University of California Press, 1993) 105.

⁶⁷ Bonny Ibhawoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018) 168.

⁶⁸ Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in British Overseas Territories* (Oxford, Oxford University Press, 2007).

⁶⁹ *Ibid* 268.

⁷⁰ *Ibid* at 261.

⁷¹ *Ibid* at 256.

Burkina Faso (formerly Upper Volta), and Mauritania, all former French colonies, did not have a Bill of Rights, but rights were parenthetically mentioned in their preambles, which cited the Declaration of Rights of Man and Citizens and the Universal Declaration of Human Rights.⁷² They were also modelled after the Constitution of the 4th and 5th French Republics.⁷³ In turn, most independence formal constitutions had some degree of entrenchment.⁷⁴ Procedural limits were imposed on the power to amend the constitution, for instance by requiring a higher vote for amending a given provision, such as in the case of Kenya.⁷⁵ Multi-party elections were accordingly held in many African countries just after independence under these constitutions.⁷⁶

Though the colonial authorities retained enormous influence and control over their colonies, they did not care to see that the democracy-protecting constitutions that they had created were enforced in the interests especially of African natives. Because of their continued influence also, it is contended, the norms that they had generated as well as the institutional apparatus they had used were easily absorbed by the elites that took over the running of political affairs. Democracy, which had just been introduced through the written constitutions, was presented and understood as a “winner takes all” system where those who take power use it for their own good and use the state apparatus to ensure that no one takes it away from them. Having inherited the prevailing colonial understanding of the use of state violence to secure allegiance, no serious challenge was ever mounted against the power holders and democracy became almost as unpopular in the post-independence period as it was during the colonial era.

Beside the norms and understandings handed down from the colonial era, oppressive legislation also remained part of the post-colonial statute books in many, if not all, African countries, the aforementioned public order statutes being an example. In spite, therefore, of normatively attractive independence constitutions, in the sense that they embraced multi-party democracy and democracy-supporting rights, African

⁷² Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2012) 113. See also Charles M. Fombad, ‘African Bills of Rights in A Comparative Perspective,’ (2011) *Fundamina* 17 (1) 33.

⁷³ *Ibid.*

⁷⁴ See, H.W.O Okoth Ogendo, ‘The Politics of Constitutional Change in Kenya since Independence,’ (1968) 71 *The African Affairs* 17.

⁷⁵ *Ibid.*

⁷⁶ Samuel M. Makinda, ‘Democracy and Multi-Party Politics in Africa’ (1996) 34 (4) *The Journal of Modern African Studies* 555-573.

post-colonial constitutional orders became host to legion authoritarian constitutional elements, a situation that led to serious tragedies considering that it had already been learnt that the only viable way to access power was through extra-constitutional means. In this set up, formal constitutions and the values they espoused suffered from major rewriting and general inattention. Le Vine, summarized the fate of formal constitutions in SSA in the following way:

New constitutions, this time without their earlier democratic biases, were written, re-written, re-configured, suspended, abrogated, and sometimes simply discarded, following the political tides in each country.⁷⁷

Le Vine’s statement, though about constitutions in West Africa, generally depicts the state of affairs in the region as a whole. In cases where the formal constitution was understood as mattering, it was subjected to frequent amendments to dress authoritarian state practices in the clothes of legality. In so doing, this culminated in an effort at making the norms in the written constitution correspond with the authoritarian ones in actual application. The table below provides examples of frequent amendments in several countries during the pre-1989 epoch.

Table 2: Examples of frequent constitutional amendment prior to the TWD

Country	Year (s) when amendments were effected
Botswana	1969,1970,1976,1978,1982,1983,1987
DRC	1961,1965,1966,1970,1971, 1972,1973,1974,1978, 1980,1982,1988
Ivory Coast	1963,1975,1980,1985
Ethiopia	1974,1977,1978,1979,1980
Kenya	1964,1965,1966,1967,1968,1969, 1974,1975,1977,1979,1982,1985, 1986,1987,1988
Lesotho	1969,1971,1972,1973,1974,1975

⁷⁷ See Victor T. Le Vine, ‘The Fall and Rise of Constitutionalism in West Africa,’ (1997) 35 (2) *The Journal of Modern African Studies* 189.

Liberia	1849,1861,1907,1927,1934,1935, 1943,1945,1947,1949,1951,1955, 1974,1981
Madagascar	1960,1962,1970,1971,1982,1988
Malawi	1968,1969,1970,1971,1972,1973, 1974,1975,1976,1977,1978,1981, 1984,1985,1987
Mali	1961,1979,1978,1981,1985,1988
Mauritania	1964,1965,1966,1967,1968,1969,1970
Mauritius	1969,1973,1975,1982,1983,1985,1986
Niger	1961,1964,1965,1983
Senegal	1961,1962,1967,1968,1970,1976, 1978,1981,1983,1984
S. Leone	1965,1972,1973,1974,1979,1981, 1985,1986
South Africa	1933,1934,1946,1963,1965,1966,1967,1968,1969,1971,1972,1973 ,1974,1975,1976,1977,1979,1980,1981,1982
Swaziland	1970,1973,1979,1980,1981,1982,1983, 1984,1987
Tanzania	1964,1966,1967,1968,1969,1970,1971,1972,1973,1974,1975,197 9,1980,1982,1984
Uganda	1963,1965,1970,1972,1973,1975,1976,1977 1980,1985,1986
Zambia	1968,1969,1974,1975,1977,1980,1983
Zimbabwe (Formerly Rhodesia)	1966,1974,1976,1981,1983,1984,1985,1987, 1988

Most of these amendments had to do with dismantling opposition politics and the structures that facilitated power control and distribution. Even in cases where they were stated as justified to address ethnic cohesion, coexistence and nation-building, they still stood out as opportunistic and their justifications were spurious.⁷⁸

⁷⁸ See Ogendero (n 74 above).

Centralisation of power, unrelenting crackdown on opposition and conversion of hitherto democracy-embracing states into single-party states can be seen as the underlying reason for most amendments of that era. Most political regimes that resorted to constitutional amendments did not, however, experience constitutional suspension or complete constitutional overthrow as was typically the case with those that rarely effected formal constitutional amendments.

Conversely, those that did not frequently amend their constitutions were prone to violent constitutional ousters and state takeovers through coups. Coups had become a “real” constitutional way of accessing power, especially in west and central African countries. Benin’s present constitution alludes to the country as having “known a turbulent constitutional and political evolution since its accession to independence”.⁷⁹ Also, at no time in Uganda’s history has anyone ever assumed power as President through a democratic process. The frequency of constitutional suspensions and constitutional orders that mostly followed coups is summarized in Table 3 as follows:

Table 3: Examples of violent constitutional Suspension in Sub-Saharan Africa Before 1989

Country	Year (s) when the constitution was suspended
Benin	1963; 1965; 1972
Burkina Faso	1966; 1974; 1980
Burundi	1966; 1976; 1987
Chad	1975
Gambia	1981
Ghana	1966; 1972; 1981
Guinea	1984
Lesotho	1970; 1986

⁷⁹ Preamble, *Constitution of Benin*, 1991.

Liberia	1980
Malawi	1968
Niger	1974
Nigeria	1966; 1983
Sierra Leone	1967
Sudan	1958; 1969
Togo	1967
Uganda	1971

As observed, whereas constitutional amendments were the vehicles of sustaining authoritarian regimes by clothing their action with legality, violent constitutional overthrow was the means by which political and constitutional regimes could be changed by aggrieved factions. Anyangwe recounts that at least 44 out of 53 countries in Africa have experienced a coup or an attempt at a coup.⁸⁰ In Narka and Ncube’s assessment, too, African countries have “experienced more than 200 military coups, counting both successful and failed coup attempts”.⁸¹ The extract below from Le Vine summarizes what constitutions meant at that time in the following words:

At all events, the general pattern between 1963 and 1989 was to treat constitutions in utilitarian fashion either as documents that could provide a fig leaf of popular legitimation for illegally-acquired power, or as symbols of the political authenticity and uniqueness of particular regimes. But they were in no way contracts between rulers and ruled since they generally represented bargains that had been struck to provide a legal – if minimal – framework for governance.⁸²

The high rate of formal constitutional turnover should not, however, be construed to mean instability on the part of real constitutions. As observed in the introductory section, and with the exception of few countries, such as Botswana and Mauritius, most African countries remained authoritarian in de facto terms over the years. The

⁸⁰ Carlson Anyangwe, *Revolutionary Overthrow of Constitutional Orders in Africa* (Langaa RPCIG, Cameroon, 2012) 1.

⁸¹ Habiba Ben Barka & Mthuli Ncube, ‘Political Fragility in Africa: Are Military Coups d’Etat a Never-Ending Phenomenon?’ <<https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20-%20Political%20Fragility%20in%20Africa%20Are%20Military%20Coups%20d%E2%80%99Et%20a%20Never%20Ending%20Phenomenon.pdf>> accessed 20 July 2019.

⁸² Le Vine (note 77 above at 189).

prospects of power transfer through democratic elections had been thwarted through amendments and substitutions while the constitutional overthrows meant that only the military or persons they supported had easy access to and a final say over political power holding.⁸³ It is only in 6 out of 47 countries that multi-party elections had been allowed as most of the countries were both de jure and de facto single-party states. In most of the political orders, pro-democracy voices that attempted to rise against the repression of the time fell prey to extra-judicial killings, forced exile, imprisonment and torture. In a 1988 work titled “Constitutions without constitutionalism: Reflections on an African political paradox”, H.W.O Okoth Ogendo felt that African societies had become numb to historical lessons from Europe and other mature democracies and that the solution to the problems that bedevilled them lay in African countries passing through the (violent) transitions akin to what those mature democracies had been party to.⁸⁴ This is the state in which African constitutional orders encountered the TWD.

1.1.2 The Third Wave of Democratisation and its import

The phrase “Third Wave of Democratisation” (herein “TWD”) is derived from Samuel Huntington’s 1991 paper, “Democracy’s Third Wave”.⁸⁵ Waves of democratisation are about “transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period.”⁸⁶ According to Huntington, there have been two other waves, the first that started around 1920 and was associated with the expansion of the right to suffrage and the second which started at the end of the Second World War.⁸⁷ The first wave witnessed the making of 29 democracies, while the second, whose peak was 1962, saw the transition of 36 countries to democracy. Each of these waves had a “reverse” wave and the Third Wave’s started in 1990.⁸⁸ Reference to the Third Wave of democratisation in this study refers to the diffusion of democracy and attendant collapse of authoritarian regimes between 1989 and 1993.

⁸³ Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, 2006) 86.

⁸⁴ H.W.O. Okoth-Ogendo, ‘Constitutions without Constitutionalism: Reflections on an African political paradox’, in Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, (Oxford University Press, New York, 1993).

⁸⁵ Samuel P. Huntington (n 10 above) 12.

⁸⁶ *Ibid* at 15.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

The period around 1989 was a seminal one in SSA, as it was in Eastern Europe and other parts of the world. Though the TWD started around 1975,⁸⁹ its effects were first felt around 1989 in Africa just as in Eastern Europe at the end of the Cold War.⁹⁰ In the words of Larry Diamond:

The democratizing trend began in Southern Europe in the mid-1970s, spread to the military regimes of South America in the late 1970s and early 1980s, reached East, Southeast, and South Asia by the mid- to late 1980s, then at the end of the 1980s saw a surge of transitions from Communist authoritarian rule in Eastern Europe and the former Soviet Union and a trend toward democracy in Central America as well. Finally, the democratic trend spread to Africa in 1990, beginning in February of that year with the sovereign National Conference in Benin and the release of Nelson Mandela and unbanning of the ANC in South Africa. By the beginning of 1996 there were between 9 and 18 democracies on the continent—again, depending on how one counts.⁹¹

In SSA, the democratic diffusions associated with the TWD were first felt (contestably) in Cape Verde and most vividly in Benin.⁹² The most momentous development of the time was the de facto and de jure opening up of the political order for some form of political competition. Closely associated with this “liberalisation of politics”, most countries, starting with Benin, convened a constitutional conference (in Benin’s case, in 1991, after having liberalized its politics following a serious political crisis associated with economic hardship).⁹³ Similar conferences were held elsewhere, especially in francophone Africa, including in Gabon in 1990, the Republic of the Congo, Mali, Niger and Togo in 1991, Zaire in 1992 and Chad in 1993.⁹⁴ In other countries, too, constitutional change processes were initiated and as a result, formal constitutional change – through amendment and substitution – became a noticeably widespread phenomenon in the region in the early 1990s. The table below shows the formal constitutional change processes that followed the TWD since 1990 when Benin held its conference and adopted a new Constitution.

Table 4: Formal constitutional change after the TWD

⁸⁹ Samuel P. Huntington (note 10 above) 12. (current era of democratic transitions constitutes the third wave of democratization in the history of the modern world)

⁹⁰ *Ibid* at 15.

⁹¹ Larry Diamond, ‘Is the Third Wave of Democratization Over? An Empirical Assessment, Working Paper #236,’ March 1997 <https://kellogg.nd.edu/sites/default/files/old_files/documents/236.pdf> accessed 25 March 2019.

⁹² See, Prempeh (note 11 above).

⁹³ Thomas Bierschenk, ‘Democratization without Development: Benin 1989–2009,’ (2009) *International Journal of Politics, Culture, and Society* 337–357.

⁹⁴ See Prempeh Kwasi (note 11 above).

Countries that amended/Substantially revised their constitutions just after the TWD	Countries that substituted their constitutions after 1989 following the TWD and subsequently
<p>Angola (1991, 1992); Botswana (1992, 1993); Cape Verde (1990, 1992, 1995); Chad (1991, 1995); Congo (1990); Congo, Dem. Rep. (1990); Cote D'Ivoire (1990, 1994,1995); Cameroon (1996); Equatorial Guinea (1995); Gabon (1994, 1995); Gambia (1994); Guinea-Bissau (1991, 1993); Kenya (1990,1991,1992); Lesotho (1990,1991); Madagascar (1995); Malawi (1993,1995); Mauritius (1990,1991,1992,1994,1995); Rwanda (1991); Sao Tome and Principe (1990); Senegal (1991,1992,1994); Seychelles (1994,1995); Sierra Leone (1992); South Africa (1994,1995); Sudan (1991,1993,1995); Tanzania (1990,1992,1993,1994,1995); Zambia (1990); Zimbabwe (1989,1990,1993).</p>	<p>Benin (1990); Burkina Faso (1991); Burundi (1992); Central African Republic (1994); Chad (1993 interim and final in 1996); Comoros (1992); Djibouti (1992); Congo (1992); Equatorial Guinea (1991); Ethiopia (1994); Gabon (1991); Guinea (1990); Madagascar (1992); Malawi (1994); Mali (1994); Mauritania (1994); Mozambique (1990); Namibia (1990); Niger (1992); Nigeria (1989, 1993); Rwanda (1993); Seychelles (1993); Togo (1992); Uganda (1995); Zambia (1991); Angola (2010); Burundi (2005, 2018); Central African Republic (2004, 2015); Comoros (1996, 2001, 2018); Congo (2001, 2015); Congo, Dem. Rep. (1997, 2003,2005); Cote D'Ivoire (2000, 2016); Eritrea (1997); Gambia (1996); Guinea (1990, 2010); Kenya (2010); Madagascar (1998,2010); Mozambique (2004); Nigeria (1999); Senegal (2001); Sierra Leone (1991 suspended in 1994 and reinstated in 1996); Somalia (2012); South Africa (Interim 1993 final 1996); Swaziland (2005); Zimbabwe (2013)</p>

Source: comparative constitutional project.⁹⁵

To be sure, formal constitutional change was seen as a means through which authoritarian practices could be disestablished. Indeed, the main aim of the formal

⁹⁵ Timeline of Constitutions, 'Comparative Constitutions Projects,' <<https://comparativeconstitutionsproject.org/chronology/>> accessed 23 July 2017.

change processes initiated in the early 1990s was to dismantle single-party regimes by amending or repealing the constitutional provisions that supported them. A review of the post-1989 constitutional reforms reveals, consequently, a remarkable improvement in the content of formal constitutions as well as the de jure quality of constitutional orders in so far as the espousal of democracy is concerned.⁹⁶ Almost without exception, most formal constitutions have numerous provisions on democracy-supporting rights and insist on multi-party periodic elections. Prempeh remarks in this regard that many of “Africa’s modern constitutions contain the full panoply of modern human rights, most of them modelled after modern international human rights instruments.”⁹⁷ According to Fombad, too, “there are many rights that are recognized and protected by all the countries. Examples of these are rights to equality and non-discrimination, freedom of speech, freedom of association, the right to vote, the right to privacy and the right to property.”⁹⁸

The claim made here is not that the post-1989 formal constitutions in SSA are now flawless. It is that there has been a huge improvement. They embody limitations, too, and that is why design aspects of constitutions cannot just be ignored. In the context of rights, for instance, two issues have remained unaddressed. First is the concern over the protection of minorities and marginalized persons, and the second relates to the design of limitation of rights clauses. Prempeh agrees with Jeremie Gilbert, regarding the first concern, that African constitutionalism has failed to embrace minorities.⁹⁹ Indeed, certain rights, such as the right not to be discriminated against on the basis of sexual orientation, are absent even in democratic countries, with the exception of South Africa and Botswana.¹⁰⁰ There are also minority groups, such as indigenous communities and marginalized factions, whose need for protection is yet to be articulated in the formal constitutions. As Slimane recounts, there is a failure of multi-ethnic and multicultural states to recognize marginalized ethnic groups in

⁹⁶ Wachira Maina, ‘Africa’s Constitutional Democracies: The Case of a Dissolving Picture, The East African, 12th March 2017 <<http://www.theeastafrican.co.ke/news/Africa-constitutional-democracies/2558-4338554-15s7ca3z/index.html>> accessed 25 July 2020.

⁹⁷ Henry K. Prempeh, ‘Constitutionalism, ethnicity and minority rights in Africa: A reply to Jeremie Gilbert,’(2013) 11 (2) (1) *International Journal of Constitutional Law* 438.

⁹⁸ Fombad (note 72 above) at 62.

⁹⁹ Prempeh (note 95 above).

¹⁰⁰ Reuters, ‘Botswana's High Court decriminalizes homosexuality,’ World News 11 June 2019, <<https://www.reuters.com/article/us-botswana-lgbt/botswanas-high-court-decriminalizes-homosexuality-idUSKCN1TC1EP>> accessed 25 June 2019.

Africa.¹⁰¹ The second problem is about the design of limitation clauses, a problem that Fombad has summarized after a detailed survey of human rights clauses in the following words:

the obscure wordings of many bills of rights and the extensive use of claw back clauses mean that considerable scope is left for the increasingly repressive governments in Africa to limit or ignore those rights which the bill of rights purports to recognize."¹⁰²

The other gain, though, associated with the TWD is that the general rate of constitutional suspensions and substitutions including violent takeover of political authority has significantly declined after 1989 and governments are now largely run by civilians. Even in cases where the military intervenes, such as Zimbabwe, arrangements to hand over power to a civilian government are entered into almost immediately.¹⁰³ Thus far, it has only been in 1991 in Sierra Leone and Niger, in 1999 in Cote d'Ivoire, and in 2003 in the Central African Republic, that cases of constitutional suspension have been reported.¹⁰⁴ Even in such instances, the suspension did not last more than a year, as was the case before, except in the case of Sierra Leone, where there was a bloody civil war from 1994 until 1996, when the suspended constitution was reinstated.¹⁰⁵ In respect of constitutional substitutions, fewer countries have created a second constitution after making a new one after 1989. As Table 4 illustrated, Burundi, the Central African Republic, Congo, the DRC, Guinea, Madagascar and Niger are among the few countries that have created more than one constitution after 1989, which is a relatively small number when contrasted with the frequency of constitutional substitution before 1989. This means that some formal constitutional longevity is increasingly a gain registered in African polities, a phenomenon with benefits towards development of a culture of "constitutional adherence".¹⁰⁶

¹⁰¹ Samia Slimane, 'Recognizing Minorities in Africa,' (2013) <<http://minorityrights.org/wp-content/uploads/old-site-downloads/download-43-Recognizing-Minorities-in-Africa.pdf>> accessed 25 June 2018.

¹⁰² Charles M Fombad, 'African Bill of Rights in Comparative Perspective,' (2011) 17 (1) *Fundamina* 1021-545

¹⁰³ See, Austin Ramzy, 'Zimbabwe's Apparent Coup: What We Know, 15 November 2017 New York Times,' <<https://www.nytimes.com/2017/11/15/world/africa/zimbabwe-mugabe-coup.html>> accessed 25 June 2018.

¹⁰⁴ Comparative Constitutional Law Project, 'Timelines of Constitutions,' <<https://comparativeconstitutionsproject.org/chronology/>> accessed 29 June 2019.

¹⁰⁵ Jimmy D. Kande, 'Transition without Rupture: Sierra Leone's Transfer Election of 1996,' (1998) 2 (41) *African Studies Review* 91 at 94.

¹⁰⁶ See, Tom Ginsburg, 'Constitutional Endurance,' in Tom Ginsburg & Rosalind Dixon (eds) *Comparative Constitutional Law* (Cheltenham, Edgar Edwards, 2011) 112 at 118.

An interesting development also worth noting is that, whereas in the pre-1989 epoch, a vast number of amendments were directed at dismantling democratic enclaves in the legal system, most of the post-1989 changes made following the TWD have been directed at improving the structures within which democracy is pursued. In some cases, formal change clauses have successfully stood in the way of opportunistic and self-seeking constitutional amendments. For instance, attempts at removing term limits have been successfully foiled in contexts such as Zambia and Malawi.¹⁰⁷ Also, Senegal's several amendments to her 2001 Constitution have among other things strengthened democracy by reducing the presidential term limit from 7 years to 5 years and diversified the mode of appointment of members of the Constitutional Council.¹⁰⁸ The constitutional amendment in Seychelles in 2006, too, had the effect of limiting the presidential terms to two five-year terms, which also applies to vice presidents.¹⁰⁹ The amendment to Nigeria's constitution of 1999, though lacking in public participation, did have the effect of limiting executive discretion and enhancing the autonomy of local governments and state legislative assemblies.¹¹⁰ This changing role of formal amendment rules is important considering that before 1989, constitutional amendments were mainly directed at dismantling structures that fostered separation of powers, checks and balances and opposition politics.

The other gain associated with the TWD is that in most legal orders, the idea of term limits can be seen to work and general compliance with this requirement has become a norm rather than the exception. In Tanzania under Mwinyi in 1995, Ghana under Rawlings in 2001, Sao Tome and Principe under Trovada in 2001, Cape Verde under Monteiro in 2001, Mauritius under Uteem in 2002, Kenya under Moi in 2002, Mozambique under Chissano in 2005, Benin under Kérékou in 2006, Comoros under Assoumani in 2006, Sierra Leone under Kabbah in 2007, Botswana under Mogae in

¹⁰⁷ Roger Tangri "Politics and presidential term limits in Uganda" in Roger Southall, Henning Melber (eds) *Legacies of Power Leadership change and former presidents in African politics* (Nordic Africa Institute, 2006) at 175.

¹⁰⁸ See Horace S Adjolohoun, 'Made in Courts' Democracies: Constitutional Adjudication and Politics in African Constitutionalism,' in Charles M Fombad *Constitutional Adjudication in Africa*, (Oxford University Press, 2017) 247 at 277.

¹⁰⁹ Rassin Vannier and Sharon Uranie, 'Seychelles' National Assembly approves constitutional amendment to limit presidential terms,' <<http://www.seychellesnewsagency.com/articles/4923/Seychelles+National+Assembly+approve+s+constitutional+amendment+to+limit+presidential+terms>> accessed 20 June 2019.

¹¹⁰ Idayat Hassan, 'Nigeria's constitutional reform: The quest for a people-driven constitution,' <<http://www.constitutionnet.org/news/nigerias-constitutional-reform-process-quest-people-driven-constitution>> 18 October 2017 accessed 20 June 2019.

2008, Mali under Konare in 2002, South Africa – though distinctly – under Mandela and later Mbeki in 2008, Liberia under Sirleaf in 2018 and Namibia under Phama in 2015, vacation of office at the end of the term has been experienced.¹¹¹ In many contexts, too, attempts at removing term limits through formal constitutional change have been unsuccessful. The specific jurisdictions where this has occurred include Zambia in 2001 under Chiluba, Malawi in 2003 under Muluzi, Nigeria in 2006 under Obasanjo, Senegal in 2012 under Wade and Burkina Faso in 2014 under Compaore.¹¹² In Senegal and Niger these attempts failed dramatically. In 2009, Wade of Senegal announced that he would run for an additional term despite the fact that his party had amended the constitution to return the country to the seven-year term that had been scrapped in 2001.¹¹³ This could not have extended his term as it applied to terms beyond 2012. He did run in 2012 despite widespread protests. Wade did not win in the first round and the opposition rallied against him in the second round, voting in Macky Sall to replace him.¹¹⁴ In Niger, the ruling party under Mamadou Tandja drafted a constitutional amendment to extend his term.¹¹⁵ Because this was barred by the constitution, he sought to make a new constitution without term limits.¹¹⁶ The Constitutional Court resisted this initiative, compelling him to dissolve the National Assembly and the Court and calling for a referendum ahead of the presidential elections. He was, however, ousted through a military coup on 18 February 2010.¹¹⁷ In summary, term limits – which were rare in the pre-TWD epoch – are now working in many political orders and formal constitutional amendments have had some impact.

1.2 Statement of the problem

In spite of these positive effects of the TWD in SSA, the de facto democratic credentials of a vast number of African countries reveal that the 1989 transitions were “false starts”

¹¹¹ See Africa Centre for Strategic Studies, ‘Constitutional Term Limits for African Leaders,’ (2018) available at <<https://africacenter.org/wp-content/uploads/2018/02/Constitutional-Term-Limits-for-African-Leaders-February-2018.pdf>> accessed 21 June 2019.

¹¹² *Ibid.*

¹¹³ See, Wachira Maina, ‘African Presidents Fight Term Limits to Rule Longer,’ <<https://www.nation.co.ke/news/africa/African-presidents-fight-term-limits-to-rule-longer/1066-4328394-tvsqx7/index.html>> accessed 25 March 2020.

¹¹⁴ Catherine Lena Kelly, ‘Senegal: What Will Turnover Bring?’ (2012) 23 (3) *Journal of Democracy* 121.

¹¹⁵ Virginie Baudais and Grégory Chauzal, ‘The 2010 coup d’état in Niger: A Praetorian Regulation of Politics?’ (2011) Volume 110, Issue 439, *African Affairs*, 295–304.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

for most polities.¹¹⁸ A vast number of political orders either partially transitioned to “hybrid” constitutions or backslid to their erstwhile authoritarian status.¹¹⁹ As observed, it is only South Africa, Benin, Cape Verde, Sao Tome and Principe, Mali, Senegal and Ghana that can be claimed to have experienced a change from authoritarian to democratic real constitutions.¹²⁰ Others, such as Cameroon, Equatorial Guinea, Sudan, Uganda, Rwanda, Burundi, Angola, the DRC, the Central African Republic and Eswatini reverted to their authoritarian constitutions or did not in fact experience any change at all.¹²¹ A majority of countries, though, such as Kenya, Tanzania, Lesotho, Nigeria, Togo, Ivory Coast, Zambia, and Malawi, just to list a few, partially transitioned into, and have since had stable, hybrid constitutions epitomised by electoral authoritarianism.¹²² Others, such as Madagascar, which had hybrid constitutions at the inception of the TWD, retained their hybrid constitutions in spite of the collapse of single-party regimes following the TWD.¹²³ Discounting the few listed democratic countries that joined Botswana and Mauritius, this state of affairs means, as observed already, that authoritarian norms and practices remained in circulation, and are effective and stable in spite of the TWD. When this study was commenced in 2017, Freedom House’s Annual Freedom in the World Report had characterized most of Sub-Saharan Africa as embodying “entrenched autocrats, fragile institutions.”¹²⁴ The report also highlighted that only 18% of the countries are “free”.¹²⁵ Further, SSA had a majority of countries that were considered to fall into a category called “Worst of the

¹¹⁸ See Prempeh (note 11 above).

¹¹⁹ See Larry Diamond ‘Is the Third Wave of Democratization Over? An Empirical Assessment,’ (n 89 above) at 40. Also see, Samuel Huntington (note 12) above at 16.

¹²⁰ Tom Lodge, ‘Alternation and Leadership Succession in African Democracies,’ (2013) 24 *Irish Studies in International Affairs* 21 at 24.

¹²¹ See the depiction in Joseph Siegle, ‘Democratic divergence in Africa: lessons and implications for aid,’ at 51. <<https://africacenter.org/wp-content/uploads/2016/02/Democratic-divergence-in-Africa-lessons-and-implication-for-aid-Siegle.pdf>> accessed 25 June 2019. See also, Michael Bratton ‘Deciphering Africa's Divergent Transitions,’ (1997) 112 (1) *Political Science Quarterly* 67 at 76. Generally, see also Rene Lemarchand, ‘Africa's Troubled Transitions,’ (1993) (3) *Journal of Democracy* 98- 109.

¹²² Generally, Compare Michael Bratton's 1994 statistics (note 119 above) with Joseph Siegle’s 2006 (note 119) above. (the transitional outcomes are different in Bratton's case. In this study, blocked transitions are analogized to “failed” while flawed transitions to “partial.”

¹²³ Freedom House, Publication Archives, <<https://freedomhouse.org/reports/publication-archives>> 20 June 2020.

¹²⁴ Freedom House, ‘Freedom in the World 2017: Populists and Autocrats: The Dual Threat to Global Democracy,’ <<https://freedomhouse.org/report/freedom-world/2017/populists-and-autocrats-dual-threat-global-democracy>> accessed 29 October 2017.

¹²⁵ Freedom House, ‘Freedom in the World 2017,’ <<https://freedomhouse.org/article/freedom-world-2017-freedom-decline-continues-amid-rising-populism-and-autocracy>> accessed 29 October 2017.

Worst.”¹²⁶ The Economic Intelligence Unit’s Democracy Index, for its part, indicated that most countries were either “authoritarian” or “hybrid” regimes as at 2017.¹²⁷ In 2017, Africa had 23 authoritarian states and 13 hybrid ones out of 52 and 39 countries respectively.¹²⁸ Instead of creating a favourable environment for democracy to flourish, the adoption of formally democratic constitutions following the TWD has essentially widened the gap between the real and the formal constitution.

Related to the stability and resilience of authoritarian de facto norms, notwithstanding the TWD, is the failure on the part of democratic and hybrid polities to consolidate. As noted already, Larry Diamond observed that Nigeria and Sudan regressed almost immediately. Some polities that had transitioned to hybrid constitutions, such as Ethiopia, the Gambia, Uganda, and Zimbabwe, regressed to authoritarian constitutions at some point in their post-1989 constitutional journeys. As at 2017, when this study was commenced, only Mauritius was considered a full democracy by the Economic Intelligence Unit’s Democracy Index.¹²⁹ South Africa, Cape Verde, Botswana, Senegal and Ghana, which are considered in this thesis as having democratic constitutions, were profiled as “flawed democracies”.¹³⁰ The report indicates that “the majority, 25” were undergoing “a deterioration in their democratic credentials.”¹³¹ Hitherto enviable cases like Mali, which had been thought to have consolidated its democratic constitution, suffered from a setback to a hybrid constitution.¹³² In the recent past, especially after 2017, and following the global phenomenon dubbed “democratic rot”, “decay” or “regression” that afflicts even polities that were thought to be democratic, such as Poland and Hungary, Sub-Saharan African countries that had either transitioned to or held onto democratic constitutions, such as Benin, followed the Mali path and succumbed to regression.¹³³ Hitherto enduring constitutional democracies countries, such as Botswana, are yet to degrade to

¹²⁶ *Ibid.*

¹²⁷ The Economist Intelligence Unit's Democracy Index, <<https://infographics.economist.com/2017/DemocracyIndex/>> accessed 29 October 2017.

¹²⁸ The Economist Intelligence Unit's Democracy Index, <http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf> 29 October 2017.

¹²⁹ *Ibid* at 33.

¹³⁰ *Ibid.*

¹³¹ *Ibid* at 32.

¹³² See Freedom House, Publication Archives (note 121 above). Generally, See also, Gero Erdmann, Transition from Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy (2011) *German Institute for Global Area Studies*, 1- 41.

¹³³ *Ibid.*

hybrid constitutions, but there has been a disquiet over their democratic consolidation as fears abound that these countries are likely to retreat to hybrid constitutions.¹³⁴ Hence, the problem that is at the centre of this study is the failure of SSA constitutions to sustain a commitment to democratic government.

1.3 Outline of the study

Following this general introduction to constitutional transformations in Sub-Saharan Africa, the nature of the problem to be studied and a definition of the terms to be used, the next highlights the gap in the existing literature on Africa's constitutional maladies. Chapter 3 then outlines the methodology that is used in investigating the research questions and the basis for case selection. Chapter 4 develops a conceptual framework to be used in researching answers to the research questions. More particularly, Chapter 4 creates a conceptual framework for assessing real constitutional change by theorising the idea of the real constitution, elaborating the different ideal types of real constitution and theorising the conditions that are necessary for real constitutional change and consolidation. It is through this chapter that the conditions of interest are identified.

Using the conditions of interest theorised under Chapter 4, Chapter 5 considers Cameroon's enduring authoritarian constitution, Chapter 6 examines Kenya's hybrid constitution, and Chapter 7 examines Benin's successful transition to and from a democratic constitution. Each of these chapters begins by describing the political and institutional context under which the real constitution has developed and been enforced, followed by a section that sets out the transitional events and real constitutional change outcome during and after the TWD. Their substantive parts look more closely at the presence or absence of the theorised conditions of interest introduced in Chapter 4. Based on the theorisation in Chapter 4, the conditions of interest are either (a) actor-based or (b) structural. Each of the case study chapters then takes a look at whether and, if so, how formal powers and judicial review have influenced the transitional outcomes, especially after the TWD. There are concluding observations at the end of each case study chapter on the likely fate of the relevant country's real constitution.

¹³⁴ Dylan Gleeman, 'The Oldest Continuous Democracy in Africa is Reported to be on a Negative Governance Trajectory,' (2019) Boston, Democratic Erosion, <<https://www.democratic-erosion.com/2019/03/28/the-oldest-continuous-democracy-in-africa-is-reported-to-be-on-a-negative-governance-trajectory-by-dylan-gleeman/>> accessed 12 March 2020; Gyimah-Boadi, E. Africa's waning democratic commitment"(2015) 26 (1) *Journal of Democracy* 101–113.

The third and last part is made up of Chapter 8. It states the overall findings of the study and revisits the research questions by responding more directly to them. This is done by assembling and analysing the case study findings thematically based on the conditions of interest examined in the case study chapters and test their findings against a wider group of countries. It also offers some implications of the findings, especially for ongoing debates, and suggests areas in need of further research.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This chapter seeks to show how the existing literature fails to adequately address the apparent endurance of authoritarian norms and practices in SSA constitutional orders as well as the attendant incomplete, partial or complete transition and troubled consolidation of democratic constitutionalism. As has been mentioned, this could be partly because SSA as a region has been largely left out of comparative constitutional law studies and also because much existing literature, especially by African law scholars, has had a bias towards formal constitutional change and stability.¹ Those studies that take a more contextual approach in turn oscillate around the effectiveness of constitutional norms and structures: the main concern being why democratic constitutional rule has been elusive in general.² None of the studies takes the approach that this one adopts of examining what drives change to de facto norms in a political order and how the change of these norms either stabilizes or leads to change of real constitutions from authoritarian to hybrid or democratic regimes and vice versa. The closest accounts are those that examine the stability of different political regimes.³ These ones, founded in political science or sociology, have a bias against legal norms that their counterparts in constitutional law capitalize on as the sections that follow show. To start off, the next segment briefly sketches the general neglect of African constitutional experiences, which is a limitation in the literature in its own way.

¹ E.g. Charles M. Fombad, 'Some Perspectives on Durability and Change under Modern African Constitutions,' (2013) 11 (2) *International Journal of Constitutional Law* 382.

² E.g. Emmanuel Gyimah-Boadi, 'Africa's Waning Democratic Commitment,' (2015) 26 (1) *Journal of Democracy* 101–113; Nic Cheeseman, *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform* (New York, Cambridge University Press, 2015).

³ These include, Julia Grauvogel & Christian Von Soest, 'Claims to Legitimacy Count: Why Sanctions Fail to Instigate Democratisation in Authoritarian Regimes (2014) 54 *European Journal of Political Research* 635–653; Chanel Davenport, 'State Repression and Political Order,' (2007) 10(1) *Annual Review of Political Science* 1–23; Karoline Wiesner *et al* 'Stability of Democracies: A Complex Systems Perspective,' (2018) 40 (1) *European Journal of Physics* 1; Joakim Ekman, 'Political Participation and Regime Stability: A Framework for Analyzing Hybrid Regimes,' (2009) 30 (1) *International Political Science Review* 7–31; Alina Rocha Menocal *et al*, 'Hybrid Regimes and the Challenges of Deepening and Sustaining Democracy in Developing Countries,' (2008) 15 (1) *South African Journal of International Affairs* 29; Diver, McKensie, 'Post-Soviet Hybrid-Regimes: Elements of stability,' (2014) *Celebrating Scholarship & Creativity Day*. 30; Larry Diamond, 'Thinking About Hybrid Regimes,' (2002) 13 (2) *Journal of Democracy*, 21-35; Valeri Bunce and Sharon Wolchik 'Defeating Dictators: Electoral Change and Stability in Competitive Authoritarian Regimes,' (2010) 62 (1) *World Politics* 43-86; Johannes Gerschewski, 'The Three Pillars of Stability: Legitimation, Repression, and Co-optation in Autocratic Regimes,' (2013) 20 (1) *Democratization* 13-38; Thomas B. Pepinsky, 'Durable Authoritarianism as a Self-Enforcing Coalition,' (2008) <<https://courses.cit.cornell.edu/tp253/docs/self-enforcing.pdf>>. (accessed 25 July 2017). (accessed 7 November 2020).

2.2 Africa in mainstream comparative constitutional studies

As noted, the fact that African constitutional systems and their experiences are largely absent from mainstream constitutional studies is largely admitted. Mark Tushnet has observed that:

despite the enthusiasm for comparative constitutional law and the emergence of systemisation of comparative work, the field is developed unevenly. A few countries feature in numerous studies: The United States, the United Kingdom and other commonwealth jurisdictions, such as Australia and Canada; Germany, France and South Africa... other nations or regions are neglected.⁴

Tushnet's sentiments are echoed by many other leading constitutional law scholars who examine important subjects such as constitution-making and stability. In 1995, amidst a reverse wave of democratisation, Jon Elster penned a seminal paper on constitutional change titled "Forces and Mechanisms in the Constitution-Making Process."⁵ In that work, Elster examined the forces behind constitution-making processes and particularly the conditions that work against good constitution writing. He remarked in his introductory pages that his "universe is limited" and that he was going to "ignore" Africa.⁶ With the exception of South Africa, many countries "continue to lie largely outside the mainstream of contemporary comparative constitutional discourse" as Kwasi Prempeh put it in a 2007 article.⁷ This trend has largely endured if the claim by Ran Hirschl in his 2014 book is anything to go by. Hirschl mentioned Sub-Saharan Africa, in particular, stating that its experiences, like those of the Nordic countries, remain "largely uncharted terrain."⁸

There is no suggestion here that African countries other than South Africa have not featured in comparative constitutional law studies, especially lately. Credit should in this respect be given to Charles Fombad, who has supplied the constitutional community, through the "Stellenbosch Handbooks in African Constitutional Law" series, with edited volumes addressing different issues of concern to African

⁴ Mark Tushnet and Madhav Khosla 'Unstable Constitutionalism,' in Mark Tushnet and Madhav Khosla *Unstable constitutionalism: Law and Politics in South Asia* (Cambridge University Press, 2015) at 3.

⁵ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process,' (1995) 45 *Duke Law Journal* 364.

⁶ *Ibid.*

⁷ See Henry K. Prempeh, 'Africa's 'Constitutional Revival': False Start or New Dawn?' in Eunice Sahle (ed) *Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Development and Dilemma* (Palgrave, 2017) 16.

⁸ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) 5.

constitutionalism. Also, in recent non-Africa-specific volumes, countries other than South Africa, or the entire region, have begun to feature. For instance, Albert, Contiades and Fatiadou's edited volume titled, "The Foundations and Traditions of Constitutional Amendment", a book that considers formal constitutional change and its underlying motives,⁹ has a chapter on Africa, specifically, the "Implications of conflation of normal and constitutional politics on constitutional change in Africa."¹⁰ While de facto norms are not considered in the essay, the author looks at the circumstances under which constitution-making in Africa takes place, contending that ruling political elites controlled constitution-making processes after the TWD, which explains their ineffectiveness and hence the gap between the written and real constitution.¹¹ Tom Ginsburg and Aziz Huq's edited book titled, "Assessing Constitutional Performance" has a chapter on a SSA country, Kenya, by James Gathii, which considers the enforcement and implementation of Kenya's 2010 Constitution.¹² Nevertheless, this is the exception rather than the norm. Other volumes in the field, such as Dixon and Stone's *"The Invisible Constitution in Comparative Perspective"*, Dawn Oliver and Carlo Fusaro's *"How Constitutions Change: A Comparative Study"* and Xenophon Contiade and Alkmeme Fotiadou's *"Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA"* leave out SSA countries save for the usual suspect: South Africa.¹³

The neglect of Africa in the comparative law literature notwithstanding, there is a rather expansive general constitutional law/politics literature on this region. In relation to this study, the main subfield focuses on constitutional change – amendment and substitution – and related themes: longevity, stability, and resilience.¹⁴ Though the

⁹ Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds) *The Foundations and Traditions of Constitutional Amendment* (Oxford, Hart Publishing, 2017)

¹⁰ Duncan Okubasu, 'The Implication of Conflation of Normal and Constitutional Politics on Constitutional Change in Africa,' in Richard Albert, Xenophon Contiades, Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 327–342.
¹¹ *Ibid.*

¹² James Thuo Gathii, 'Assessing the Constitution of Kenya 2010 five years later,' in Tom Ginsburg and Aziz Huq (eds) *Assessing Constitutional Performance* (Cambridge University Press, 2016) 337-364.

¹³ See references to African countries in Caitlin Goss 'Interim Constitutions and the Invisible Constitution,' in A Stone and R Dixon (eds) *The Invisible Constitution in Comparative Perspectives* (Cambridge University Press, 2018) 173, 174. Dawn Oliver & Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study* (Hart Publishing, Portland, 2011); Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge, New York, 2013).

¹⁴ This include but are not limited to, Mads Andenas (ed.), *The Creation and Amendment of Constitutional Norms*, (2000) *British Institute of International & Comparative Law*; D Oliver and C Fusaro (note 13 above); Contiades (ed.), (note 13 above); Stephen Levinson (ed.), *Responding*

formal constitution is often a part of the real constitution, these ideals become very elusive where the formal constitution is unenforced or is not normatively attractive. Whereas insights are gathered from contributions on these themes, this study's awareness that the existing literature on these themes has a bias towards the written constitution, leaving out especially the unwritten norms, is what makes it different in general terms.¹⁵ On the other hand, this study also draws on the comparative politics literature, especially on the nature of political regimes: hybrid, authoritarian and democratic. A vast literature exists on these regimes and on what makes them endure.¹⁶ In the context of Africa, Nic Cheeseman's monograph, *"Democracy in Africa: Successes, Failures, and the Struggle for Political Reform"*, a book that "documented the great variety of pathways through which African countries have moved toward, and away from, democracy",¹⁷ could be treated alongside other volumes that consider electoral authoritarian regimes as offering plausible explanations behind the apparent failure to transition.¹⁸ These studies, as already mentioned, eschew legal norms and rules and do not pay particular attention to how legal norms, written and unwritten,

to Imperfection: The Theory and Practice of Constitutional Amendment, (Princeton University Press, Princeton, 1995); Reijer Passchier, *Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective*, (diss. Leiden), Amsterdam: Ipskamp Printing 2017); Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All?' (2015) 13 *International Journal of Constitutional Law*, 686; Reijer Passchier and Maarten Stremler, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 (2) *The Cambridge Journal of International and Comparative Law* 337- 367; Xenophon Contiades and Fotiadou, Alkmene, On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks? (2015) 9 (1) *Vienna Journal of International Constitutional Law* 3-26; Peter Ordeshook, *Constitutional Stability* (1992) 3 *Constit Polit Econ* 137-175; Tom Ginsburg, James Melton & Zachary Elkins, 'The Endurance of National Constitutions,' (Cambridge University Press, 2013); Gabriel L. Negretto, 'The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America,' (2008) <https://kellogg.nd.edu/sites/default/files/old_files/documents/350_0.pdf> accessed 7 November 2020; Erik Bjorn Rasch, and Roger D. Congleton 'Amendment Procedures and Constitutional Stability,'" in Roger D. Congleton, and Birgitta Swedenborg (eds) *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge, MA: MIT Press, 2006); Heather K. Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution,' (2007) 55 *Drake Law Review* 925; Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007).

¹⁵ Particularly literature in constitutional law essays and books.

¹⁶ Nic Cheeseman (note 2 above).

¹⁷ *Ibid.*

¹⁸ Yonatan L Morse, 'Electoral authoritarianism and Weak States in Africa: The Role of Parties Versus Presidents in Tanzania and Cameroon,' (2017) 39 (1) *International Political Science Review* 114-; Matthijs Bogaards, 'Re-examining African Elections,' (2013) 24 (4) *Journal of Democracy* 151-160; Michael Bratton, Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (New York, NY: Cambridge University Press, 1997); Staffan Lindberg, *Democracy and Elections in Africa* (Baltimore, MD: Johns Hopkins University Press, 2006); Stephen Levitsky and Lucan Way, *A Competitive Authoritarianism Hybrid Regimes After the Cold War* (NY: Cambridge University Press, 2010).

change and how, in so doing, they facilitate dismemberment or entrenchment of the various political regimes whose change and stability these studies are in fact devoted to understanding.

2.3 Discourses on constitutional dysfunction in Sub-Saharan Africa

Literature from both fields into which this study falls has tried to unravel the state of affairs in African countries under various themes. In comparative law discourse, the dominant claims made include a relatively spurious one that democracy and the formal constitutional apparatus that implement it are un-African and, second, that the process of making post-1989 constitutions was marred by exclusion, with the result that constitutions suffer from a lack of sociological legitimacy. In both the political science and the comparative constitutional law literature, institutional design has been said to matter and is felt to provide the solution to failures to successfully transition.¹⁹ In the political science literature, particularly on Africa, the link between democracy and wealth has also been advanced as the reason behind the failure to consolidate.²⁰ These various claims are considered in the sections that follow and their limitations flagged. The judgment passed about them is that they are helpful in understanding the problems facing African political orders today, but they offer partial explanations at best.

2.3.1 Cultural inappropriateness

Though not featuring prominently in the literature, Tanzania's first President, Julius Nyerere's statement that (multi-party) democracy was "un-African" is a fairly often endorsed explanation behind the setbacks that democracy has suffered in Sub-Saharan Africa.²¹ Nyerere, who had studied at the University of Edinburgh, was a very influential Pan-African leader. According to Cheeseman, his influence helped to "promote the proliferation of single party systems across the continent."²² His claim that democracy was un-African set into motion a somewhat lasting impression that

¹⁹ See e.g. Cheeseman (note 2 above).

²⁰ For example, Michael Bratton, 'Poor People and Democratic Citizenship in Africa,' Afrobarometer Working Paper No. 56, <<https://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo56.pdf>> accessed 23 November 2020; Larry Diamond, Larry 'Economic Development and Democracy Reconsidered,' (1992) 35 *American Behavioral Scientist* 450-99; David Bigman, *Poverty, Hunger, and Democracy in Africa Potential and Limitations of Democracy in Cementing Multiethnic Societies* (London, Palgrave Macmillan, 2014)

²¹ Julius Nyerere, *Freedom and Socialism – Uhuru Na Ujamaa – A Selection from Writings and Speeches, 1965–1967*. (Oxford, Oxford University Press, 1968).

²² Cheeseman (note 2 above) at 39.

democracy is a Western institution and by that fact alone, incapable of flourishing in Africa.²³ This is felt to be the case because of its close association with liberalism, which centres on the individual and is thus inherently incompatible with set-ups that are considered communitarian.²⁴ This discourse turns on the appropriateness of liberal democracy as a governance model in SSA or at times on the need to Africanize democracy.²⁵ Indeed, as was pointed out earlier in this chapter, democratic politics as we understand it, does not have a foundation in pre-colonial African experiences, and at its introduction, it was ignored.²⁶ It is on the basis of this understanding that Lathi Jotia remarks that, “[a]lthough liberal democracy has proved to be a successful political theory in the West; in Africa it is still receiving mixed reactions”.²⁷ Though focusing on liberal democracy as a whole, Ikuenobe, for his part, makes and defends the claim that “I do not believe that the liberal variant of democracy is workable” in post-colonial African states.²⁸ His particular objection is that the normative basis for liberal democracy – individual autonomy – is, as mentioned, not compatible with communitarian African societies.²⁹ For him, democracy of the kind that is practised in the West is not suitable for multi-ethnic, cultural and religious groups.³⁰

²³ Gero Erdmann, *Democracy, Culture and Tradition: On the Problem of Pre-colonial Rule in the African Debate on Democracy* (Konrad Adenauer Foundation, 2000); See also, Kwame Nkrumah, ‘*African Socialism Revisited*,’ in *Africa: National and Social Revolution – Collection of Papers Read at the Cairo Seminar, 78–83*. (Prague: Peace and Socialism, 1967); William Gumede (2017) ‘The Democracy Deficit of Africa’s Liberation Movements Turned Governments,’ *Politikon*, 44:1, 27-48; Sakah S. Mahmud ‘The State and Human Rights in Africa in the 1990s: Perspectives and Prospects,’ (1993) 12 *Human Rights Quarterly* 485- 495.

²⁴ See Henry K. Prempeh, ‘Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,’ (2006) 80 (4) *Tulane Law Review* 1 at 79 (“In the early decades of sovereign statehood in Africa, the “African” concept of human rights formed an important part of the intellectual and political arsenal deployed by the continent’s ruling elites to reject demands for democracy and civil and political liberties.³⁵⁴ With the dismal failure of the authoritarian project across Africa has come growing popular and intellectual rejection of its ideological and intellectual underpinnings, including its positing of an inherent tension between democracy and development and between civil/political rights and social/economic rights.”)

²⁵ Polycarp Ikuenobe, ‘The Prospects of Western Liberal Democracy,’ in Africa (2016) *The Critique*, available at <<http://www.thecritique.com/articles/the-prospects-of-western-liberal-democracy-in-africa/>> accessed 20 August 2017.

²⁶ Generally, See Terence C. Halliday and Lucien Karpik *Political Liberalisms in the British Post Colony: A Theme in Three Variations*, in Malcom Feeley, et al (eds) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, 2012) 3.

²⁷ Agreement Lathi Jotia, ‘Liberal Democracy: An African Perspective,’ (2012) <[http://www.savap.org.pk/journals/ARInt./Vol.2\(3\)/2012\(2.3-75\).pdf](http://www.savap.org.pk/journals/ARInt./Vol.2(3)/2012(2.3-75).pdf)> accessed 27 October 2017.

²⁸ Polycarp Ikuenobe (n 25 above).

²⁹ *Ibid.*

³⁰ *Ibid.* see also Makau Mutua, (he claims that liberal democracy is ‘a limited vehicle for responding to, among others, the vagaries of market fundamentalism, globalization,’ Makau

These claims are certainly plausible on their own, but they do not stand as explanations for the apparent failure of democracy, particularly in hybrid and authoritarian polities. If they were, the quest for democracy would not persist in those societies to date. Democracy has indeed become part of African political rhetoric and even powerful political figures running authoritarian regimes allude to it. In 2013, for instance, when Robert Mugabe, one of Africa's leading autocrats at that time, "won" elections, he attacked his opposition rivals, saying that he and his party were "delivering democracy on a platter."³¹ Most, if not all, post-1989 formal constitutions are entirely committed to the idea of democracy if their reference to it and the values that undergird it are anything to go by. The 1991 Constitution of Equatorial Guinea, a country whose President, Teodoro Obiang Nguema Mbasogo, has been in office since 1979, and whose Vice-President is his son, Teodoro Nguema Obiang Mangue, provides that Equatorial Guinea is a "democratic state",³² an aspect that is not subject to revision.³³ Beside, no easy link can be established between democratic regimes in Africa, say Benin, and the distorted way in which democracy was introduced or even its post-colonial constitutional tragedies. Hence Sandbrook observes that, "I contend that liberal democracy is a defensible goal in sub-Saharan countries".³⁴

Another strand of the cultural appropriateness discourse is one which professes that the very idea of constitutions and the constraints they imposed were un-African.³⁵ True to this claim, and perhaps with the exception of autonomous South African states like the Orange Free State, the idea of African states and formal constitutions did not exist even in the most sophisticated pre-colonial political orders, like Ethiopia. As Table 1 showed, formal constitutions were mainly introduced in the 1960s after decolonisation. The earliest formal constitution on the continent is the one Liberian American immigrants introduced in 1847, which was an imitation of the American

Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism,' (2008) 51 (1) *African Studies Review* 17-39.

³¹ See BBC, 'Mugabe: We are Delivering Democracy on a Platter,' 12 August 2013, <<https://www.bbc.com/news/av/world-africa-23672465/mugabe-we-are-delivering-democracy-on-a-platter>> accessed 7 November 2020.

³² Item No. 1, Constitution of Equatorial Guinea 1991.

³³ Item No. 104, Constitution of Equatorial Guinea Ibid.

³⁴ Richard Sandbrook, 'Liberal Democracy in Africa: A Socialist-Revisionist Perspective,' (1988) 2 (22) *Canadian Journal of African Studies/Revue Canadienne des Études Africaines* 240 at 241.

³⁵ Joe Teffo, 'Monarchy and Democracy: Towards a Cultural Renaissance,' (2002) 1 (1) *Journal on African Philosophy*, 1 -17; See also, Pearson Nherere and Marina D'Engelbronner-Kolff, 'The Institutionalisation of Human Rights in Southern Africa, (Nordic Human Rights Publications, 1993), at 8.

Declaration of Independence and the US Constitution.³⁶ The Liberian Constitution did not, however, inspire existing African chiefdoms and other political formations to adopt formal constitutions. These, just like the African states themselves, are products of colonial occupation, and are doomed to be failed projects, the claim assumes. Though making reference to the idea of the African state and not to constitutions, Mutua's sentiments can be read as echoing this claim.³⁷ He wrote:

the post-colonial state, the uncritical successor of the colonial state, is doomed because it lacks basic moral legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental reason for its failure.³⁸

The idea that the alien nature of constitutions explains constitutional and democratic failure in Africa holds perhaps in relation to what Issa Shivji classified as "first generation" constitutions- and perhaps inapplicable to Francophone Africa.³⁹ As mentioned, the quest for democratic governance has endured and by the late 1990s, Africa had experienced about three waves of constitution-making that had resulted in "made-in-Africa" constitutions.⁴⁰ If indeed written constitutions as a basis for coordinating a society's public life were unwelcome in Africa, the project should have been abandoned altogether fifty years after independence. Instead, as Grigoire Bakandeja wa Mpungu observes about the Democratic Republic of Congo:

The political and constitutional history of the DRC shows, in light of the foregoing, that, after 46 years of independence, the country is still looking for a constitution that would ensure its political and institutional stability, a prerequisite for the rebirth of the state and the Republic.⁴¹

The foregoing statement is merely reflective of the state of affairs in many African countries save to add that even the most repressive regimes in the post-independence period conceived constitutions as an indispensable instrument of governance.⁴² Governments that came into power through military coups more often than not either

³⁶ Frank Sherman, *Liberia: The Land, Its People, History and Culture* (New Africa Press, 2011) at 301.

³⁷ Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' (1995) 16 *Mich. J. Int'l L.* 1113.

³⁸ *Ibid.*

³⁹ Issa G. Shivji, *Where is Uhuru? Reflections on the Struggle for Democracy in Africa* (Fahamu Books Cape Town, 2009) 50; Ben O. Nwabueze *Constitutional democracy: Africa*, Vol. 3. (2004 Lagos, Nigeria: Spectrum Books) 1119–3077. See also Muna Ndulo,

⁴⁰ Charles M. Fombad, 'Constitutional Literacy in Africa: Challenges and Prospect' (2018) 44 (3) *Commonwealth Law Bulletin*, 492 at 493

⁴¹ Grigoire Bakandeja wa Mpungu, 'The New Constitution of the Democratic Republic of Congo: Sources and Innovations,' in Charles Fombad and Christina Murray (eds) *Fostering Constitutionalism in Africa* (Pretoria, Pretoria Law Press, 2010) 141 at 197.

⁴² See H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African political paradox', in Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, (Oxford University Press, New York, 1993).

reinstated constitutions that they had abrogated or created new ones. Also, even in respect of countries that more or less retained their pre-colonial governance structure, such as Swaziland (now called Eswatini), the idea of a formal constitution, which was not there before the colonial experience, has now been completely embraced.⁴³

This cultural appropriateness discourse certainly does not offer an explanation for the failure to transition from authoritarian real constitutions, especially after 1989 when African states ventured into a new wave of constitution-making following the TWD. Its main focus is on how the independence constitutions and ideas behind them did not tally with African ideas and experiences. While it thus had great weight just after colonialism, it does not say much 50 years and beyond after independence. Intriguingly, whereas this discourse frowns at the felt “un-African” nature of democracy and the institutions that operationalize it, it says nothing about authoritarian de facto norms and understandings that were generated during the colonial epoch, such as the use of violence to extract allegiance towards political authority, which are part and parcel of many political orders even after the TWD and successive waves of constitution-making.

2.3.2 Exclusionary constitution-making

There is also a persistent idea that, although formal constitutions in Africa have embraced democratic governance, these constitutions lack sociological legitimacy because they are a product of exclusionary constitution-making processes. This is an explanation for the suboptimal enforcement of constitutions. Muna Ndulo, for instance, once wrote:

The process of adopting a constitution is as important as its substance.... the process must be legitimate and for it to be legitimate, it must be inclusive. It should represent the interests of all the people in the country, and the people must be made to feel that they own the process and the end product.... Since independence, the practice in many African countries has been to adopt new constitutions through the use of commissions... the use of commissions to recommend a constitution is susceptible to manipulation by the government in power and often results into imposition of preferred constitutional models. Matters are made worse by the perception held by most people that such commissions are populated by people sympathetic to the ruling party.⁴⁴

⁴³ Swaziland has a constitution revised in 2005.

⁴⁴ Muna Ndulo ‘Constitution Making Process in Africa: Assessing both the Process and Content,’ (2001) *Cornell Law Faculty Publications Paper 57*, 114 (On file). See also, Muna Ndulo (note 9 above).

Ndulo's view is a dominant hypothesis that has been used to judge constitutional performance in general in many parts of Africa. This is especially given the success story of South Africa whose 1994-1996 constitution-making process is considered to have been participatory.⁴⁵ Tripp, for instance, laments Uganda's constitution-making process that resulted in its 1995 Constitution, saying that "the undemocratic characteristic of the 1995 Constitution can be traced in the undemocratic aspects of constitution making".⁴⁶ Indeed, African political elites view the processes of constitutional change as a means of thwarting demands for deeper political or constitutional reforms, especially when these are demanded by opposition factions.⁴⁷ In electoral authoritarian regimes, which is what Africa's hybrid regimes are, there is said to be competition over the rules of the game, which is often expressed in constitutions.⁴⁸ The contents of these constitutions are consequently a grave concern for the ruling regime and it is unsurprising that these elites have a serious interest in constitution-making and change processes.

It should be noted, also, that this discourse offered an explanation for the failure of pre-1989 constitutions. The pre-1989 version of this explanation focused on first-generation constitutions, and explained constitutional neglect on the basis that Africans were not involved in the constitution-making process and were rather concerned about other matters at that time, like securing political freedom.⁴⁹ As Olasunkanmi put it:

Why were these constitutions illegitimate even if legal? The truth is that they were not compacted through a truly open and democratic process that paid attention to the dreams, pains, and aspirations of African people, their communities, and constituencies. In fact, most of these were directly imposed constitutions or elite-driven processes that treat the people and their ideas with disrespect, if not contempt. The hallmark of this constitution is that they were never subjected to popular debates or referenda.⁵⁰

⁴⁵ Vivien Hart, *Democratic Constitution Making* (2003) United States Institute of Peace Special Report, <https://peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking_USIP2003.pdf>; accessed 27 August 2017.

⁴⁶ Aili M. Tripp, 'The Politics of Constitution Making in Uganda' <http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6_Framing.pdf> accessed 1 April 2017.

⁴⁷ Duncan Okubasu (note 10 above).

⁴⁸ See, Andreas Schedler, 'The Nested Game of Democratization by Elections,' (2002) 23 (1) *International Political Science Review / Revue internationale de science politique* Electoral Governance and Democratization. Gouvernance électorale et démocratisation 103-122.

⁴⁹ Aborisade Olasunkanmi, 'Constitution Without Constitutionalism: Interrogating the Africa Experience (2018) 2 (5) *Art Human Open Acc J* 272-276.

⁵⁰ *Ibid.*

It is indeed right to claim that first-generation constitutions were concluded as compromises between political elites and the departing colonial masters, and while the former were interested in political freedom, the later were concerned with securing the interests of settler populations that were to remain.⁵¹ It is no wonder that Fombad considers the transition away from the imposed independence constitutions to those “made-in-Africa” as a “remarkable development.”⁵²

Though not wishing to dismiss the claim of exclusionary constitution-making, some counter-illustrations exist. First, Cape Verde transitioned to a democratic constitution without the adoption of a new constitution.⁵³ Second, in Benin, a significant political actor that orchestrated the collapse of the Mathieu Kérékou regime, the Community Party of Benin, did not participate in the early 1990s constitutional conferences that ushered Benin into a democratic constitutional era.⁵⁴ Third, some of the countries that experienced fairly inclusive constitution-making processes, such as Kenya, are yet to successfully transition into full-blown democratic constitutionalism.⁵⁵ Sudan’s constitution-making process, too, which started with the signing of the Comprehensive Peace Agreement, is considered a participatory one but did not succeed in rooting out authoritarianism in post-2011 Sudan.⁵⁶ Fourth, exclusionary constitution-making also does not explain why Mauritius and Botswana have consolidated their democracies over the years on the basis of their imposed independence constitutions. Indeed, even beyond Africa, the Japanese Constitution stands as an illustration that a constitution that is not a product of popular authorship can still be quite effective.⁵⁷ For this reason, Gathii has conceded that, “although participatory constitution making may give rise to a sense of ownership of the product,

⁵¹ Mwiza Jo Nkhata, Popular Involvement and Constitution-Making: The Struggle Towards Constitutionalism in Malawi in Ojienda & Mbondenyi (eds) *Constitutionalism and Democratic Governance in Africa* (Pretoria: Pretoria University Law Press, 2013) 219 at 230.

⁵² Charles M. Fombad, ‘The Evolution of Modern African Constitutions: A Retrospective Perspective,’ in Charles M. Fombad *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 13.

⁵³ Comparative Constitutional Law Project, ‘Timelines of Constitutions,’ <<https://comparativeconstitutionsproject.org/chronology/>> accessed 29 June 2019.

⁵⁴ Philippe Noudjenoume, *La démocratie au Bénin: Bilan et perspectives* (Paris: L'Harmattan, 1999).

⁵⁵ On countering views about Kenya’s participatory constitution making process, see John Mukuna, “‘We the people:’ On Popular Participation and the Making of the 2010 Constitution of Kenya,” (2014) 5 (20) *Mediterranean Journal of Social Sciences* 85.

⁵⁶ On the participatory nature of Sudan’s constitution making, see, Noha Ibrahim Abdelgabar, ‘International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan,’ (2013) 46 (2) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 131-151.

⁵⁷ Mwiza Jo Nkhata, (note 51 above) at 225.

it is by no means a sine qua non to having a constitution that has efficacy on the ground”⁵⁸ In short, participatory constitution-making is not a necessary or sufficient condition for transition to a democratic real constitution.⁵⁹

2.3.3 Poor normative and institutional-design choices

Kwasi Prempeh’s 2007 article, “Africa’s ‘Constitutionalism Revival’: False Start or New Dawn?”, which remains one of the few articles that considers the failure of African countries to transition after the TWD, called for “a second generation of constitutional reforms...”⁶⁰ In a subsequent article on judicial review in Africa, Prempeh concluded that:

Further constitutional reform is necessary to reconfigure the organization and distribution of power within the African state and thereby tame the executive hegemony and excessive centralization of power in Africa that continue to characterize government and politics in Africa. Only then might the promise of a “second liberation” that is represented by the opening of political space in contemporary Africa be meaningfully and sustainably realized for the benefit of Africa’s peoples.⁶¹

Beyond these two works of Prempeh, there is a vast literature that also attributes democratic failure to design choices, particularly of state institutions (executive, legislature and judiciary) and to constitutional change rules that are often resorted to by powerful political institutions to maintain the status quo.⁶² The impression created by this literature – justifiably – is that the judicial and legislative arms of government in Africa before 1989 were subservient to the executive (to be precise the President) and that realizing checks and balances and separation of powers was an illusion, hence the tyrannical rule of that period.⁶³ Regarding rules of change, a great deal of literature

⁵⁸ James Thuo Gathii ‘Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,’ (2008) 49 4 *William & Mary Law Review* 1109 at 1138.

⁵⁹ Joanne Wallis, ‘How important is Participatory Constitution-Making? Lessons from Timor-Leste and Bougainville’ (2016) 54 (3) *Commonwealth and Comparative Politics* 368. (“Despite the purported benefits, there is scepticism about participatory constitution-making. First, sceptics question peoples’ capacity to participate; they are concerned that if ordinary people do not possess sufficient knowledge and expertise to judge what is in their collective interests, they may become disillusioned or targets of manipulation, deception and extremism, or induced to hold inaccurate, biased or damaging beliefs.”).

⁶⁰ Henry Kwasi Prempeh (note 7 above) at 506.

⁶¹ H Kwasi Prempeh (note 24 above) at 84.

⁶² See e.g. the essays in Grant Masterson and Melanie Meirotti (eds) *Checks and Balances African Constitutions and Democracy in the 21st Century* (EISA, Johannesburg, 2017). Henry Kwasi Prempeh, ‘Constitutional Autochthony and the Invention and Survival of “Absolute Presidentialism” in Frankenberg, G. (Ed.) *Postcolonial Africa: Order from Transfer: Comparative Constitutional Design and Legal Culture*,’ (Edgar Edwards, 2013) 209.

⁶³ Ben Nwabueze *Presidentialism in Commonwealth Africa* (1974, New York, NY: St. Martins Press); Oda van Cranenburgh ‘Democracy promotion in Africa: The Institutional Context’ (2011) 18 (2) *Democratization* 443-461 (“African democracy is often based on a particular set of institutions which tend to concentrate power in the executive. A powerful president operates in

attributes constitutional instability to the ease with which African leaders changed constitutions for selfish and spurious reasons without obstruction.⁶⁴

Apart from the relationship between political institutions and the judiciary, a particularly acute concern has been whether parliamentary systems are more conducive to democratic development than presidential ones- supposedly following robust critique on the presidential system by Nwabueze particularly in commonwealth Africa.⁶⁵ These debates still persist today, especially in fully authoritarian countries, and whether resorting to a parliamentary system of government in place of a presidential one as a means of reducing the enormous powers that presidents have wielded is an important question given that most authoritarian regimes are essentially presidential in nature.⁶⁶ Torvic and Robinson have framed this concern as follows:

Even in the wave of democracy which has swept over Africa since the 1990s, no country has yet made such a transition, even though the switch to presidentialism is clearly associated with a transition to a less democratic style of politics in Africa. Also worthy of note is that two of the three countries which started with parliamentary institutions and have not changed them - Botswana and Mauritius - are the only two countries which have been economically successful in Sub-Saharan Africa since independence. The pattern is present both in Francophone and Anglophone countries. Any relationship in cross-national data between having been a British colony and parliamentarism turns out to be driven by Caribbean islands. Moreover, including the countries that started out with what researchers often refer to as Afrocommunist constitutions at independence (such as Angola and Mozambique) all countries that have switched away from these have adopted presidential institutions - not a single one of them have adopted parliamentary constitutions.⁶⁷

In this regard, it is important to note that SSA political systems are quite varied. Only Swaziland (Eswatini) and Lesotho are monarchies. The rest of the countries are republics.⁶⁸ Benin, Ghana and Senegal are democratic regimes which have a unitary presidential system. Botswana, South Africa, Mauritius and Sao Tome and Principe, for their part, have a non-unitary government, most of which are semi-presidential/parliamentary systems. Some of the semi-presidential systems, such as the DRC and Somalia, are also full-blown authoritarian states. Although it is therefore felt

a context of a minimal separation of powers, with few possibilities to restrain the executive, and a highly majoritarian party-political landscape.”); Ali Mazrui, ‘The Monarchical Tendency in African Political Culture,’ (1967) 18 *British Journal of Sociology* 231.

⁶⁴ See Fombad (note 1 above) See also, Ojienda and Mbondenyi (note 183 above); Fombad and Murray (eds) *Fostering Constitutionalism in Africa* (2010, Pretoria, Pretoria Law Press).

⁶⁵ See Nwabueze (note 63 above). See also, James A. Robinson & Ragnar Torvik, ‘Endogenous Presidentialism,’ (2016) 14 (4) *Journal of the European Economic Association* 907-942.

⁶⁶ Henry Kwasi Prempeh ‘Presidents Untamed,’ (2008) 19 (2) *Journal of Democracy* 109–123.

⁶⁷ James A. Robinson & Ragnar Torvik (note 65 above) at 909.

⁶⁸ But see, Mazrui (note 63 above) claiming that African presidents have monarchical tendencies.

that through the adoption of, say, parliamentary systems African countries are likely to migrate to democratic real constitutions, examples like Ethiopia, Benin and DRC suggest otherwise.

In terms of general institutional-design choices following the TWD, though, most post-1989 constitutions actually sought to respond to the design limitations of either independence constitutions or those that had been made over the years. A better framework can be said to have been created that allows separation of powers and checks and balances to be realized, while supplementing these institutions with other agencies, such as independent commissions: the so-called fourth arm of government.⁶⁹ In 2017, Fombad edited a valuable contribution on institutional relations, a book that documents institutional structures in a number of jurisdictions.⁷⁰ In a chapter on Nigeria, Shykil comments on the problems of the executive-legislature relationship as “not attributable to design” and that the Nigerian Constitution “makes ample provision for a clear separation of powers between the legislature, judiciary and executive.”⁷¹ Thomashausen, for his part, notes about Angola that the formal relations between the judiciary and political arms in the Constitution are “adequate”.⁷² Similar assessments are made by most contributors to the book.⁷³ These arrangements are not, however, enforced as anticipated. Inadequate design might therefore explain the pre-1989 failure, but it cannot satisfactorily explain the state of democracy in hybrid and authoritarian regimes following the post-1989 constitution-making ventures.

A particularly important design aspect that has been addressed and which is unrelated to institutions is “rules of change.” This was in response to the claim that poorly drafted rules of change inhibited constitutional restraints as they were overcome through opportunistic amendments.⁷⁴ Most post-1989 constitutions now have entrenched rules of formal amendment. Fombad has conducted an excellent audit of

⁶⁹ See generally, Charles M Fombad, ‘The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa,’ in Charles M Fombad (ed.) *Separation of Powers in African Constitutionalism* (Oxford, Oxford University Press, 2016) 325.

⁷⁰ Charles M Fombad (ed) *Separation of Powers in African Constitutionalism*, (Oxford University Press, 2016).

⁷¹ Silvester Shykil, ‘Legislative-executive Relations in Presidential Democracies: The Case of Nigeria in Charles M Fombad (ed.) *Separation of Powers in African Constitutionalism*’ (Oxford University Press, 2016) at 153.

⁷² Andre Thomashausen, ‘Super-presidentialism in Angola and the Angolan judiciary,’ Charles M Fombad (ed.) *Separation of Powers in African Constitutionalism*, (Oxford University Press, 2016).

⁷³ Charles M Fombad (note 70 above).

⁷⁴ Generally, see CM Fombad, (note 1 above) at 382.

30 African constitutions and observes that “most of the post-1990 substantially revised or new African constitutions attempt, in diverse ways, to place some limits and restrictions on the powers of governments to amend the constitution.”⁷⁵ His inspection shows that this has been achieved in various ways, such as through the imposition of procedural and formal limits on the power to amend the constitution, lengthening of the period of time when an amendment is to be debated and passed, and the requirement for a referendum if the amendment touches on certain aspects of the constitution.⁷⁶ All in all, however, the argument associated with minimal constitutional change vests too much faith in formal constitutions, incautiously presuming their enforcement, and does not envisage the new problem that they create in the face of underlying authoritarian de facto norms: ample provisions on separation of powers and checks and balances has created a gap between the written and the real constitution while the rigidity of rules of formal change continues to widen that gap, particularly in cases experiencing authoritarian entrenchment. And yet ruling political elites have been unable to use the formal rules of change to reconcile the real and the formal constitution because of their rigidity. The core problem of this category of literature, which blames constitutional dysfunction on the design of institutions or rules of change, is that it presumes that formal stability is an end in itself and that these normatively attractive constitutional features are self-enforcing. But this is not always the case, as the notion of “sham” constitutions attests.⁷⁷

2.3.4 Wealth factor

The other important explanation that has not been subjected to much interrogation has to do with the link between overall societal wealth and democracy. Wealth, according to the so-called “Lipset hypothesis,”⁷⁸ is a condition for democratic consolidation, “The [more] well-to-do a nation, the greater the chances that it will sustain democracy.”⁷⁹ In Lipset’s analysis:

⁷⁵ *Ibid* at 412.

⁷⁶ *Ibid*.

⁷⁷ See generally David Law and Milla Versteeg, ‘Sham Constitutions,’ (2013) 101 *California Law Review* 863.

⁷⁸ Seymour Martin Lipset ‘Some social requisites of democracy: Economic Development and Political Legitimacy,’ (1959) 53 *American Political Science Review* 69.

⁷⁹ *Ibid*.

Only in a wealthy society in which relatively few citizens lived in real poverty could a situation exist in which the mass of the population could intelligibly participate in politics and could develop the self-restraint necessary to avoid succumbing to the appeals of irresponsible demagogues.⁸⁰

Lipset's hypothesis has apparently been confirmed by a series of works, but it has been qualified in as much as phenomena such as a "historical pattern of colonial legacies", "regional patterns of democratic diffusion" (such as the TWD), and "ethnic heterogeneity" have been found to affect some aspects of this hypothesis and justify context-sensitivity.

In the African context, it has been said, socio-economic conditions are not conducive to democratic transition.⁸¹ For example, Claude Ake advises that:

the quest for democracy must be considered in the context of Africa's most pressing needs, especially emancipation from "ignorance, poverty, and disease." The pursuit of democracy will not, it is argued, feed the hungry or heal the sick. Nor will it give shelter to the homeless. People must be educated and fed before they can appreciate democracy, for there is no choice in ignorance and there are no possibilities for self-fulfilment in extreme poverty.⁸²

In spite of this assessment, of the economically affluent in Africa, only South Africa is a democratic country in a list that arguably includes Nigeria, Kenya, Angola and Ethiopia.⁸³ On the other hand, Benin and Sao Tome and Principe, which are among the least developed countries in Africa, attained and retained democratic rule over time.⁸⁴ Against this, Equatorial Guinea, which has one of the highest per-capita incomes in Africa, is an authoritarian regime.⁸⁵ Whereas the wealth factor may be able to explain

⁸⁰ *Ibid.*

⁸¹ See Ogendo, *Constitutions Without Constitutionalism* (note 42 above). See also, Naomi Chazan, "Africa's Democratic Challenge" (1992) 9 (2) *World Policy Journal* 279-307; Robert H. Bates, *Socio-Economic Bases of Democratization in Africa: Some Reflections in African Governance in the 1990's*, (Carter Presidential Centre, Atlanta, 1990); Samuel Decalo, 'The Process, Prospects and Constraints of Democratization in Africa' (1992) 91 362 *African Affairs* 7-35; (27 pages); Ernest Aryeetey, 'Is there a tension between democracy and economic development in Africa?' 11 March 2019, *Africa in Focus*, <<https://www.brookings.edu/blog/africa-in-focus/2019/03/11/is-there-a-tension-between-democracy-and-economic-development-in-africa/>> accessed 25th June 2020.

⁸² Claude Ake, 'Rethinking African Democracy,' (1991) 2 (1) *Journal of Democracy* 32 at 35.

⁸³ Jenna Delpont, 'Africa's Top 10 Wealthiest Countries Ranked by GDP,' March 2020 <<https://www.itnewsafrika.com/2020/03/africas-top-10-wealthiest-countries-ranked-by-gdp/>> accessed 5 May 2020.

⁸⁴ UN list of Least Developed Countries <<https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>> 5 May 2020.

⁸⁵ World Bank, Equatorial Guinea, <<https://data.worldbank.org/country/equatorial-guinea>> as at 5 May 2020.

the comparatively better performance of Mauritius, Botswana and South Africa, and cannot therefore be dismissed out of hand, it can only provide a partial explanation.⁸⁶

2.4 Summing up: Justification

Having demonstrated the limitations of the literature, this study is worthwhile for two reasons. First, it significantly contributes to ongoing discussions about constitutional stability and longevity/endurance by introducing a new perspective. As the literature review section of this study shows, inquiries into the stability and longevity of constitutions mainly focus on written constitutions and their ability to endure amidst “environmental shocks” or changes to the contexts in which they operate. In focusing on the real constitution, this study brings a different perspective to these themes. While the stability and endurance of constitutions is of value, this study contends that not all constitutional arrangements are desirable just because they are enduring. Put differently, there is no value in a formal constitution being enduring or resilient if its provisions are largely unenforced or, if enforced, foster authoritarianism. In such set-ups, what would be desirable is the instability of these sorts of arrangements. In addition, this study also focuses – as mentioned— on a region of the world that lags behind in comparative constitutional law: Sub-Saharan Africa. Its conceptual framework, largely based on mainstream political/constitutional law inquiries, is deployed in a context whence dominant theoretical ideas have not emerged.

Second, and more importantly, this study aims to make an original contribution to the promotion of democratic rule in Sub-Saharan Africa. As section 1.2 showed, an enduring quest for democratic governance in SSA persists if legal and political reforms after the TWD are anything to go by. These efforts are often directed at dismantling formal constitutional arrangements, but as noted, they are yet to result in real constitutional change in vast polities. Far from transforming authoritarian political orders to democratic ones, the adoption of formally democratic constitutions in most polities seems to have merely created a gap between the real and the formal constitution. As problematized also, most political orders are regressing into either hybrid or authoritarian regimes. Until the factors behind the change and stability of authoritarian norms are understood, this study contends, little can be done about the

⁸⁶ See e.g. Emizet F. Kisangani, ‘Economic Growth and Democracy in Africa: Revisiting the Feldstein-Horioka Puzzle,’ (2006) 39 (4) *Canadian Journal of Political Science / Revue canadienne de science politique* 855-881.

creation or sustenance of democratic constitutions. Consequently, there is a need to conduct an audit of African political orders to understand the reasons behind their different transitional outcomes in the face of the remarkable wave of democratisation to which African political orders were party. Having explained the limitations in existing literature, the next Chapter explains the methodology used.

CHAPTER 3: METHODOLOGY

3.1 Introduction

This Chapter explains the approach used in studying the problems associated with real constitutional change and stability in SSA as contextualised and stated in Chapter 1. It does so by first defining key terms and stating the research questions in section 3.2 and 3.3 respectively. Secondly, it elucidates in section 3.4 its theoretical and methodological approach that will help it to avoid the limitations of previous works discussed in Chapter 2. In particular, it explains why and how it departs from approaches that have a bias towards the formal constitution. Section 3.5 explains the approach used in analysing and presenting the obtained data; section 3.6 clarifies the validity of this study and section 3.7 describes the ethical considerations. The chapter ends with a summary and a segue to the case study chapters that follow.

3.2. Defining key terms

3.2.1. Third Wave of Democratisation

The Third Wave of Democratisation has the meaning ascribed to it under section 1.1.2 of this thesis and means, the diffusion of democracy and attendant collapse of authoritarian regimes between 1975 and 1994. In the African set-up this diffusion can be said to have occurred between 1989 and 1994.

3.2.2. Sub-Saharan Africa

Sub-Saharan Africa is both a geographical and ethno-cultural area that covers countries that are either outside or partially outside the South of the Saharan Desert. According to the World Bank, these countries are Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Comoros, Chad, Congo Democratic Republic, Congo Republic, Cote D'Ivoire, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Somalia, Sudan, South Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe.¹

¹ World Bank, Sub-Saharan Africa, available at <https://data.worldbank.org/country/ZG>

3.2.3. Normatively attractive constitution

The term normatively attractive constitution is loosely used in this study to refer to (formal) constitutions that guarantee multi-party periodic elections, recognise and seek to protect democracy supporting rights such as expression, assembly and association.

3.2.4. Real constitutional change

Real constitutional change, has the meaning ascribed to it and elaborated under Chapter 4 of this study, means transformation from one ideal type of a real constitution to another, say, from authoritarian to either hybrid or democratic and vice versa.

3.3. Research questions

The research questions sought to be answered through this research are:

- 1) Why did African constitutional orders attain different constitutional change outcomes after the Third Wave of Democratisation?
- 2) Why has ostensible commitment to democratic constitutionalism not translated to real democratic constitutions in Sub-Saharan Africa after the Third Wave of Democratisation?
- 3) What is behind the endurance of authoritarianism in Sub-Saharan Africa after the Third Wave of Democratisation?
- 4) Why has democracy not been consolidated in Sub-Saharan Africa after the Third Wave of Democratisation?
- 5) What conditions are necessary and sufficient for change to and stability of democratic real constitutions?

3.4 Theoretical and methodological approach

Scepticism towards formal constitutions and the attendant methodology adopted in this study is influenced by sociological jurisprudence. This view of law advocates an understanding of the relationship between “law in the books” and “living law” or “law in action.”² It developed in the early 20th century following, among others, Rudolph Von Jhering, Eugen Ehrlich and Roscoe Pound’s contributions.³ Its forerunner was the French jurist, Montesquieu, who in his *The Spirit of Laws*, argued that law is a product

² See, David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law, (1984) Volume 4, Issue 2, *Legal Studies*, 157-174.

³ Generally, see, James A. Gardner, ‘The Sociological Jurisprudence of Roscoe Pound (Part I),’ (1961) 7 *Vill. L. Rev.* 1.

of numerous factors, including local manners, custom and the physical environment.⁴ Good law, to Montesquieu, was one that conformed to the “spirit of the society”.⁵ As observed, Montesquieuan thought was popularized and refined by Rudolph von Jhering, Eugen Ehrlich and more influentially by Roscoe Pound. Ehrlich’s main contribution to sociological jurisprudence was his insistence on the social basis of law.⁶ He viewed law as not deriving from state authority but rather from social compulsions.⁷ Thus, he spoke of the “living law”, which is not positive rules in statutes or even reported cases, but “the activities of the society.”⁸ The growth of this thought in the 20th century is attributed to Roscoe Pound, who is thought to be the father of (American) sociological jurisprudence.⁹ He repackaged the approach by calling for attention to the effect of laws on society rather than questions about what is or is not law: what Freeman describes as the “social determination of law.”¹⁰ Pound consequently envisions the role of law as that of social engineering, essentially as reconciling competing interests, of individuals and society.¹¹ He called for the study of law focusing on the actual social effects of legal institutions, legal precepts and legal doctrines, as one of the eight points that sociological jurists insist on.¹²

In general, sociological jurisprudence rails against the jurisprudence of conceptions and legal positivism, and invites attention to “the law in action”.¹³ Consequently, it does not conceive of law as an autonomous appendage to the social order, but as an institution intricately intertwined with the conditions obtaining on the ground. Some of these conditions are competing individual and collective interests that law aims to mediate between. In so doing – inviting attention to law in action – sociological jurisprudence advocates for the application of scientific methods in the study of law.¹⁴ The concern of those who study legal institutions – including law itself – should consequently not be on norms per se, but on the interactions and influences

⁴ De Baron Montesquieu, ‘The Spirit of Laws (1748)’ (Translated English version) <<https://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws>>

⁵ *Ibid.*

⁶ Eugen Ehrlich, ‘Fundamental Principles of the Sociology of Law 1862-1922,’ (Trans. Walter Moll, New Jersey: Transaction Publishers, 2009) at 426, 486.

⁷ *Ibid.*

⁸ *Ibid.*, 493.

⁹ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th eds, London: Sweet & Maxwell, 2008) 835.

¹⁰ *Ibid.*, at 849.

¹¹ *Ibid.*

¹² *Ibid.* at 900.

¹³ See Roscoe Pound, ‘Law in Books and Law in Action,’ (1910) 44 *American Law Review* 12.

¹⁴ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 2008).

between norms, actors and institutions. In constitutional law inquiries, this approach would discourage the application of doctrinal methods because constitutions do not operate in a vacuum. As Hardin cautioned, “it is absurd to assess the normative qualities of a constitution from its contents alone.”¹⁵

Guided by this influence, too, this study overcomes the concern flagged at the introduction of this study – the bias towards legal instruments and norms by doctrinal legal studies – by avoiding “Large-C” constitutions as its core subject of concern. Given the disappointments that have followed the adoption of normatively attractive formal constitutions in SSA political orders after the TWD, a focus on formal change and stability may not yield any different result from what has been deciphered already. The fact, though, that formal constitutions are not optimally enforced, does not mean that there is a constitutional lacuna. Instead, and drawing from sociological jurisprudence, this study assumes that de facto norms that are outside the formal constitution have pervaded the political order and it is only when we shift attention to them, their effect and what makes them change, that we can begin to understand the prevailing state of affairs on the ground. As Hale observed about patronalistic societies of the kind found in Africa, the “real” working of politics of “those unwritten and officially uncodified norms, habits, and practices that actually guide political behaviour” is what matters.¹⁶ Hence, the most plausible way to study constitutions in Sub-Saharan Africa is to take into account social facts, practices and contributions of actors in the legal order and how these relate to each other. It is this approach that informs the methodology adopted in Chapter 2 as well as the conceptual framework in Chapter 4 for assessing real constitutional change and, by extension, stability.

In order to give effect to this approach, this study adopts an interdisciplinary method that blends doctrinal analysis with the “results of research in other disciplines”,¹⁷ including political science. This approach is better suited to understanding the reasons behind changes to, or the stability of, real constitutional

¹⁵ Russell Hardin, ‘Why a Constitution,’ in Denis J Galligan and Mila Versteeg (eds) *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 52 at 54.

¹⁶ Henry Hale, ‘The Informal Politics of Formal Constitutions: Rethinking the effects of ‘Presidentialism’ and “parliamentarianism” in Kyrgyzstan, Moldova and Ukraine Tom Ginsburg, Alberto Simpser (eds) *Constitutions in Authoritarian Regime* (New York, Cambridge University Press, 2014) 2-4.

¹⁷ Phillip Langbroek et al, ‘Methodology of Legal Research: Challenges and Opportunities,’ (2017) 13 (3) *Utrecht Law Review* 7.

norms. In this way, this study adopts a broadly socio-legal approach in combining doctrinal and social science methods.¹⁸ Socio-legal research, it has been said:

means different things to different scholars and is probably best understood as crossing the boundaries of law in context, empirical work, social science methodologies and non-doctrinal work more broadly.¹⁹

The sections that follow elaborate in more detail how the doctrinal approach will be used alongside qualitative empirical methods.

3.4.1 Doctrinal and deskwork component

This study, in part, makes use of the main approach used in the study of legal norms: doctrinal analysis.²⁰ This approach “involves analysis of case law, arranging, ordering and systematizing legal propositions and [the] study of legal institutions through legal reasoning or rational deduction.”²¹ Several parts of this thesis use this approach. The conceptual framework developed in Chapter 4 relies on information, arguments and propositions in existing primary legal texts (constitutions, case law, reports) as well as interpretations in secondary materials (books, journal articles, newspapers, and reports) to construct and reconstruct understandings of constitutional regimes and how they change.

Relevance is the main criterion for selecting literature used for the doctrinal components of this study. Two broad sub-criteria are used, namely literature that falls under what political scientists regard as “regimes” and that which falls under sub-themes of constitutional change, such as endurance, durability, resilience and stability. This sub-criterion is what was used to select materials for Chapter 2 (the literature review), as well as Chapter 4, which develops a conceptual framework. The second sub-criterion focuses on materials on constitutional law in SSA in general and in the case-study countries in particular. In addition to the case-study chapters and analysis, this category of literature obtained through deskwork research was also used in the

¹⁸ Peter Hillyard, ‘Invoking Indignation; Reflections on Future Directions of Socio-Legal Studies,’ (2002) 29 (4) *Journal of Law and Society* 645; Matyas Bodig, ‘Legal Doctrinal Scholarship and Interdisciplinary Engagement,’ (2015) 2 *Erasmus Law Review* 42 at 42.

¹⁹ Jessica Guth and Chris Ashford, ‘The Legal Education and Training Review: Regulating Socio- Legal and Liberal Education?’ (2014) 48 (1) *The Law Teacher* at 11.

²⁰ Aakriti Kharel, ‘Doctrinal Legal Research,’ (2018) at 5 (on file with author).

²¹ SN Jain, ‘Doctrinal and Non-Doctrinal Legal Research,’ in S.K. Verma & M. Afzal Wani (eds.) *Legal Research and Methodology* (India, Indian Law Institute, 2016) 68.

introductory chapter to contextualise and problematise constitutional developments in Africa.

3.4.2 Qualitative empirical methods

Other than the doctrinal approach, this study also uses qualitative research methods commonly used in social science research.²² According to Leavy, qualitative research is:

often used to explore or describe social phenomena; to unpack the meanings that people ascribe to activities, situations, events or artefacts; build a depth of understanding about some aspects of social life; build “thick descriptions of people” in their natural settings; explore new and under researched areas.²³

In this research, case studies and interviews are used, and their analysis and presentation, conform to this understanding of qualitative research.²⁴ In David Law’s view, such qualitative methods “are widely thought to possess advantages when it comes to building theories and developing explanations of empirical relations.”²⁵ The main concern of causal-explanatory social science research, by contrast, is to understand, not social processes, but the relationship between variables.²⁶ Chapter Four of this study adopts this approach in identifying various independent variables whose relationship with different transitional outcomes (the dependent variable) is sought to be understood.

3.4.2.1 Data sources and collection

In Epstein and Martin’s assessment, the first concern that a researcher should address is whether “the data the researcher needs already exist in the form she needs it”.²⁷ They add that “researchers can locate suitable data without having to invest in costly from-scratch data-collection efforts”.²⁸ When conducting empirical legal studies:

²² On whether law is a social study, see Goodrich. Samuel, ‘Is Law Really a Social Science? A View from Comparative Law,’ (2008) 67 *Cambridge Law Journal* 288 at 315.

²³ Patricia Leavy ‘Introduction’ in Patricia Leavy (eds) *The Oxford Handbook of Qualitative Research* (Oxford University Press, NY, 2014) at 2.

²⁴ On qualitative methods see, Earl Babbie, *The Practice of Social Research* (12th ed. Belmont, CA: Wadsworth Cengage, 2010) Daniel Muijs *Doing Quantitative Research in Education with SPSS*, (2nd edition. London: SAGE Publications, 2010).

²⁵ David Law ‘Constitutions,’ in Peter Cane & Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010) at 389.

²⁶ Craig Brians et al. *Empirical Political Analysis: Quantitative and Qualitative Research Methods* (8th ed. Boston, MA: Longman, 2011) at 30.

²⁷ Lee Epstein and Andrew D. Martin, ‘Quantitative Approaches to Empirical Legal Research,’ in Peter Cane and Herbert M. Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) at 909.

²⁸ *Ibid.*

legal researchers simply do not have the luxury of analysing data they developed in an experiment (i.e., experimental data). Instead, they must make use of data the world—not they—generated.²⁹

To this end, there are three empirical components to this study. The first is information contained in secondary sources. Melkinsburg’s project that culminated in the “*Endurance of National Constitutions*” is ongoing with a website documenting, *inter alia*, “Constitutional Timelines.”³⁰ Empirical information is available from this source on formal constitutional change, either through amendment, suspension or substitution for Sub-Saharan African countries from the time of independence.³¹ The second source is the several (online) databases that contain primary information used to assess the commitment of various political orders to democracy and human rights. The main one in this regard is managed by Freedom House. Others that will also be considered include the Economic Intelligence Unit’s “Democracy Index”,³² the Mo Ibrahim Foundation’s Index of African Governance (IIAG),³³ and the Bertelsmann Transformation Index (BTI).³⁴

To supplement these sources, this study also relies on personal and written interviews conducted and administered in the case-study countries. For each of the three case studies, interviews were conducted and questionnaires were administered to persons who were felt to have an interest in legal and political processes, either as academics from various fields – such as history, political science, or law – judicial officers, government officials, politicians or lawyers. In Cameroon, the respondents included a magistrate, a banker, three academics (one of whom was a professor of politics), a politician and three lawyers. Most informants in Cameroon insisted on anonymity. In Kenya, participants included a judge, three lawyers, three government employees attached to parliament, a policeman, and five academics, who included a historian and a constitutional law scholar. In Benin, an academic, a lawyer, a professor of history, a member of the communist party of Benin, the Secretary General of the

²⁹ *Ibid*, at 904.

³⁰ See Comparative Constitutional Project
<<https://comparativeconstitutionsproject.org/chronology/>>

³¹ *Ibid*.

³² The Economist Intelligence Unit's Democracy Index, <<https://infographics.economist.com/2017/DemocracyIndex/>> accessed 8 August 2020.

³³ Ibrahim Index of African Governance (IIAG), <<http://mo.ibrahim.foundation/iiaag/>> accessed 8 August 2020.

³⁴ BTI Transformation Index, <<https://www.bti-project.org/en/home.html?&cb=00000>> accessed 20 August 2020.

Constitutional Court, and a politician were among the interview participants. The primary considerations in selecting interviewees were their involvement in, or research into, legal and political processes in these countries and their willingness to participate as informants. Unfortunately, several key individuals who were approached to participate declined to participate, especially in Cameroon.

The first and second category of empirical information was accessed through library or deskwork research. The third category was collected through interviews undertaken in person or through Skype. For each interview, the data collection took the form of a conversation which started with an introduction to the study and the purpose of the interview, based around the five themes of this research: (a) whether the researcher's preliminary assessment of the concerned political order as authoritarian, democratic or hybrid was consistent with what the respondent thought of the conditions of the order; (b) whether the constitution of the country was sufficient to enable democracy to flourish or whether there was a need for change; (c) the role that various actors have played in the democratisation process (pro-democracy forces such as civil society, international actors and incumbents); and (d) other influences (such as environmental) that influence politics and constitutional reforms. The researcher's role in this respect was (a) introducing the themes; (b) asking questions; (c) overt encouragement; (d) elaboration; and (d) asking for further answers and clarifications. A set of questions modelled along these lines was used in instances where an interview in writing was preferred by a respondent. Answers to the questions were recorded and subsequently reduced to writing under the various themes. Notes were also taken in the process.

3.4.2.2 Case studies and their selection

The main comparative logic used for case selection was the "most different cases" approach. In Chapter 1, transitional processes after 1989 have been classified as either failed, partial or complete. Examples of countries that assume these forms were also given according to profiles given by Freedom House statistics. Freedom House classifies countries into "free", "partly free" and "not free." In Chapter 4, the net effect of de facto norms in the legal order is explained as conforming to one or another real constitution: democratic, hybrid or authoritarian. As observed, the criteria for determining whether a country has an authoritarian, hybrid or democratic constitution resonates with Freedom House profiles (not free, partly free and free). Its statistics, which have been compiled even prior to 1989, are thus used to assess a country as having one or the other ideal type of constitution.

Cameroon, Kenya and Benin are the select case study countries. In spite of some similar authoritarian pre- and post-1989 conditions, they ended up with different transitional outcomes. The different outcomes in question were that Benin successfully transitioned to a democratic constitution, while Kenya partially did so and ended up with a hybrid one. Cameroon, for its part, remained with an authoritarian constitution in spite of some reforms aimed at the “liberalisation of politics”. In this regard, Cameroon represents countries that either did not transition at all or reverted back to their pre-1989 condition. Such countries include Uganda, Rwanda, Equatorial Guinea, Chad, Central African Republic, Sudan, DRC Congo and Angola. Kenya, for its part, represents countries that partially transitioned, which were listed in Chapter 1 to include Zambia, Malawi, Nigeria, Ethiopia, Tanzania, Ivory Coast, Madagascar and Mozambique. Benin represents countries that transitioned after the TWD to democratic constitutions, a group to which South Africa, Cape Verde, Sao Tome and Principe, Ghana and Senegal belong.

There are, of course, African countries that possess either hybrid, authoritarian or democratic constitutions but cannot be said to have been party to, or followed the general path towards transitions associated with the TWD. These include Somalia, Liberia, Namibia, South Sudan, Botswana and Mauritius. In the case of Somalia, its legal and political orders broke down after the TWD and it ended up as a failed state. Liberia has had a somewhat different history when contrasted with most other African countries. It was never colonized and as at 1984 it had already created its present-day Constitution under which it went through two successive civil wars that ended around 2003.³⁵ South Sudan falls into the league of authoritarian countries but came into existence after the TWD, like Eritrea and Namibia. Botswana and Mauritius, for their part, can be considered as having democratic constitutions even in the darkest constitutional times on the continent, prior to 1989.³⁶ These legal orders are not completely ignored and some are considered in Chapter 8 that synthesizes the findings and tests emerging conclusions.

³⁵ Richard Akum, ‘Mainlehwon Vonhmassess, Liberia’s Post-war Constitution Review: A Tale of Mistrust and Uncertainty,’ 26 May 2015, *LSE Blog*, <<https://blogs.lse.ac.uk/africaatlse/2015/05/26/liberias-postwar-constitution-review-a-tale-of-mistrust-and-uncertainty/>> accessed 25 June 2017.

³⁶ Bertha Z. Osei-Hwedie, ‘Successful Development and Democracy in Africa: The Case of Botswana and Mauritius,’ (2000) 65 (1) (192) *Il Politico* 73-90.

In addition to the fact that the selected case-study countries possessed authoritarian constitutions prior to the TWD, they possess other similar features. First, all these countries – as will be shown in the individual case-study chapters – were and still are not demographically homogeneous and therefore not insulated from ethnic politics.³⁷ Second, all these countries are principally neo-patrimonial in that politics are mobilized along patron-client lines.³⁸ Third, and perhaps most importantly for this study, all these countries effected changes to their formal constitution following the TWD and committed to some degree of ostensible democratic constitutionalism.³⁹ Fourth, all these countries were party to the colonial experience and decolonisation even if their colonial masters were different. Kenya is a British and Benin a former French colony. Part of Cameroon was colonized by the British while the other (larger) part was colonized by the French.⁴⁰ The last similarity in these cases is that they all have a presidential system of government where the president is not part of parliament, at least on paper.⁴¹ These broad similarities allow this study to identify a smaller number of variables explaining their divergent outcomes on the key dependent variable – successful, or unsuccessful (partial or failed) transition to real constitutional democracy.

³⁷ Generally see, W.K Shilaho *Political Power and Tribalism in Kenya* (Palgrave Macmillan, 2018); Rogers Tabe Egbe Oroch, 'SWELA, ethnicity, and democracy in Cameroon's patrimonial state: An anthropological critique" (2014) 34 (2) *Critique of Anthropology*, 204; Martin Battle & Jennifer C. Seely 'It's All Relative: Modelling Candidate Support in Benin,' (2010) 16 (1) *Nationalism and Ethnic Politics* 42-66.

³⁸ Leonard Wantchekon, 'Clientelism and Voting Behavior: Evidence from a Field Experiment in Benin,' (2003) 55 *World Politics* 399-422; Francis Nyamnjoh, *Africa's Media: Democracy and the Politics of Belonging* (London: Zed Books, 2005); Bratton, M, Van de Walle, N, 'Neopatrimonial Regimes and Political Transitions in Africa (1994) 46 *World Politics* 453-489; Biniam E. Bedasso, "Ethnicity, Intra-elite Differentiation and Political Stability in Kenya" (2015) 114 (456) *African Affairs* 361-381.

³⁹ Migai Akech, *Institutional Reform in the New Constitution of Kenya* (2010) ICTJ, <<https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>>; accessed 20 June 2017; David Mokam, 'The Search for a Cameroonian Model of Democracy or the Search for the Domination of the State Party: 1966-2006,' (2012) *Cardenas de Estudios Africanos* available at <https://journals.openedition.org/cea/533> accessed 20 June 2017; Signonna Horace Adjolohoun 'Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty years of practice and the dilemmas of revising the 1990 Constitution of Benin,' in Tom O Ojienda and M Mbondenyi (eds) *Constitutionalism and Democracy in Africa: Contemporary Perspectives from Sub-Saharan Africa* (Pretoria University Law Press, 2013) 245.

⁴⁰ Charles M. Fombad, 'Developments in Cameroonian Constitutional Law: The Year 2016 in Review,' (2017) <<http://www.icconnectblog.com/2017/11/developments-in-cameroonian-constitutional-law-the-year-2016-in-review/>> accessed 20 June 2019.

⁴¹ See Chapter 9 and 10 *Constitution of Kenya 2010*; Title III and VI *Constitution of Benin, 1990*; and Part II and III *Constitution of Cameroon Law No. 96-06*.

These “similarities” are certainly not shared by all other Sub-Saharan countries. One of these, as Chapter 1 showed, is colonial legacy and its relationship to the introduction of authoritarian norms as well as democratisation in various political orders.⁴² Hence, while these case studies included former French (Benin and part of Cameroon) and British (Kenya and part of Cameroon) colonies, there are former Portuguese colonies in SSA, too, such as Angola and Mozambique, and former Belgian colonies, such as Burundi. The Portuguese, Belgians and Spanish had a different approach to colonialism and shaped the legal world that they left behind somewhat differently from the British and the French at the end of their rule.⁴³ Ethiopia and Liberia are also different because neither was colonized. As at 2017, however, countries that were colonised by the Spanish, Belgians or Portuguese belonged to the same group as Kenya, Cameroon or Benin.

There is more, though, that differentiates SSA legal orders than the fact that they had different experiences of colonisation. Lesotho, South Africa, Ethiopia and Botswana have, for instance, parliamentary systems.⁴⁴ By contrast, Angola, Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Gabon, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Mozambique, Nigeria, Sierra Leone, Seychelles, Sudan, South Sudan, Tanzania, Togo, Zambia, and Zimbabwe have presidential or semi-presidential systems.⁴⁵ This study is alive to these differences. In particular, Chapter 6 examines the extent to which they affect the outcomes of the case-study chapters.

⁴² Michael Bernhard, Christopher Reenock and Timothy Nordstrom, ‘The Legacy of Western Overseas Colonialism on Democratic Survival,’ (2004) 48 (1) *International Studies Quarter* 225 at 230.

⁴³ Ewans Martin, ‘Belgium and the Colonial Experience,’ (2003) 11 (2) *Journal of Contemporary European Studies* 167–180; Katherine Schulz Richard, ‘Belgium Colonialism: The Legacy of Belgium’s 19th and 20th Century African Colonies 18 February 2019, available at <https://www.thoughtco.com/overview-of-belgian-colonialism-1434364>; But see Patrick Chabal, ‘The Post-Colonial State in Portuguese-Speaking Africa,’ (1992) 8 *Portuguese Studies [Special Issue supported by the Comissão Nacional para as Comemorações dos Descobrimentos Portugueses]* 189-202 (“We need to rethink our approach and accept that, however different the history of Portuguese-speaking Africa may have been, the trajectory of its post-colonial states is not significantly different from the trajectory of other African countries...”); Yolanda Aixela-Cabrñ ‘Exploring Euro-African pasts through an analysis of Spanish colonial practices in Africa (Morocco and Spanish Guinea)” (2017) 51 (1) *Canadian Journal of African Studies / Revue canadienne des études africaines* 23-42.

⁴⁴ Tom Lodge, ‘First-generation Constitutions in Africa,’ in Grant Masterson and Melanie Meirotti (eds) *Checks and balances African constitutions and democracy in the 21st century* (EISA, Johannesburg, 2017) at 20.

⁴⁵ Kevin YL Tan ‘Presidential Systems,’ (2017) Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] Oxford Constitution Law.

The problems afflicting African legal orders – such as the gap between the de facto and real constitution and the stubborn endurance of authoritarian constitutionalism – have varying dimensions. Hirschl has cautioned in this regard that:

problems of context, relativism, and systemic selection biases [hinder] generalisation in comparative constitutional law.⁴⁶

So as to mitigate the limitations of small-n case-study research, this thesis tests and reinforces the case-study findings through a cross-case analysis of a slightly larger number of cases, in this case, eight countries. These are South Africa, Cape Verde, Equatorial Guinea, Ghana, Niger, Uganda, Madagascar and Angola and Ethiopia. The selection includes an additional three countries with authoritarian real constitutions, being Angola, Uganda and Equatorial Guinea. Equatorial Guinea and Angola, for their part, are former Spanish and Portuguese colonies; taking them into account allows consideration of countries with a colonial influence that is different from British or French. South Africa, Ghana and Cape Verde are democratic countries whose circumstances are used to cross-check the findings from Benin. South Africa's race factor and its apartheid history make it a "different from Benin" case study. Ghana for its part moved from an authoritarian to a hybrid and finally to a democratic real constitution. It in essence followed a lengthier path than that taken by South Africa, Cape Verde and Benin. The other set, Madagascar and Niger, are all hybrid regimes but have their own peculiarities, such as the absence of colonial influence in Ethiopia, Madagascar's rather tumultuous life after the TWD as well as Niger's successive military regimes. Testing the case-study findings in Chapter 8 against this wider range of experiences from different political orders gives added validity to this study's findings.

3.5 Analysis and presentation

The methodological approach taken in the longer case studies is Comparative Historical Analysis (CHA). CHA is a:

field of research characterized by the use of systematic comparison and the analysis of processes over time to explain large-scale outcomes such as revolutions, political regimes, and welfare states.⁴⁷

⁴⁶ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, (Oxford University Press, 2014) at 224.

⁴⁷ James Mahoney, 'Comparative Historical Methods,' (2004) 30 *Annual Review of Sociology* 81.

This approach has gained prominence since 2000 in political science and in sociology and is one of the most effective tools for “studying institutional change of various sorts.”⁴⁸ James Mahoney and Dietrich Rueschemeyer, its leading expositors, describe CHA in general terms as encompassing “any and all studies that juxtapose historical patterns across cases”.⁴⁹ As an approach used to study social phenomena, CHA has three main features that set it apart from either “historical sociology” or “historical institutionalism.”⁵⁰ In summary, they are “a concern with causal analysis, the exploration of temporal processes, and the use of systematic and contextualized comparison typically limited to a small number of cases”.⁵¹

In the place, thus, of a purely doctrinal synthesis of legal texts, this study resorts to CHA to understand the different transitional outcomes in African constitutional orders. There is already a known outcome, which is the different transitional outcomes (complete, partial and no transition) with a subsequent consolidation or regression. To fulfil its ambitions, the study commences by generating a conceptual framework, which is used to identify similarities and differences across cases. Relying on empirical information collated, the findings of the case studies are presented in three different case-study chapters – Chapters 5, 6 and 7. Each of these chapters commences with a description of the social, economic and political context of the country concerned. A thick description of the constitutional conditions is then undertaken from independence till 2017, the year when this study was commenced, and the conditions traced especially from 1989 when these polities had similar constitutions. This is then followed by a section that uses the conditions of interest to code their presence or absence in a bid to deductively generalise the conditions necessary for real constitutional change and stability. Emerging hypotheses on causality of the transitional outcome are summarised in Chapter 8 and tested in a cross-case analysis of an expanded list of countries.

⁴⁸ Theunis Roux, *Politico-Legal Dynamics of Judicial Review* (New York, Cambridge University Press, 2018) at 36.

⁴⁹ See, James Mahoney, and D Rueschemeyer, ‘Comparative Historical Analysis,’ in James Mahoney, and Dietrich Rueschemeyer (eds) *Comparative Historical Analysis in Social-Sciences* (New York, Cambridge University Press, 2014) at 11. See also, James Mahoney “Strategies of Causal Assessment in Comparative Historical Analysis” in James Mahoney, and D Rueschemeyer (eds) *Comparative Historical Analysis in Social-Sciences* (Cambridge University Press, 2014) 337.

⁵⁰ *Ibid.*

⁵¹ *Ibid* at 14.

3.6. Validity and limitations

The validity of this study hinges on certain assumptions that are made as well as on its scope – what it covers and what it leaves out. The first assumption made is that there is a correspondence between the conditions within a political order and its de facto elements that explains state practice. If, therefore, state practices are authoritarian, it is assumed, the de facto elements are authoritarian, too. The study classifies South Africa as democratic because Freedom House says that it is “free”, and Cameroon as authoritarian because Freedom House says it is “not free.” From a certain perspective, this assumption can be quite unfounded. During the data collection stage for instance, most respondents said that Kenya had been a hybrid regime from 1992 when it conducted its first multi-party elections. According to Freedom House statistics though, Kenya became a “partly-free” country, hence a hybrid regime, in 2002 following the defeat of President Moi’s nominee. In addition, it is difficult to draw a precise line between, say, authoritarian and hybrid as well as hybrid and democratic regimes, particularly those in transition. Benin, for example, has been on downward trend since 2017 and some of the features of its political order are what are commonly seen in many hybrid regimes, including Kenya.⁵² Picking a country on the basis of the Freedom House categorisations can thus be misleading.

The process of transition from one real constitutional regime to another is probably more complex than is presented here. There are likely be a wide range of factors and conditions that explain changes to real constitutional norms. Because of time, resource constraints and the purpose of this study, many important items are left out and can only be presented here as possible subjects of future research. For instance, while it was mentioned that several norms were generated and applied during the colonial and post-colonial era, this study does not specifically focus on these elements and their influence today. Broad assumptions are simply made that those norms still exist almost in the form that they took during the colonial and immediate post-colonial period. In addition, considering how economic vulnerability exposes countries in the region to external influence, it might have been of interest to pursue the link between national wealth and democratisation as a complete theme on its own. Further, this study also does not consider other important conditions that might

⁵² Mathias Hounkpe, ‘Interview with Le Point, Bénin - Législatives : « Le chef de l’État en ressortira forcément affaibli »’ <https://www.lepoint.fr/afrique/benin-legislatives-le-chef-de-l-etat-en-ressortira-forcement-affaibli-26-04-2019-2309701_3826.php> accessed 20 May 2019.

have been of interest: the role of the military, religion, natural resources as well as conflict. These four, among others, are quite prominent features of most African political orders but they are not considered as conditions of interest because of the limited time available and the general scope of this research. These conditions have certainly influenced the transitional outcomes in some contexts, but they are not examined here in detail.

Also, the comparative logic for this research is “most different cases” assessed according to the contrasting transitional outcomes of the three case studies. With more time, another approach might have been to look at the different transitional paths taken by real constitutional regimes towards a common outcome. The question on this approach would have been, for example, whether Kenya as a hybrid authoritarian regime had travelled the same path as another hybrid regime, say Madagascar. As pointed out above, Madagascar has been party to violent military rule and take-over even after the TWD, a path that Kenya has not followed, yet both of them as at 2017 were considered as “partly-free.” It is only when we see commonalities within a given class of real constitutional regimes that we can confidently say that a certain condition is necessary and sufficient for transition to that particular outcome. That could have been achieved if the case studies had been, say, Kenya and Madagascar. Closely related to the aforementioned assumption is the fact that, while countries have been loosely assembled into three broad groups, the nature of their real constitutions, even within a group, varies widely. Such variation may be explained by factors that fall outside the scope of this study. For instance, whereas South Africa and Benin have been classified together as having transitioned into real constitutional democracies, their pathways to consolidation and precise outcomes are different. In the 2017 Freedom House Report, for instance, South Africa had a 78/100 score⁵³ while Benin had 82/100.⁵⁴ With time, it might have been possible to consider the reasons behind these variations.

Besides, the process of evolution of political and constitutional orders can at times be gradual and even “without significant political discontinuances”.⁵⁵ The

⁵³ Freedom in the World, South Africa, <<https://freedomhouse.org/country/south-africa/freedom-world/2017>> accessed 30 October 2017.

⁵⁴ Freedom in the World 2017, Benin, <<https://freedomhouse.org/country/benin/freedom-world/2017>> accessed 30 October 2017.

⁵⁵ S Gardbaum, Revolutionary Constitutionalism, (2017) 15 (1) *International Journal of Constitutional Law* 173–200.

subject matter of this study – real constitutional norms – is intangible and invisible. Whereas some of these norms have formal expression, some are unwritten. Understanding how these norms change presents a serious challenge because reliance is placed on what is said or written about them. Indeed, when Melkinsburg wrote their magnum opus, the *Endurance of National Constitutions*, they remarked as follows about the problems associated with unwritten constitutional norms:

The unwritten constitution poses a significant challenge to comparative research. Efforts to examine the unwritten constitution are bedevilled by evidentiary and definitional problems.⁵⁶

Lastly, this comparative study was limited to literature in English, which precluded access to much important scholarship on Francophone and Lusophone countries. Much information about political processes in Cameroon and Benin is available only in French and rarely accessible through research sites known to the English-speaking world. This also applies to the interviews: although the questions were translated into French when necessary, and responses back into English, the intention or meaning was undoubtedly lost in some respects. Also, in the absence of a culture of law reporting, and given the (at times) brief nature of decisions from civil law jurisdictions, reading judicial decisions at times left this project with more questions than answers. It was easier, for example, to study and analyse the 2013 decision of the Supreme Court of Kenya on elections than the decision of the Constitutional Court of Benin on Kiyikou's election. Just as there are "usual suspects" in mainstream constitutional studies, there are also certain "go-to" countries in African comparative constitutional studies.⁵⁷ In other words, and in spite of materials translated from French to English for the interviews, there is no doubt that there can be counter illustrations from sources that were out of reach either because of language limitations or the fact that some events have not been reduced to writing or published.

3.7 Ethical considerations

This research recognises principles that govern research and seeks to give effect to them in various ways. First, sources are recognised through footnotes and a bibliography provided at the end to acknowledge the ideas and works of other people that are used. Second, the identity of respondents is protected to the extent that

⁵⁶ Tom Ginsburg, James Melton & Zachary Elkins, 'The Endurance of National Constitutions,' (Cambridge University Press, 2013) at 46.

⁵⁷ As would be expected, Anglophone countries feature more prominently than Francophone and Lusophone countries in English language literature.

interviewees were asked if they were willing to be mentioned by name or not. In respect of those who withheld the consent, a Pseudonym was used. Third, caution has been taken to ensure that the information obtained, particularly from the interviewees, is not divulged.

3.8 Concluding observations

This Chapter has presented the methodology to be used in the study of real constitutional change and stability in Sub-Saharan Africa. Having stated the research questions, this Chapter has explained what sets its approach apart from other works whose limitations are highlighted in Chapter 2. In particular, this chapter has shown that, following the tradition of sociological jurisprudence, this study combines both doctrinal as well as qualitative empirical research methods in confronting the problem and answering the questions posed. The doctrinal component essentially entails reliance on materials selected on the basis of their relevance to support the propositions made and the attendant conclusions. The qualitative component enables it to use social science methods to collect empirical data through case studies for use in answering the research questions. The case study countries are Cameroon, Kenya and Benin, each representing a different real constitutional change outcome. The findings of these case studies are refined under Chapter 8 through a validating section that incorporates a wider list of cases namely Ghana, South Africa, Niger, Ethiopia, Madagascar, Uganda, Equatorial Guinea and Eritrea whose circumstances are deciphered using desk-based research. Ultimately, the approach used in analysing and presenting answers obtained through the case studies is stated in this Chapter to be Comparative Historical Analysis. The chapter has ended by highlighting assumptions underlying its validity. As indicated in Chapter 1, the next chapter elaborates terms through a conceptual framework that it develops for use in the case study chapters and concluding discussion.

CHAPTER FOUR: THEORISING REAL CONSTITUTIONAL CHANGE

4.1 Introduction

As noted in Chapter 2, much is known already about the reasons behind formal constitutional change: how it occurs and what makes formal constitutions endure.¹ By contrast, though there is a great deal of political science literature on political regimes and the conditions for their stability,² there is none that succinctly theorises the idea of “the real constitution” or the causes of real constitutional transformation.³ This chapter

¹ See e.g. Mads Andenas (ed.), *The Creation and Amendment of Constitutional Norms*, (2000) *British Institute of International & Comparative Law*; D Oliver and C Fusaro (note 13 above); Contiades (ed.), (note 13 above); Stephen Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, (Princeton University Press, Princeton, 1995); Reijer Passchier, *Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective*, (diss. Leiden), Amsterdam: Ipskamp Printing 2017); Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All?’ (2015) 13 *International Journal of Constitutional Law*, 686; Reijer Passchier and Maarten Stremmer, ‘Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision’ (2016) 5 (2) *The Cambridge Journal of International and Comparative Law* 337- 367; Xenophon Contiades and Fotiadou, Alkmene, On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks? (2015) 9 (1) *Vienna Journal of International Constitutional Law* 3- 26; Peter Ordeshook, *Constitutional Stability* (1992) 3 *Constit Polit Econ* 137–175; Tom Ginsburg, James Melton & Zachary Elkins, ‘The Endurance of National Constitutions,’ (Cambridge University Press, 2013); Gabriel L. Negretto, ‘The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America,’ (2008) <https://kellogg.nd.edu/sites/default/files/old_files/documents/350_0.pdf> accessed 7 November 2020; Erik Bjorn Rasch, and Roger D. Congleton ‘Amendment Procedures and Constitutional Stability,’ in Roger D. Congleton, and Birgitta Swedenborg (eds) *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge, MA: MIT Press, 2006); Heather K. Gerken, ‘The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution,’ (2007) 55 *Drake Law Review* 925; Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007); Xenophon Contiades and Fotiadou, Alkmene, On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks? (2015) 9 (1) *Vienna Journal of International Constitutional Law* 3- 26; Charles M. Fombad, ‘The Evolution of Modern African Constitutions: A Retrospective Perspective,’ in Charles M. Fombad *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 13.

² See e.g. Johannes Gerschewski ‘The three pillars of stability: legitimation, repression, and co-optation in autocratic regimes,’ (2013) 20 (1) *Democratization* 13-38; Holger Albrecht and Oliver Schlumberger, ‘Waiting for Godot. Regime Change Without Democratization in the Middle East,’ (2004) 25 *International Political Science Review* 371– 392; Bueno De Mesquita, Bruce, Alastair Smith, Randolph M. Siverson, and James D. Morrow, *The Logic of Political Survival* (Cambridge, MA: The MIT Press, 2003); Hlaing, Kyaw Yin. ‘Setting the Rules for Survival. Why the Burmese Military Regime Survives in an Age of Democratization,’ (2009) *The Pacific Review* 271 –291; Przeworski, Adam, Michael Alvarez, Jose´ Antonio Cheibub, and Fernando Limongi ‘What Makes Democracies Endure?’ (1996) 7 *Journal of Democracy* 39– 55; McMahon, R. Blake and Slantchev, Branislav “The guardianship dilemma: regime security through and from the armed forces” (2015) 109 (2) *American Political Science Review* 297-313; Joseph Wright and Daehee Bak “Measuring autocratic regime stability” (2016) *Research and Politics* 1-7; Joakim Ekman ‘Political Participation and Regime Stability: A Framework for Analyzing Review Hybrid Regimes,’ (2009) 30 (1) *International Political Science* 7-31.

³ In English literature, the term “real constitution” features prominently in Jan Erk, ‘Real Constitution, Formal Constitution and Democracy in the European Union,’ (2007) 45 (3) *Journal Compilations* 633–652. See also Jack Balkin, ‘The Roots of the Living Constitution,’ (2012) 92

consequently addresses those issues. Drawing on literature in both constitutional theory and political science, it develops an account of a range of possible conditions for real constitutional change. These theoretically derived conditions are then used as investigative tools to understand real constitutional change and stability in Sub-Saharan Africa in the case-study chapters.

In order to achieve its objectives, this Chapter commences by first elaborating the idea of the real constitution in section 4.2. As observed in section 1.10 of Chapter 1, the real constitution is made up of numerous elements, but there are certain elements that can be commonly traced in most legal systems. Section 4.3 lists and expounds upon these elements, both to justify this study's focus on the real constitution and to identify the elements of the real constitution that will be used to examine various constitutional outcomes of interest. Section 4.4 in turn discusses various ideal-typical real constitutions and their observable features. The heart of this chapter, section 4.5, first theorises the idea of real constitutional change – and by extension stability – and then sets out various conditions that, at a theoretical level, may be said to drive real constitutional change. These conditions are discussed under four broad subheadings: (a) actor-led; (b) structural; (c) changes to formal constitutional powers; and (d) effective judicial review. The chapter concludes with a summary.

4.2 Defining the real constitution

The late Walter Murphy is reportedly famous for intervening in conversations about constitutions with the question “you mean the written constitution.”⁴ His intervention was informed by the many connotations that the phrase “the constitution” bears.⁵ It is commonplace to see, for example, such distinctions as the de jure vs de facto, prescriptive vs descriptive and small “c” vs large “C” constitution, depending on the

Boston University Law Review 1133; Dieter Grim, “Types of Regimes” in M Rosenfeld, A Sajy *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press: 2012) 98

⁴ See Tom Ginsburg, James Melton & Zachary Elkins, ‘The Endurance of National Constitutions,’ (Cambridge University Press, 2013) at 46. at 30.

⁵ For different conceptions of constitution, See, Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008) 57 -59; Graham Maddox, ‘A Note on the Meaning of ‘Constitution’,’ (1982) *American Political Science Review* 76, 805–809; Charles Howard McIlwain, ‘Constitutionalism: Ancient and Modern,’ (1947) <<http://www.constitution.org/cmt/mcilw/mcilw.htm>> accessed 3 March 2016; Michael Zuckert and Felix Velezuela ‘Constitution in the Age of Terror’ in Ellen Frankel Paul, Fred D. Miller et al, (eds) *What Should Constitutions Do?* (Cambridge University Press: 2011) 72; Jeremy Waldron, Book Review, ‘Never Mind the Constitution: A comparative critique of anti-constitutionalism’ (2014) 127 *Harvard Law Review* 1147, 1159-61.

nature of the study.⁶ As observed in Chapter 1, the de jure, prescriptive, formal and large “c” constitutional labels are used synonymously with the formal or written official constitution, while tags such as “the day-to-day workings of constitutions,”⁷ “de facto”,⁸ “empirical”⁹, or “working”¹⁰ constitution are used in reference to what is designated in this study as the real constitution.

The real constitution has a long ancestry that predates the formal constitution as we understand it today. As Jan Erk remarked, the word “formal” constitution has its origins in the German-language literature on constitutional politics.¹¹ It is the “letter of the law.”¹² The modern notion of the formal constitution is thus associated with the 1st French Republican and American constitutions.¹³ According to Grimm, the normative and prescriptive, or formal constitution, “emerged during the eighteenth century in the course of the American and French” revolutions.¹⁴ The French Constitution of 1771 and the Constitution of the United States of America of 1787 are thus thought to be the first modern formal constitutions in this sense.¹⁵ They codified rules that spelt out the relationship between the state and its subjects in the form of a modern constitution, even though such rules existed as a practical matter before the American and French revolutions.¹⁶ The real constitution, for its part, is traceable to early known civilisations.¹⁷ Though thinkers like Cicero, Plato and Aristotle spoke about systems of

⁶ David S Law, “Constitutions” in P Cane & H Kritzer (eds) *The Oxford Handbook Of Empirical Legal Research* (2010: Oxford University Press) at 16 (“the distinction at issue has been expressed in a variety of ways, each of which has its own shadings and nuances, but the underlying divide is between de jure, written, codified, or formal constitutions (“large- c” constitutions), on the one hand, and de facto, unwritten, uncodified, or informal constitutions (“small- c” constitutions), on the other. A large- c constitution is a legal document, or set of legal documents, that (1) proclaims its own status as supreme or fundamental law, (2) purports to dictate the structure, contours, and powers of the state, and (3) may also be formally entrenched, in the sense of being harder to amend or repeal than other laws. A small- c constitution, by contrast, consists of the body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits”)

⁷ *Ibid.*

⁸ See e.g. Katarzyna Metelska-Szaniawska, ‘Post-socialist constitutions: The de jure–de facto gap, its effects and determinants,’ (2020) *Economics of Transition and Institutional Change* 1–22 at 1.

⁹ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 3.

¹⁰ Karl Lewellyn, ‘The Constitution as an Institution’ (1934–1935) *Oregon Law Review* 108.

¹¹ Erk (note 3 above).

¹² *Ibid.*

¹³ See, Ulrich Preuss, ‘The Implications of Eternity Clauses,’ (2011) 44 (3) *Israel Law Review* 429.

¹⁴ D Grimm (note 9 above).

¹⁵ Preuss (note 13 above).

¹⁶ Generally, see Grimm (note 9 above).

¹⁷ Graham Maddox, ‘A Note on the Meaning of ‘Constitution’,’ (1982) *American Political Science Review* 76, 805–809.

governance, including ideas that undergird present-day constitutions in their least developed forms, ancient city states were not run by virtue of documents such as modern-day constitutions.¹⁸ The original sense of the word constitution was associated with the ‘makeup of something.’¹⁹ Cicero identified the constitution with the way the state was established while Aristotle connected the constitution to the “forces operating within the polity to produce its public life”.²⁰ In Aristotle’s view, a constitution “is the way of life of a citizen-body”.²¹ Reference to constitutions by early thinkers denoted the actual conditions that constituted the body politics rather than the written document.²² On this account, every society, including those without a formal constitution, has a real constitution.

How then can we tell that certain norms in a political order are part of its real constitution? Ernst Young has suggested – though without using the term real constitution – that the way to go about it is to consider the functions of a constitution.²³ Claiming that there is a constitution in the United States “outside” the 1789 Constitution, Young argues that there is a disconnect between how constitutions are described and what their functions are. He argues:

My central claim in this Article is that the American “constitution” consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments.²⁴

Though Young’s claim is just about the US, it holds sway in many, if not all political orders. The “wider sources” of constitutional authority are quite expansive and range from, say, foundational documents (such as the Declaration of Independence), to legal, moral and political principles (such as Social Contract Theory), to list but a few.²⁵ In most polities though, the written constitution, quasi-constitutional legislation, informally or extra-constitutionally acquired powers and political practices, judicial

¹⁸ Cicero W. Keyes, ‘Original Elements in Cicero’s Ideal Constitution,’ (1921) 42 (4) *The American Journal of Philology* 309.

¹⁹ Michael Zuckert and Felix Velezuela (n 5 above) at 72.

²⁰ *Ibid.*

²¹ Thomas I. White, Aristotle and Utopia (1976) 29 (4) *Renaissance Quarterly* 640.

²² Michael Zuckert and Felix Velezuela (note 5 above).

²³ K.N. Llewellyn (note 10 above); Ernest A. Young, ‘The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda,’ (2008) *Journal of Constitutional Law* 399. See also Lawrence B. Solum, ‘Originalism and the Invisible Constitution,’ in A Stone and R Dixon, *The Invisible Constitution in Comparative Perspective* (2018: Cambridge University Press), 61 at 62 (Solum noted that “the United States obviously has an unwritten constitution: not all of the content of constitutional law is explicitly stated in the constitutional text.”)

²⁴ *Ibid.*

²⁵ Solum (note 23 above) at 80.

pronouncements, constitutional conventions, and informal norms and understandings about what public officials are required to do are often the fount of “small-c” constitutional authority. This list can certainly be longer in some political orders than others and the role that each of these elements plays may also vary from context to context. The section that follows elaborates on some of these elements.

4.2.1 The large “c”/written Constitution

With the exception of a few countries, all societies have embraced the idea of a supreme text, officially recognised as the constitution, that forms the basis for power acquisition, distribution and control – what Melkinsburg call the “large-c” Constitution. The written text of a formal constitution may be contained in a single official document, such as the Constitution of the United States of America of 1789, or in more than one document, such as in the Czech Republic or Canada, whose official constitutions are polytextual.²⁶ This written text is often read together with what Upendra Baxi has called the “doctrinal constitution”, by which he means judicial interpretations of the text together with the principles that undergird texts, such as the separation of powers and checks and balances.

Enforcement – or rather susceptibility to enforcement – is central in adjudging written constitutions’ contribution to the real constitution. It could be contended in this regard that where a formal constitution is unenforced, it is not a part of the real constitution at all. In the field of constitutional stability for instance, a text that is unenforced, even if it is rarely altered, cannot be considered stable as it is self-enforcement that imputes “constitutional stability”.²⁷ The presence of a gap between practice and the written text, in this regard, often denotes non-enforcement, except perhaps in polities where less has been reduced to writing.²⁸ The real instances of non-enforcement are consequently societies whose robust recognition of rights and institutional frameworks is not on a par with constitutional practice on the ground. It is in respect of these societies that the idea of “sham” or “sham-like” constitutions has

²⁶ Tom Kahana ‘Canada’ in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (2011, Oxford: Hart Publishing) at 9 at 11; Michal Tomoszek, ‘The Czech Republic’ in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (2011, Oxford Hart Publishing) 41 at 42.

²⁷ See for instance, See, Peter C Ordeshook, ‘Constitutional Stability,’ (1992) 3 (2) *Constitutional Political Economy* 137-175; Sonnia Mittal & Barry R Weingast, ‘Constitutional Stability and the Deferential Court’ (2010) 13 (2) *Journal of Constitutional Law* 337.

²⁸ See e.g. Jannekke Gerards, ‘The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing it,’ (2016) 2 *Revue interdisciplinaire d’études juridiques* 70.

emerged to describe a phenomenon where the prescriptive and descriptive constitutions are at variance.²⁹ Sham constitutions, Tushnet argued, “embody the normative values associated with constitutionalism in their text but in their operation fall dramatically short of actualizing those values”.³⁰ It is, presumably, the centrality of enforcement that makes Hardin describe constitutions as “consequentialist” instruments such that if one is not optimally operative it becomes unworthy of the description “constitution”.³¹

The notion of enforcement as the criterion for assessing whether a formal constitution is part of the real constitution does not, however, mean that formal constitutions are only politically valuable to the extent that they are enforced. Constitutions play far more roles than the “consequentialist” one that Hardin suggests. For instance, constitutions and some of their accompanying texts, such as preambles, perform an “expressive” function, by articulating the values and aspirations of societies.³² Also, constitutions, it has been said, just like courts, play strategic roles in authoritarian regimes.³³ In Ginsburg and Simpser’s view, constitutions facilitate “coordination within the authoritarian group” and send out strategic messages to international and domestic actors.³⁴ Tushnet adds, in paraphrasing Ginsburg and Simpson, that they “provide guidance for officials and subjects with respect to the actions they are required or allowed to take”.³⁵ In addition, certain aspects of the written constitution, even when it is a sham, may be enforceable. For instance, a constitution may provide for democratic multiparty elections to be held every five years. This provision could be enforced, and hence part of the real constitution, even though the quality of the elections was poor and suggestive of a weak democracy in practice. The written constitution, in other words, will be more or less reflective of the real constitution depending on where it sits along a continuum from pure sham to the hypothetical, perfectly enforced written constitution.

²⁹ See, David S. Law and M Versteeg, ‘Sham Constitutions,’ (2013) 101 *California Law Review* 863.

³⁰ Mark Tushnet, ‘Constitution’ in Michael Rosenfield and Andras Sajó, *Oxford Handbook of Comparative Constitutional Law* (2012: Oxford University Press) 217, 228.

³¹ R Hardin, (note 15 above) at 54.

³² Richard Albert, ‘The Expressive Function of Constitutional Amendment Rules,’ (2013) *McGill Law Journal*, 59, (2), 225–281; Michael C. Dorf, ‘The Aspirational Constitution,’ 77 *Geo. Wash. L. Rev.* 1631 (2008-2009); Mauricio Garcia Villegas, Law as Hope: Constitutions, Courts, and Social Change in Latin America (2004) 16 *Fla. Journal of International Law* 133.

³³ Tom Ginsburg & Alberto Simpser, ‘Introduction,’ in T Ginsburg & A Simpser (eds) *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014) 4-5.

³⁴ *Ibid.*

³⁵ Mark Tushnet, ‘Authoritarian Constitutions,’ (2015) *Cornell Law Review* 391.

Lastly, there is an empirical connection between the real constitution and the written one. As Melton claimed about human rights:

entrenching a human right in the constitution can, under certain circumstances, significantly improve the odds that a country will observe that right in practice. This finding suggests that the relationship between constitutional promises and actual practice is stronger than generally assumed.³⁶

Melton's research on rights is not the only research to establish a connection between the written and the real constitution. In a different project, Melton and Ginsburg noted a "positive relationship between de jure and de facto judicial independence reported by Hayo and Voigt."³⁷ These comparisons have extended beyond judicial independence and reveal that de jure (formal) institutions can influence de facto ones.³⁸

In sum, three claims are made about a polity's real constitution if it has a written one. The first is that enforced aspects of the written constitution form part of that polity's real constitution. Second, the strategic purposes for which written constitutions are used in a polity are also part of the real constitution, whether or not they are enforced. Third, these purposes – whether the formal constitution is actually enforced or serves an instrumental value – shape understandings of what the written constitution means for power acquisition, distribution and use. These understandings are themselves part of the real constitution.

4.2.2 Quasi-constitutional legislation

It is hardly possible that power can be acquired and exercised pursuant to a written constitution only. The bulk of the day-to-day workings of most governments is undertaken through legislation. There is certainly a raft of legislation in every legal order, some of which address aspects, say, of commerce or private law. What is of concern here, however, as a component of the real constitution is more public law-

³⁶ J. Melton, 'Do Constitutional Rights Matter?' (2014) available at <https://pdfs.semanticscholar.org/e030/faaef3401760e608dfb9faa13389bd41d377.pdf> (accessed 13 April 2019).

³⁷ James Melton & T. Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Re-evaluation of Explanations for Judicial Independence,' (Coase-Sandor Institute for Law & Economics Working Paper No. 612, 2014) 210.

³⁸ Peter Foldvari, 'De Facto Versus de Jure Political Institutions in the Long-Run: A Multivariate Analysis,' (2017) 130 (820–2000) *Soc Indic Res*, 759–777. For a contrasting view, see, William Armaline Davita Silfen Glasberg, Bandana Purkayastha 'De Jure vs. De Facto Rights: A Response to "Human Rights: What the United States Might Learn from the Rest of the World and, Yes, from American Sociology,"' (2017) 32 (1) *Sociological Forum* 220.

oriented legislation, particularly laws that operationalize or qualify the practice of democracy and its supporting rights.

Any statute touching on state power that is enacted and not struck down constitutes not only a fount of authority but also a legitimate interpretation of the constitution in the sense that it confirms that the legislature's law-making power extends to enacting a statute of that type. There is in this regard a vast amount of legislation that is part of a polity's real constitution to the extent that it is enforced. This includes "quasi-constitutional", "organic" and "super" statutes.³⁹ Though constitutional authority is often imputed to "super" or "quasi-constitutional" statutes, a wider array of legislative enactments constitutes the real constitution.

Legislation as an important element of the real constitution is more prominent in constitutional systems without official constitutions contained in one document.⁴⁰ Such polities include the United Kingdom. Its Parliaments Act of 1911, though just an ordinary law, has an important constitutional status being the formal instrument through which the regulation of the relationship between the House of Lords and the House of Commons is coordinated.⁴¹ Passed in 1910, this statute is said to have had "had a profound effect on Parliament and politics in the 20th century".⁴² It was enacted following a constitutional crisis epitomised by the rejection of a budget submitted by the Liberal Government to the Conservative-dominated Parliament. Among others, this statute sought to "remove the power of the House of Lords to reject money bills, and to replace the Lords' veto over other public bills with the power of delay".⁴³ It also reduced the term of parliamentarians from 7 years to 5 years.⁴⁴ Young, citing this piece of legislation together with the Parliament Act of 1946, has described them as being "part of the English Constitution because of what they do, not because they have any formal markers that set them off from ordinary legislation."⁴⁵ Outside the United

³⁹ See e.g. William N. Eskridge, Jr and J Ferejohn, 'Super-Statutes: The New American Constitutionalism,' in Richard W Bauman and T Kahana (eds.) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, Cambridge, 2006).

⁴⁰ See e.g. Fred Ridley, 'Defining Constitutional Law in Britain,' (1991) *Common Law Review* 101; Sir Kenneth Keith, *On the Constitution of New Zealand* (1991) 44 (1) *Political Science* 28.

⁴¹ A P Dennis, "The Parliament Act of 1911" (1912) 6 (2) *American Political Science Review* 194.

⁴² See House of Lords, Living Heritage, House of Lords Reforms, Parliament Act, 1911, <<https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseoflords/house-of-lords-reform/from-the-collections/from-the-parliamentary-collections-the-parliament-act/parliament-act-1911/>> accessed 16 June 2020.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Young (note 23 above) at 411.

Kingdom, New Zealand's State Sector Act 1988, Electoral Act 1993 and the New Zealand Bill of Rights Act 1990, to mention a few, also serve as illustrations.⁴⁶ In Israel, the Basic Laws, including the Basic Law: Human Dignity and Liberty as well as the Basic Law: Occupation of 1994 serve as examples of legislation with immense impact.⁴⁷ In describing the Canadian constitution, too, Kahana tells us that it is made up of "31 statutes and orders".⁴⁸

The phenomenon of legislation forming part of the real constitution is not, however, just a feature of societies that lack a monotextual formal constitution. In Germany, for instance, though article 79 of its Constitution prohibits any form of "accessory/secondary" constitution, this "does not by any means exclude the existence of ordinary legislation which is constitutional in terms of substance, such as electoral law or the law on citizenship".⁴⁹ In Finland also, though having a written constitution that came into force in 2000, its "Acts of Exceptions", which are essentially outside the constitution, are the means through which it is "possible to accept a violation of the core meaning of a constitutional provision."⁵⁰ Similar examples from across the world exist, illustrating that statutes form part of the real constitution even in jurisdictions with an official/written constitution.

Indeed, most written constitutions contain so-called "by law" clauses through which some matters or details are left out to be implemented through ordinary legislation or for various purposes.⁵¹ In this regard, Ginsburg and Dixon have commented that:

it is often the case that constitution-makers self-consciously choose not to bind their successors. Instead, they often draft constitutional provisions in such vague language that they do not bind their successors at all. Alternatively, they choose to defer decision-making to the future by adopting "by law" clauses that explicitly delegate certain constitutional questions to future legislatures.⁵²

⁴⁶ See Office of the General Governor, "The Constitution of New Zealand" available at <<https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution>> accessed 15 January 2020.

⁴⁷ See Suzie Navot, 'Israel,' in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (London, Hart Publishing, 2011) 196-197.

⁴⁸ T Kahana (note 26 above at 11).

⁴⁹ J Woelk "Germany" in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (Oxford Hart Publishing, 2011) 143 at 145.

⁵⁰ Sukksi Markku, 'Finland' in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A comparative Study* (Oxford Hart Publishing, 2011) 87 at 102.

⁵¹ Rosalind Dixon and Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" (2011) 9 (3) *International Journal of Constitutional Law* at 636.

⁵² *Ibid.*

Through these kinds of “by law” clauses, formal constitutions confer upon ordinary legislation normative force almost equal to that of the written constitution. In practice, these kinds of statutes sometimes exist because the constitution explicitly requires them to be enacted- though they could be created out of obvious necessity to implement constitutional provisions. Examples include South Africa’s Promotion of Administrative Justice Act,⁵³ which implements section 33 of its 1996 Constitution. Kenya’s Election Act, was enacted pursuant to the 2010’s Constitution directive that “Parliament shall enact legislation to provide for” inter alia, “the nomination of candidates” and “the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda”.⁵⁴ The enforceable content of the rights in the written constitution would therefore be found in these statutes granted, as Ginsburg and Dixon have said, that (written) constitutional language is often vaguely framed.⁵⁵ In this regard, there are constitutionally required and constitutionally supported statutes that are part and parcel of the real constitution to the extent that they are enforced.

The importance of legislation as part of the real constitution is seen in the fact that, following the TWD, the repeal of written constitutional provisions by some de jure one-party states was accompanied by the enactment of ordinary legislation to allow, for instance, the creation of political parties. Sub-Saharan Africa alone provides a host of illustrations. In Tanzania, the enactment of the Political Party’s Act 1992 was followed by the amendment of article 10 of its constitution.⁵⁶ South Africa’s 1996 Constitution was accompanied by the repeal of numerous (in)famous apartheid statutes.⁵⁷ In some instances, no change to the written constitution was undertaken as this was achieved through legislative repeal or enactment. An example of this is Cameroon, whose multi-party democracy was restored when the ruling party “passed several laws, notably the law governing political parties”,⁵⁸ from December 1990 to early 1991, without corresponding formal constitutional change, which only came later around 1996. In Eritrea, the introduction of multi-party politics in 2001 was also

⁵³ Act No 3 of 2000.

⁵⁴ Article 82, Constitution of Kenya 2010.

⁵⁵ Dixon and Ginsburg (note 51 above).

⁵⁶ Mohabe Nyirabu, ‘The Multiparty Reform Process in Tanzania: The Dominance of the Ruling Party,’ (2002) 7 (2) *African Journal of Political Science* 104; D Chipeta, *Administrative Law in Tanzania a Digest of Cases: A Digest of Cases* (Mkuki Na Nyota Publishers, 2009) xxxvi.

⁵⁷ Kritikasam SO Biavon, ‘The Post-Apartheid city: Hopes, Possibilities and Harsh Realities in David Smith,’ (eds) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* 240.

⁵⁸ David Mokam, ‘The Search for a Cameroonian Model of Democracy or the Search for the Domination of the State Party: 1966-2006 (2012) 23 *Cadernos de Estudos Africanos* 85.

effected through a draft law, which was neither debated nor passed.⁵⁹ It is worth pointing out that some of these statutes with a constitutional effect may not be enforced just as written constitutions in some set-ups are unenforced.

4.2.3 Judicial decisions

Courts, Dressel, Sanchez-Urribarri and Stroh wrote, “have become central to political life throughout the world.”⁶⁰ Their decisions or predispositions may be part or reflective of the real constitution, depending on their enforcement and the legal traditions of the polity in question.⁶¹ Though “case law” is often associated with common law jurisdictions,⁶² judicial decisions in general and the working of constitutional review bodies – as well as their decisions – whether as part of the judiciary or not constitute an important part of the real constitution. As Balkin put it, “common-law processes of precedent and tradition are America’s real constitution”.⁶³ In some jurisdictions thus, particularly where a democratic culture exists, whatever courts proclaim in the process of interpreting or enforcing the constitution constitutes the real constitution.

In common law countries in particular, decisions of courts are considered to be part of the formal sources of legal authority and what courts say can be, as already mentioned, part of the real constitution. Until the South African Constitutional Court decided in 1995 through its famous decision in *S v Makwanyane & Another*,⁶⁴ it was possible for capital punishment to be imposed in that country. The *Makwanyane* judgment and not any particular legislative or constitutional provision has consequently become the point of reference for the question of the death penalty in South Africa and unless and until *Makwanyane* is set aside, it is its position that matters on the issue. Also, before the 2005 decision of South Africa’s Constitutional Court in *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*, the authority against the permissibility of same-sex marriage lay in ordinary legislation. Fourie then became the

⁵⁹ Ben Turner, *The Statesman's Yearbook 2007: The Politics, Cultures and Economies of the World* (Springer, 2017) 437.

⁶⁰ Bjurn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, ‘The Informal Dimension of Judicial Politics: A Relational Perspective,’ (2017) 13 *Annual Review of Law and Social Science* 1.

⁶¹ See Solum (note 23 above) at 103.

⁶² Vincy Fon and Francesco Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis,’ (2004) Minnesota Legal Studies Research Paper No. 07-19 <<http://dx.doi.org/10.2139/ssrn.534504>> accessed 10 June 2019.

⁶³ Joel Balkin (note 3 above).

⁶⁴ [1995] ZACC 3.

reference point for actors in the constitutional order and courtesy of it, Parliament passed the Civil Union Act to recognise and fulfil the right of same-sex couples to marry. In the US, decisions such as *Grutter v Bollinger* (on race),⁶⁵ *Roe v Wade* (on abortion),⁶⁶ and *Obergefell v Hodges* (on sexual orientation)⁶⁷ can be likened to South Africa's *Makwanyane* and *Fourie* cases.

In a similar vein, the very practice of courts or judicial review institutions of reviewing legislation or executive action as well as those institutions' and other actors' general understanding of the reach of their powers is also part of the real constitution. This practice has flourished in some regimes, especially those that are said to have strong-form judicial review, while in others it has not. In set-ups with strong-form judicial review, judges operate under some sort of a "constitutional" understanding that they can venture into matters that are considered to be in the competence of political institutions. In societies with weak-form judicial review, judicial restraint in matters felt to fall in the domain of politics is also a constitutional norm of a sort. Other than the form of judicial review in its strong and weak sense, the general use of courts in certain spheres is also a part of a society's real constitution. As observed in section 4.2.1, courts in authoritarian regimes play strategic roles that can be analogised to what constitutions do in those regimes. The instrumental roles that these courts play could also be treated as part of those polities' real constitution.

4.2.4 Conventions

Conventions are often considered to be part of the real constitution.⁶⁸ They are practices of political behaviour in use over a period of time and which are believed to have the force of law. Vermeule describes them as "unwritten but obligatory constitutional custom or norm".⁶⁹ Just like formal principles and legislation, constitutional conventions have been said to play a significant role, particularly in parliamentary democracies. The Canadian Parliament has, for instance, described the "no confidence" convention in these words:

⁶⁵ 539 U.S. 306.

⁶⁶ 410 U.S. 113, (1973).

⁶⁷ 576 U.S. ____ (2015)

⁶⁸ Carlos Bernal, 'Foreword- Informal Constitutional Change: A critical Introduction and Appraisal,' (2014) 60 *American Journal of Comparative Law* 493.

⁶⁹ A Vermeule, 'Conventions in Court,' (2013) Harvard Public Law Working Paper, <<http://dx.doi.org/10.2139/ssrn.2354491>> accessed 30 June 2018.

The fact that the Prime Minister and the Cabinet are responsible to, or must answer to the House of Commons for their actions is a fundamental characteristic of parliamentary government. They must enjoy the support and the confidence of a majority of Members of the House to remain in office. This is commonly referred to as the confidence convention. This complex constitutional subject, [is] a matter of tradition that is not written into any statute or standing Order of the House.⁷⁰

Just like legislative enactments, conventions are more prominent in countries without written constitutions, such as the United Kingdom and New Zealand, though they also exist in other polities, too. In the United Kingdom, some of these conventions include that the party that gets the majority of seats in the House of Commons is entitled to form a government⁷¹ and that the Prime Minister always comes from the party with the majority of seats in the House of Commons and therefore has command of that House of Parliament.⁷² The relationship between the Monarch and the Ministers is also governed by conventions, some being that the Monarch will always act in accordance with the advice of the Ministers except under some exceptional cases.⁷³ Outside the United Kingdom, and in New Zealand in particular, the convention of collective cabinet responsibility is considered an important part of the real constitution.⁷⁴

These conventions are not, however, only part of the real constitution in countries without a written constitution or in the commonwealth world. Concerning the United States, for example, Vermeule notes that “it is a mistake to think that all constitutional rules are written”.⁷⁵ For him, “despite the existence of a written constitution – conventions are essential to the operation of the U.S. constitutional regime”.⁷⁶ In India, “a convention...developed that the most senior judge of the Supreme Court was always appointed the Chief Justice on vacation of office on superannuation or otherwise”.⁷⁷ Elsewhere, in Canada, “the conventions of Cabinet

House of Commons, Procedure and Practice, <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_02_2-e.html> accessed 20 May 2019; See also, Nicholas A. MacDonald and JWJ Bowden, ‘No Discretion: On Prorogation and the Governor General,’ *Canadian Parliamentary Review* 34, no. 1 (Spring 2011) at 7.

⁷¹ *Ibid.*

⁷² On conventions generally, see George Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1987: Oxford, Oxford University Press).

⁷³ E Sahin, ‘The Conventions of the United Kingdom and a New Written Constitution,’ *Kings Student’s Law Review*, <<https://blogs.kcl.ac.uk/kslr/?p=120>> accessed 20 June 2019.

⁷⁴ <https://teara.govt.nz/en/constitution/page-2> last visited 15 June 2020.

⁷⁵ Vermeule (note 69 above) at 3.

⁷⁶ *Ibid.*

⁷⁷ Mahendra Pal Singh in D Oliver and C Fusaro (eds) *How Constitutions Change: A comparative Study* (2011, Oxford Hart Publishing) at 188. See also, *Record Assn v Union of India*, AIR 1994 SC 268.

confidence, confidentiality and solidarity”, though unwritten in any statute, “play a key role in solidifying the powers of the executive branch.”⁷⁸ In Switzerland, too, a civil law jurisdiction, the practice that the presidency of the collective body rotates yearly is a strong constitutional convention without a formal underpinning norm and though Switzerland’s written constitution provides for multi-party elections, this practice has resulted in the electoral system militating against the formation of an opposition.⁷⁹

Though conventions are generally adhered to, they are at times departed from. In England for instance, there has been a convention that major parties do not always put up an opponent when the Speaker is seeking re-election.⁸⁰ Around 1988, candidates were proposed to stand against Bernard Weatherill, contrary to this convention. This was done by both the Labour Party and the Social Democratic Party.⁸¹ Prior to the passing of the *Parliament Act 1911*, Britain had been through a constitutional crisis that some feel was orchestrated by the breach of a constitutional convention: that the House of Lords should not reject a budget passed by the House of Commons.⁸²

The traditional understanding is that conventions are not enforceable in courts of law. This traditional view is often supported by citation of the eminent British scholar, AV Dicey, to whom, conventions “are not enforced or enforceable by the Courts”.⁸³ Their judicial non-enforcement notwithstanding, according to this view, they “enjoy de facto constitutional supremacy because the political culture [in countries such as Canada] has rendered them binding.”⁸⁴ What is contemplated therefore is that departure from conventions attracts political consequences and even in cases where they are breached, this is a matter of political expedience. This traditional view has, however, been challenged and recent scholarship indicates that courts, especially in

⁷⁸ Kahana (note 26 above) at 24.

⁷⁹ CH Church and A Vatter “Opposition in Consensual Switzerland: A Short but Significant Experiment” (2009) 44 (4) *Government and Opposition* 412 at 427.

⁸⁰ See, UK Parliament, The Speaker and Elections (2016) available at <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/the-speaker/elections/> accessed 16 May 2018.

⁸¹ The Telegraph, Speakers who seek re-election have been opposed (14 December 2009) available at <https://www.telegraph.co.uk/comment/6803742/Speakers-who-sought-re-election-have-been-opposed.html> accessed 16 May 2018.

⁸² *Ibid.*

⁸³ Roger E. Michener, “Foreword” (to) A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 15 (ed. Roger E. Michener, Liberty Fund 1982), available at http://files.libertyfund.org/files/1714/Dicey_0125_EBk_v7.0.pdf accessed 20 June 2020.

⁸⁴ Kahana (note 26 above) at 13.

the commonwealth world, recognize and also enforce constitutional conventions. Albert, Perry and Ahmed argue in this regard that:

Commonwealth courts go beyond simply recognizing the existence of conventions. They employ conventions in legal reasoning towards the resolution of a dispute. More significantly, courts do what the dominant view says they cannot: they enforce conventions in order to resolve legal disputes before them. These juridical developments arise out of recent conflicts which have destabilized the traditional view that Commonwealth courts do and should recognize, employ, but never enforce conventions.⁸⁵

They go on, in a follow-up article, to describe cases in the United Kingdom and even in other countries, such as in India, where courts either simply recognised some of these conventions or went so far as to enforce them.⁸⁶ As elements of the real constitution though, what matters is whether they have normative force in practice, i.e. whether they are generally adhered to by political actors, whether or not enforced by courts.

4.2.5 Informal powers and informal politics

The category of informal powers and informal politics is a vast and unwieldy sub-category of elements of the real constitution. “Informal powers” refers to authority whose foundation either lies outside the written constitution or is in excess of what has been prescribed. In the case of the latter, the surplus authority has an extra-textual foundation. Personality cults, kinship, social relations, religion, economic interests, brute force, de facto control of the security apparatus and charisma are common exemplifications of informal powers. A cult of personality is in this regard quite a common fount of informal power. As Adrian Teodor Popan explains, heroic images are at times created of individuals, through the media and other forms of propaganda, to generate worship-like behaviour towards them.⁸⁷ Examples of individuals, especially dictators, who deploy this type of power abound. They include Zaire’s Mobutu, who “Africanised” his name to Mobutu Sese Seko Nkuku Ngbendu Wa Za Banga, meaning “The all-powerful warrior who, because of his endurance and inflexible will to win,

⁸⁵ F Ahmed, R Albert, A Perry, ‘Judging Constitutional Conventions,’ (September 26, 2017). Oxford Legal Studies Research Paper No. 59/2017. <<https://ssrn.com/abstract=3043190><http://dx.doi.org/10.2139/ssrn.3043190>> accessed 7 November 2020.

⁸⁶ F Ahmed, R Albert and A Perry, “Enforcing Constitutional Conventions” (2019) 17 (4) *International Journal of Constitutional Law* 1146–1165.

⁸⁷ Adrian Popan Teodor (August 2015) ‘The ABC of sycophancy: structural conditions for the emergence of dictators’ cults of personality,’ *The University of Texas*: 196–213 <http://doi:10.15781/T2J960G15>. hdl:2152/46763 accessed 20 June 2019.

goes from conquest to conquest, leaving fire in his wake”.⁸⁸ Elsewhere, in Yugoslavia, Josip Broz Tito was considered “peasant chief, protector and the legendary hero”.⁸⁹

Closely related to personality cults and charismatic authority is what Freedom House describes as the “Men Behind the Scenes.”⁹⁰ These are an individual or group that “holds no elected office or rules from a post vastly inferior to [their] real status.”⁹¹ They are, however, very influential despite being beyond the reach of voters, public information or even the formal law itself.⁹² They include “powerful business magnates or security service chiefs who exercise an outsized influence on politics”.⁹³ An example includes Poland’s Jarosław Kaczyński, who is a mere Member of Parliament, sitting in no committee but whose influence as the chairman of the ruling Law and Justice (PiS) Party is pronounced and “his actual dominance ... widely known” in the Polish political sphere.⁹⁴ Elsewhere, billionaire Bidzina Ivanishvili in Georgia or the Gupta family in South Africa are examples of individuals or groups whose informal powers can be said to be part of the real constitution.⁹⁵

Other than informal powers, there is also informal politics. The distinction made between formal and informal politics has links with formal and informal markets: formal markets are regulated by the state and occur within state rules.⁹⁶ Eilo Wing-Yat Yu has distinguished between formal and informal politics in the following terms:

Formal politics is defined as political participation under “rules and institutions” while informal politics is a kind of “conventions and codes behaviour” in the political sphere, such as cronyism and guanxi networks. Both kinds of politics are interacting and functionally inseparable in a political system.⁹⁷

⁸⁸ J Daniszewski and A M Simmons, Mobutu, Zairian Dictator for 32 Years, Dies in Exile, *Los Angeles Times*, 8 September 1997 <https://www.latimes.com/archives/la-xpm-1997-sep-08-mn-30058-story.html> accessed 20 June 2019.

⁸⁹ Apor B, Behrends J, et al, *The Leaders Cult in Communist Dictatorships: Stalin and the Eastern Bloc*. (2004: Palgrave Macmillan)

⁹⁰ Freedom House, Nations in Transit 2018: Confronting Illiberalism' (Freedom House, 2018) available at <https://www.democratic-decay.org/bibliography> accessed 20 June 2019.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Neil Arun, State capture: Zuma, the Guptas, and the sale of South Africa, BBC, 15 July 2019 available at <https://www.bbc.com/news/world-africa-48980964> accessed 12 June 2020.

⁹⁶ See, S Radnitz, Informal Politics and the State (2011) Review Article, <<http://faculty.washington.edu/srad/wordpress/wp-content/uploads/2014/07/Informal-Politics.pdf>> accessed 12 June 2020.

⁹⁷ E Wing-Yat Yu (2007) 'Formal and Informal Politics in Macao Special Administrative Region Elections 2004–2005,' (2007) 16 (52) *Journal of Contemporary China* 417.

Informal politics are thus those that mostly occur outside formal political structures, such as the legislature, but often find strong expression (and influence) in (and over) formal institutions and politics. Their identifiable form ranges from demands of social and interest groups, such as civil society and church-based organisations, to intra- and extra-party politics. Informal establishments, such as traditional institutions, could also fall into this category.

Informal politics play very pronounced roles, particularly in contexts characterised by non-enforcement of formal rules. In the context of Sub-Saharan Africa, where there is admittedly an enforcement shortfall, Patrick Chabal and Jean-Pascal Daloz remark that “political action operates ... largely in the realms of the informal, uncodified and unpoliced – that is, in a world that is not ordered in the sense we usually take our own polities in the West to be”.⁹⁸ In this regard, two facets of informal politics in the African context stand out: first is identarian (such as ethnicity, race and religion) and second, patronage (neopatrimonial) politics.⁹⁹ Regarding the former, ethnicity is perhaps more prominent in most domains. Tomchak conducted an audit of ethnic conflict and the politicisation of ethnicity in Sub-Saharan Africa, and observed as follows:¹⁰⁰

The average ethnic saliency across all countries for 2016 was 0.4207 with a standard deviation of 0.1273. The fact that the average value was so high confirms the bias that was presented as a potential worry concerning ethnic saliency wherein discussions of Sub-Saharan Africa. It means that nearly half of all news coverage on the continent involves the discussion of ethnicity.¹⁰¹

Another case in point is supplied by Eifert, Miguel and Posner.¹⁰² They draw on data from over 35,000 respondents in 22 public opinion surveys in 10 countries and remark that politicians find it advantageous to “play the ethnic card” as a means of mobilizing supporters to acquire or retain political power.¹⁰³ On the other hand, patrimonialism and neo-patrimony can be core aspects of the political economy in that they shape individual and popular understandings of the relationship between individuals or

⁹⁸ P Chabal, P and JP Daloz *Africa Works, Disorder as Political Instrument* (James Curry, Oxford, 1998)

⁹⁹ For an overview on the influence of ethnicity in Africa, see D Welsh, “Ethnicity in Sub-Saharan Africa” (1996) 72 (3) *Ethnicity and International Relations* 477-491.

¹⁰⁰ J Tomchak, “Re-Examining Ethnic Conflict in Sub-Saharan Africa: A New Framework for Understanding the Politicization of Ethnicity” (2017) http://politicalscience.yale.edu/sites/default/files/tomchak_joseph.pdf accessed 15 June 2017.

¹⁰¹ *Ibid.*, at 57.

¹⁰² B Eifert, E Miguel, And DN ‘Posner, Political Competition and Ethnic Identification,’ (2010) 54, (2) *American Journal of Political Science* 494–510.

¹⁰³ *Ibid.*

communities and the state. In undemocratic set-ups, personal networks are exploited as a means of accessing power with dividends expected if the power is acquired or retained. Rotberg has illustrated, for instance, how Robert Mugabe (Zimbabwe), Teodoro Obiang (Equatorial Guinea) and Isaias Faki (Eritrea) pursue(d) class rather than collective good through their personal relationships.¹⁰⁴ It is this form of politics that Hale profiled as “patrimonialism” whose core characteristic is that political exchanges tend to be characterized more by punishment and rewards meted out to individuals than policies that are not directed at an individual but broader society.¹⁰⁵ He adds that it can be conceived as a “collective action problem” in which “individuals understand politics as an arena of personal wealth and distribution.”¹⁰⁶

Informal politics may not be necessarily pathological considering that this element may spawn or be shaped by civil society organisations or other pressure groups, such as trade unions. In this regard, Radnitz has argued that informal politics can be constructive and do not always bear negative or “parasitic” connotations.¹⁰⁷ In terms of its positive value, he argues that informal politics can fill the gaps and weaknesses of formal institutions and also that some informal institutions of accountability can actually substitute for defective formal institutions.¹⁰⁸ Assessing the domains of informal politics in the United States, for instance, Azari and Smith have theorised as follows about the import of informal politics:

they complete or fill gaps in formal institutions, coordinate the operation of overlapping (and perhaps clashing) institutions, and operate parallel to formal institutions in regulating political behaviour.¹⁰⁹

The position taken by Azari and Smith is also adopted by Dressel, Sanchez- Urribarri and Stroh, who explain the profound role that informal networks play in judicial politics.¹¹⁰ All in all, informal politics, to the extent that they actually shape the

¹⁰⁴ Robert Rotberg, *Africa Emerges: Consummate Challenges, Abundant Opportunities* (Polity Press, 2013).

¹⁰⁵ Hale ‘The Informal Politics of Formal Constitutions,’ in T Ginsburg & A Simpser (eds) *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014) at 220.

¹⁰⁶ *Ibid.*

¹⁰⁷ Scott Radnitz, ‘Informal Politics and the State,’ (2011) *Comparative Politics* 357.

¹⁰⁸ *Ibid.*

¹⁰⁹ See also, Julia R. Azari and Jennifer K. Smith, ‘Unwritten Rules: Informal Institutions in Established Democracies,’ (2012) 10 (1) *Political Perspectives* 37.

¹¹⁰ Bjurn Dressel, Raun Sanchez-Urribarri, and Alexander Stroh, ‘The Informal Dimension of Judicial Politics: A Relational Perspective,’ (2017) 13 *Annual Review of Law and Social Science* 413-430.

working of institutions, including their efficacy, are clearly an element of the real constitution.

4.3 Typologies of real constitutions

Cumulatively, when the various elements of the real constitution are enforced, they create constitutional conditions which, as already mentioned, can be adjudged as being democratic, authoritarian or hybrid.¹¹¹ The nature of a regime, as delineated by political scientists, should correspond – this thesis contends – to one or the other of these ideal types. Hence, a polity that is democratic should have a corresponding real democratic constitution and vice versa. For purposes of this study, countries in Sub-Saharan Africa can thus be said to have either democratic, hybrid or authoritarian constitutions. It is important to note, however, these are broad categorisations and that there are other classificatory schemes that refine these ideal types.¹¹²

At the dawn of the TWD, as was explained in Chapter 1, most countries in SSA had authoritarian constitutions. After the TWD, some remained authoritarian or relapsed into authoritarian constitutions. This is the first outcome of interest that is investigated. In normative terms, societies with this form of constitution can assume different forms and could be neopatrimonial, bureaucratic or populist. Classified in terms of electoral democracy, they could also be closed (without elections) or competitive (with elections). Neopatrimonial regimes are, according to Brownlee, “those in which the leader treats the state as his private fiefdom and gives only rhetorical attention to formal political institutions”.¹¹³ Examples of this kind of regime include Libya under Muammar Gadhafi or Tunisia under Zine El Abidine Ben Ali.¹¹⁴ Bureaucratic regimes, on the other hand, are epitomised by and associated with military authority to the extent that they are [often] not mobilised on popular basis.¹¹⁵

¹¹¹ See Larry Diamond, ‘Thinking About Hybrid Regimes,’ (2002) 13 (2) *Journal of Democracy* 21-35; J Brownlee ‘Portents of Pluralism: How Hybrid Regimes Affect Democratic Transitions’ (2009) 53 (3) *American Journal of Political Science* 515.

¹¹² See for example the classifications of Dieter Grimm’s “Constitutions as Expressions of Political Ideas” which include, “Liberal Non-Democratic” and “Non-Liberal Democratic” Constitutions describing certain forms of regimes, Dieter Grim, “Types of Regimes” in M Rosenfeld, A Sajy *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press: 2012) 98.

¹¹³ Jason Brownlee, 2002, ‘...And Yet They Persist: Explaining Survival and Transition in Neopatrimonial Regimes,’ (2002) 37 (3) *Studies in Comparative International Development* 35 at 37.

¹¹⁴ *Ibid.*

¹¹⁵ See David Collier ‘Bureaucratic Authoritarianism,’ in J Krieger (editor), *The Oxford Companion to Politics of the World*, (2nd ed, 2001: Oxford, Oxford University Press) 93-95. Collier remarks that “Bureaucratic authoritarianism has thus been understood as a form of bureaucratic and

The common prototype of an authoritarian real constitution is what can be dubbed a “popular authoritarian regime” whose key attributes include:

Mass Line ideology, strong interpersonal trust and rich social capital, individual political activism and political contention, weak political institutions and an underdeveloped civic society, an often paranoid and highly responsive government, and strong regime support.¹¹⁶

Bureaucratic and neopatrimonial regimes have become rare, but populist regimes are, as suggested, quite common in the modern age.¹¹⁷ Gino Germani suggested in his 1978 book that there exists a “modern [form of] authoritarianism” which is essentially populist. Its core attributes are that it “does not reduce individuals to passive subjects...” and “its aim is not depoliticisation (though this may occur), but politicisation according to a certain specific ideology.”¹¹⁸

In general, and whatever its form, a society could be said to have an authoritarian real constitution, if (a) it is governed by a privileged dominant group or person who imposes their ideology often using violence and coercion to ensure that policy choices it single-handedly makes are not subjected to criticism;¹¹⁹ (b) it experiences limited pluralism and dissent is proscribed except if it does not pose a threat to the regime or its policy choices;¹²⁰ (c) power in such states is often exercised without any accountability to the citizens and even though it may respond to public

technocratic military rule that seeks to curtail popular mobilization and is built on a political coalition and a policy orientation that entails strong ties to international economic actors ... As a subtype of authoritarian rule, it may be distinguished from other subtypes: populist authoritarianism, which promotes popular mobilization rather than demobilization; and traditional authoritarianism, which is found prior to any extensive popular mobilization’ at 94.

¹¹⁶ Wenfang Tang, *Populist Authoritarianism: Chinese Political Culture and Regime Sustainability* (New York, Oxford University Press, 2016).

¹¹⁷ Gino Germani, *Authoritarianism, Fascism, and National Populism* (New Brunswick: Transaction Books, 1978)

¹¹⁸ *Ibid*, at 10.

¹¹⁹ See, Hans-Joachim Lauth ‘Authoritarian Regimes’ (2012) InterAmerican Wiki: Terms - Concepts - Critical Perspectives <http://www.uni-bielefeld.de/cias/wiki/a_Authoritarian%20Regimes.html> accessed 15 June 2018 ; JJ Linz, “Totalitarian and Authoritarian Regimes” in FJ Greenstein *et. al.* (eds) *Handbook of Political Science, Volume 3, Macropolitical Theory* (1975: Addison-Wesley, Mass) 175–411; JJ Linz “An Authoritarian Regime: The Case of Spain” in E Allard and Y Littunen (eds), *Cleavages, Ideologies and Party Systems* (1964, Helsinki: Transactions of the Westermarck Society) Linz wrote that authoritarian systems are “‘...political systems with limited, not responsible, political pluralism, without elaborate and guiding ideology, but with distinctive mentalities, without extensive nor intensive political mobilization, except at some points in their development, and in which a leader or occasionally a small group exercises power within formally ill-defined limits but actually quite predictable ones’ at 225.

¹²⁰ Roberto Niembro, ‘Conceptualizing Authoritarian Constitutionalism. A Latin American View’ *Völkerrechtsblog*, 17 July 2017 <<https://voelkerrechtsblog.org/articles/conceptualizing-authoritarian-constitutionalism/>> accessed 16 August 2019.

sentiments; ¹²¹ (d) democracy is stifled, political opposition is at times proscribed or exists for formal purposes as long as it does not pose a threat to the regime; and (e) in cases where elections are held periodically, they are won on the basis of “massive victory”.¹²²

The second set of countries are those that partially transitioned and possess what is delineated as a “hybrid constitution”. This category of constitution is the second outcome of interest. Whether conceived as a bridge from democratic to authoritarian regime or a destination in itself, a real constitution is hybrid if it is neither fully democratic nor authoritarian. In the political science literature, the label “hybrid regime” is a reaction to the “confusion” occasioned by the “blurred boundary” between authoritarian and non-authoritarian regimes.¹²³ A hybrid constitution thus describes the constitution of political establishments at times delineated as “semi-authoritarian regimes” or “competitive/electoral authoritarian regimes”.¹²⁴ Semi-authoritarian regimes are distinguishable from competitive/electoral authoritarian regimes in that for the latter, the place and role of elections is more pronounced than in the former. The semi-authoritarian ones “combine rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions, and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits”.¹²⁵ These are characterised by more than elections and include, as the section that follows shows, dominance of a political outfit that controls policy formulation. Electoral/competitive authoritarian regimes, on the other hand, are more about the quality of democratic elections and as such, electoral authoritarian regimes are essentially civilian ones that host democratic institutions that permit real competition for power, but for which, according to Way and Levitsky, “the political playing field is so heavily tilted in favor of incumbents that the regime cannot be labelled democratic”.¹²⁶ In virtually all cases though, electoral authoritarian regimes are semi-authoritarian.

¹²¹ *Ibid.*

¹²² See, Daniela Donno, ‘Elections and Democratization in Authoritarian Regimes,’ (2013) 57 (3) *American Journal of Political Science* 703.

¹²³ Leah Gilbert and Payam Mohseni ‘Beyond Authoritarianism: The Conceptualization of Hybrid Regimes,’ (2011) 46 *Studies in Comparative International Development* 270 at 271.

¹²⁴ Marina Ottaway, ‘Democracy Challenged: The Rise of Semi-Authoritarianism’ (Carnegie Endowment for International Peace, Washington, DC, 2003) 3.

¹²⁵ *Ibid.*

¹²⁶ Steven Levitsky, and Lucan A. Way, ‘International Linkage and Democratization,’ (2005) 16 (3) *Journal of Democracy* 20-34.

Hybrid regimes and the constitutions that condition them combine democratic traits, such as direct and frequent elections, with autocratic ones, such as strategic repression of democracy-supporting rights. It is these kinds of regime that Tushnet depicts as embracing “authoritarian constitutionalism”.¹²⁷ He uses Singapore to exemplify regimes that are normative in their own distinct sense.¹²⁸ Like their authoritarian counterparts, they are [often] controlled by a dominant political party with little room for challenging any policy decisions that they make and this is what – according to Tushnet – makes them authoritarian. On the other side, though, such regimes do not obviously resort to arbitrary arrest of opposition, rather they can sanction them using other measures, such as claims for breach of financial/tax regulations.¹²⁹ He explains, for instance, that in Singapore, bankruptcy laws are at times used to inhibit opposition participation in politics.¹³⁰ They permit reasonably open discussion and criticisms of state policies, hold periodic elections that are reasonably free and fair, combining “high-intensity coercion” and “low-intensity coercion” to ensure that the dominant party prevails in elections.¹³¹ Unlike their authoritarian counterparts, they are reasonably conscious of public opinion and can change their policy choices in response to public opinion for the sake of regime legitimation and preservation. They also accommodate dissent through various mechanism, such as co-option. Last, in a hybrid constitutional regime, courts are reasonably independent and though they might at times reject important regime initiatives, they are not oblivious of and are at times sensitive to interests of the state.¹³²

The last outcome of interest is countries that successfully transitioned and can be said to have a democratic constitution. A polity is assumed in this thesis to have a democratic constitution if, relatively speaking, it has several of the following traits: (1) is not controlled by a dominant individual or party that determines all relevant public policy choices¹³³ (2) protects political rights and civil liberties;¹³⁴ (3) allows for open criticism of the ruling regime without fear of censure; (4) is a self-governed society in

¹²⁷ Jean-François Gagné, ‘Hybrid Regimes, Oxford Bibliographies,’ (Reviewed 2017) <<http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0167.xml>> accessed on 20 March 2019.

¹²⁸ Mark Tushnet, (note 30 above).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

the sense that it conducts free and fair elections; (5) does not base policy on regime preservation or some ideology that is used as a basis for the consolidation of power;¹³⁵ (6) is sensitive to public opinion which shapes public policy for public-interested reasons; (7) has courts that are independent and enforce the rule of law independently without interference;¹³⁶ and (8) respects liberal democracy as a political ideology and allows it to influence the choice of leaders and policies. The above criteria are very expansive and are not intended to function in this thesis as the observable features of a democratic real constitution. Instead, what is meant by a democratic real constitution is the presence of free and fair elections held periodically with the protection and promotion of democracy-supporting rights. In the segment that follows, the idea of real constitutional change is explained in greater detail.

4.4 Real constitutional change

Real constitutional change was defined in Chapter 1 to mean transformation from one ideal type of a real constitution to another. For this change to occur, elements producing the particular type ought to be changed, a phenomenon that could occur through “enactment, acceptance, explicit derogation or abrogation, implicit derogation or through abrogation, interpretation, infra-constitutional mutation and desuetude”.¹³⁷ These are essentially the main ways through which change to constitutional norms occurs. Consequently, where real constitutional change has occurred, it should be assumed that certain elements of the real constitution, written or unwritten, have either been expunged or altered. Through real constitutional change, a political order can become more authoritarian or more democratic resulting in six case scenarios that fall under two broad categories: democratic constitutional change and authoritarian constitutional change, the former representing evolution towards democracy and the later regression from it. In summary these scenarios are:

A. Change towards a democratic real constitution

Authoritarian constitution > democratic constitution

Authoritarian constitution > hybrid constitution

Hybrid constitution > democratic constitution

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Carlos Bernal, ‘Foreword- Informal Constitutional Change: A Critical Introduction and Appraisal,’ (2014) *The American Journal of Comparative Law* 493.

B. Change towards an authoritarian real constitution

Democratic constitution > authoritarian constitution

Democratic constitution > Hybrid constitution

Hybrid constitution > authoritarian constitution

Each of the elements of the real constitution has its own way of mutating, though a change to some elements can trigger a change in other elements, too. For instance, a quasi-constitutional statute could be struck down by a court or repealed by a legislative body and its formal enforcement would cease. Judicial decisions could be overturned or departed from, too. Granted the special place that a written constitution occupies in a legal order, its change could affect the other elements, such as legislation that enforced the changed aspects. Implicit in the definition of real constitutional change adopted is the assumption that change to elements of the real constitution is not real constitutional change if it does not result in a change from one ideal type to another. There are instances where a formal constitution is substituted but without any change being registered in the real constitution. In France, for instance, the administrative structures remained intact in spite of rampant changes to the written constitution, hence Boyron's description of the evolution of the French system as "change with continuity".¹³⁸

Explanations behind real constitutional change are yet to be theorised comprehensively, if at all. This could be, as mentioned, because of devotion to formal constitutions when studying phenomena such as constitutional change and related themes – endurance, stability and resilience.¹³⁹ The triggers to real constitutional change, though, seem to be analogous to those that drive formal change and which were theorised by Donald Lutz to be the need to modify the political system:¹⁴⁰

- a. As a result of changes in the environment within which the political system operates (demographic, technology, economics etc.);

¹³⁸ Sophie Boyron, 'France' in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (Oxford Hart Publishing, 2011) 115 at 142.

¹³⁹ Elkins et al, (note 4 above); G L. Negretto (note 1 above); EB Rasch and R D. Congleton (note 194 above); H K. Gerken (note 1 above) Melissa Schwartzberg (note 1 above); R Albert, X Contiades, A Fotiadou (note 1 above); and CM Fombad (n 1 above).

¹⁴⁰ Donald S Lutz, 'Towards a Theory of Constitutional Amendment,' (1994) 88 (2) *The American Political Science Review* 355-370.

- b. Changes in the value system distributed across populations;
- c. Unwarranted or unexpected institutional effects; and
- a. The cumulative effect of decisions made by the executive, judiciary and legislature.

As observed, real constitutional change could also occur for these reasons and some of the intuitively felt motives such as the need to oust an autocratic leader can be explained, say, by reasons (a) and (b).

The power that causes real constitutional change is exercised by actors, who could be interest groups, power seekers or holders or external actors. It is contended in this regard that real constitutional change towards a democratic constitution occurs when certain conditions exist, which are supposed at this stage to include change to incumbent power holders, existence of effective democracy-demanding groups and promotion of democracy by international actors. The success or failure of these actors is in turn facilitated or impinged by underlying often context-unique structural conditions obtaining in the polity in question. These conditions could themselves be the fount of endogenous or exogenous forces required to trigger real constitutional change. Because of the centrality and legitimating role of written powers, change to formal aspects of the real constitution, it is contended, may result in real constitutional change or consolidation. This is also the case with judicial review. In the sections that follow, each of these conditions of interest that will be used to investigate constitutional change outcomes after the TWD in SSA are elaborated.

4.4.1 Actor-based conditions

Constitutional norms do not come into existence nor do they evolve on their own; they are not self-executing either. They are brought into being by actors within or outside the political order to propagate or preserve certain interests. Real constitutional change, too, is either facilitated or foiled by actors who either initiate the process, resist it or shape its trajectory. Benefactors of particular constitutional arrangements would want those arrangements to be stable just the same way that those dispassionate about the arrangement would want it ousted if not altered. In this regard and as mentioned, the incumbent power holders, democracy-demanding groups as well as the international community or actors are felt to be, broadly speaking, the usual drivers of real constitutional change. How they contribute to this endeavour is discussed in the sections that follow under different subheadings.

4.4.1.1 Change to incumbent power holders

When Richard Snyder theorized change to neopatrimonial dictatorships, especially in South America, he saw the ultimate solution for such polities as lying in the unravelling of “dictators’ patronage networks and a corresponding increase in exclusion of political elites”¹⁴¹ Melkinsburg too contend in their research on formal constitutional longevity that “changes in leadership will increase the risk of constitutional change”.¹⁴² An inference to be drawn from these standpoints, even though the Melkinsburg one focuses on the text, is that a change to incumbent power holders is likely to midwife real constitutional change. Put differently, unless political elites see themselves out of power or actually leave power, it is unlikely that real constitutional change can be registered especially towards a democratic constitution. Conversely, real constitutional change towards an authoritarian constitution could be fostered in a bid to keep power holders in authority or when as a matter of fact they remain in power. Put differently, it should be expected that authoritarian constitutionalism would consolidate in environments where change to incumbents is unlikely, while consolidation of a democratic constitution would also occur in contexts where there is a circulation of leadership, especially through a democratic process. As an example, it was not until the ouster of Zine El Abidine Ben Ali in 2011 that democratic change begun to take place in Tunisia.¹⁴³ Though democratic transition does not depend solely on change to incumbents, and in fact incumbents can change without a corresponding real constitutional change,¹⁴⁴ it is hardly possible to see real constitutional change occur as this is both a cause and an outcome.

The case made here is not that a mere change to incumbent power holders results into real constitutional change towards a democratic constitution. As Way and Levitsky have cautioned, “leadership is far less important than international and domestic structural variables in shaping” of “regime trajectories”.¹⁴⁵ While change to incumbent power holders may hold in certain domains, such as Fiji in 2006 following

¹⁴¹ Richard Snyder, ‘Explaining Transitions from Neopatrimonial Dictatorships,’ (1992) 24 (4) *Comparative Politics* 379.

¹⁴² Elkins et al (note 4 above) 116.

¹⁴³ YH Zoubir, ‘The Democratic Transition In Tunisia,’ (2015) 1 *Conflict Trends*, <<https://www.accord.org.za/conflict-trends/democratic-transition-tunisia/>> accessed on 18 June 2019.

¹⁴⁴ Michael Bratton, Nicholas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge University Press, 1997) 206.

¹⁴⁵ Steven Levitsky and Lucan Way, Competitive Authoritarianism: The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era, 74 <<http://homes.ieu.edu.tr/~ibagdadi/INT435/Readings/General/Levitsky-Way-Stanford%20-%20Competitive%20Authoritarianism.pdf>> accessed 18 June 2019.

the Josaia Voreqe Bainimarama-led military coup, in other contexts it does not bear fruit, an example being Egypt. The ouster of Hosni Mubarak, an unqualified version of this supposition would say, should have led to a democratic constitution. Instead, Egypt has “has never had real experience with democracy”¹⁴⁶ even after that ouster. As Oraby puts it:

With the toppling of Egypt’s long-standing authoritarian leader Hosni Mubarak, it appeared to have made it to the heart of the region. Today, however, little of this optimism remains, leading many in the West to question what happened to Egyptian democracy. The answer is simple yet unpleasant: democracy never really made it to Egypt.¹⁴⁷

The case of Egypt after Mubarak falls into three scenarios that qualify this supposition. The first one arises where change to incumbent power holders occurs through military ouster without subsequent handover of power to a civilian body. A case in point is the pre-1989 African takeovers mentioned in Chapter 1. Where this occurs in a military-civilian sort of arrangement, or where power is subsequently handed over to a civilian government, real constitutional change could occur. It for this reason that some have claimed that coups are good for democracy. In Derpanopoulos et al’s view:

Recent research, however, suggests that the consequences of coups may have changed since the end of the Cold War. Not only have coups declined in frequency, but those that occur are increasingly followed by competitive elections. From 1950 to 1989, 14% of successful coups against dictatorships led to democracy within two years, while 40% did so from 1990 to 2015.¹⁴⁸

A second situation is where the main political figure remains in power when those under him are changing. Zimbabwe’s Robert Mugabe is a case in point. He was President from 1987 to 2017 at a time when Zimbabwe had three first Vice Presidents: Simon Muzenda (1987-2003); Joyce Munjuru (2004- 2013) and Emerson Mnangagwa (2014-2017).¹⁴⁹ The third scenario, related to the second, is a case in which, because of continuous assimilation of incoming political elites, a change of the main political

¹⁴⁶ Farah Oraby, ‘What Really Happened to Egyptian Democracy? (2018) Berkeley Political Review,’ <<https://bpr.berkeley.edu/2018/04/30/what-really-happened-to-egyptian-democracy/>> accessed on 18 June 2019.

¹⁴⁷ *Ibid.*

¹⁴⁸ George Derpanopoulos *et al* ‘Are coups good for democracy?’ (2016) (January-March) *Research and Politics* 1–7 2.

¹⁴⁹ Mediel Hove, ‘When a Political Party Turns against Its Cadres: ZANU PF Factional Infightings 2004-2017,’ (2019) 12 (2) *African Security* 200; Lewanika, Zimbabwe and Zanu-PF’S Continuing Hegemony: Meet the New Boss, Same as the Old Boss? LSE Africa blog, <<https://blogs.lse.ac.uk/africaatlse/2017/12/13/zimbabwe-and-zanu-pfs-continuing-hegemony-meet-the-new-boss-same-as-the-old-boss/>> accessed 18 June 2019.

figure leaves everything almost as intact as it was before his or her exit, Zimbabwe still being an illustration. The military ouster of Mugabe in 2017 was not accompanied by real constitutional change because, one may argue, the takeover was by a ZANU-PF and Mugabe-bred politician and former vice president: Mnangagwa.¹⁵⁰ Power transfer in Angola, too, from Dos Santos to Joro Manuel Gonzalves Lourenço under Movimento Popular de Libertação de Angola – Partido do Trabalho, MPLA following Dos Santos's resignation is also an illustration of this third scenario.¹⁵¹ The common denominator in this third scenario is a strong party system not necessarily held together by a single political figure. In some instances, the protagonist could remain behind the scenes as a source of formal power. Dos Santos, for instance, remained the party leader after the 2017 elections.¹⁵²

A change to incumbent power holders could occur in various ways. In a democratic constitutional order, this happens through an election or compliance with term limits. In other setups, especially, authoritarian ones, change to incumbent power holders could occur through civil uprising (such as Tunisia in 2011 that led to the removal of Ben Ali); military ouster (such as the removal of President Marc Ravalomanana in Madagascar in 2009); death (Sani Abacha in Nigeria in 1988), resignation (Ahidjo in Cameroon in 1982) or through the forced handover of power (Yumjaagiin Tsedenbal in 1984 in Mongolia). On rare occasions also, especially where the incumbent political actors are assured of immunity or amnesty, they could subject themselves to democratic elections and lose power through an election (Kerekou in Benin in 1992). Where a peaceful takeover of power from these leaders falls outside the three contemplated case scenarios, a transfiguration of the real constitution most likely occurs, Tunisia being an illustration. In all circumstances, though, a change to the actor(s) bears prospects for real constitutional change. In Angola for instance, the “resignation” of Dos Santos is said to have “offered some hope for political change”.¹⁵³ In hybrid-constitutional polities, there is always a possibility for change to the incumbent power holders through democratic means. The most feasible ways through

¹⁵⁰ *Ibid.*

¹⁵¹ David Pilling, ‘Joro Lourenço has a chance to transform Angola,’ *Financial Times*, 10 October 2018.

¹⁵² Z Matsimbe and N Domingos, ‘Angola’s 2017 Elections and the Start of A Post-Dos Santos Era,’ (2018) *Journal of African Elections* 1 at 2.

¹⁵³ *Ibid.*

which this can occur is through ruling party disintegration¹⁵⁴ or cases where there is a strong and unified opposition.¹⁵⁵

It is consequently thought that a change to incumbent power holders, in an authoritarian/hybrid-constitutional society, is likely to push for real constitutional change towards a democratic constitution. The assumption that underlies this claim, which is investigated in the case study chapters and subsequently refined, is that in authoritarian/hybrid-constitutional societies, especially the neopatrimonial ones, patronage networks stand exposed when the fulcrum of these networks – the incumbent -- gives way. Hybrid-constitutional polities would for their part most likely experience real constitutional change towards authoritarianism if this condition is absent. Last, in democratic constitutional societies, the reality that power is often circulated is a viable condition for consolidation.

4.4.1.2 Existence of effective democracy-demanding groups (DDGs)

Pressure, from democracy-demanding groups can drive real constitutional change from authoritarian set-ups and can also guard against change to an authoritarian constitution. A relationship has, in this regard, been said to exist between democratic transitions and consolidation, one the one hand, and efforts of democracy-demanding groups, on the other.¹⁵⁶ When Grigorij Mesežnikov's theorised the Taiwanese transition, he observed in this regard as follows:

the lack or absence of advanced elements of civil society, a non-existent civic culture, weak civic participation and low level of trust in NGOs' activities cause significant difficulties in the process of democratic transitions. These conditions hinder the progress of democratization, becoming an obstacle in promoting democratization trends.¹⁵⁷

¹⁵⁴ S Levitsky and L Way 'Beyond Patronage: Ruling Party Cohesion and Authoritarian Stability,' (2010) *APSA 2010 Annual Meeting Paper* at 2.

¹⁵⁵ Andreas Schedler, 'Elections Without Democracy: The Menu of Manipulation,' (2002) 13 (2) *Journal of Democracy* 36-50; Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (Oxford University Press, 2013); Andreas Schedler (eds.) *Electoral Authoritarianism: The Dynamics of Unfree Competition* (Boulder and London: Lynne Rienner Publishers, 2006); S Levitsky and L Way *Competitive authoritarianism: Hybrid regimes after the Cold War* (Cambridge University Press, New York, 2010) 37-71.

¹⁵⁶ See, Graeme Gill *The Dynamics of Democratization. Elites, Civil Society and the Transition Process* (Macmillan, London 2000) P Mclaverty 'Civil Society and Democracy,' (2002) 8 (4) *Contemporary Politics* 303-318.

¹⁵⁷ Grigorij Mesežnikov, 'Democratization and Civil Society Development in Taiwan Some Lessons for Central Europe,' (2013) Institute for Public Affairs, <[athttp://www.ivo.sk/buxus/docs//publikacie/subory/Democratization_and_Civil_Society_Development_in_Taiwan.pdf](http://www.ivo.sk/buxus/docs//publikacie/subory/Democratization_and_Civil_Society_Development_in_Taiwan.pdf) accessed> 16 June 2019.

Indeed, in many polities that have transitioned to a democratic real constitution, there is more often than not a group that pushes for political and/or constitutional reforms whether that group's agenda is disguised or not. ('Disguised' in the sense that a group could be interested in taking over power and simply use democracy as its inflection point.) The list of persons or groups that belong to this cluster -- democracy-demanding groups -- is wide and includes opposition politicians, members of civil society, labour movements, media, academics, professionals, faith-based organisations and influential individuals.¹⁵⁸

The role played by democracy-demanding groups as agents of real constitutional change is more prominent in authoritarian regimes, where they are part of the problem that the ruling elites have to deal with. Characteristically, countering pro-democracy voices, especially through coercive measures, remains a main preoccupation for regimes operating under authoritarian constitutions. As Way and Levitsky put it:

Sustaining modern authoritarianism is a complex and costly endeavour. It entails dissuading diverse social and political actors from challenging the regime (through co-optation, intimidation, or repression), as well as maintaining the loyalty and cooperation of powerful actors within the regime.¹⁵⁹

In the abstract, the efficacy of pro-democracy voices, it is argued, is reliant on several factors, the main ones being (a) uniformity of purpose and (b) endogenous forces destabilizing the regime or at least something that drives the regime to collapse under the weight of its own contradictions. These forces are often supplied courtesy of underlying structural conditions that are discussed in a separate segment. Disunity and absence of collegial effort makes the initiatives of democracy-demanding groups counterproductive. The 1989 protests against the Li Peng government, which exemplify this claim, were portrayed as follows:

The millions of Chinese who demonstrated in May 1989 against the government of Li Peng and, in the final stage, against the PRC regime itself succeeded in bringing to a halt normal life in large parts of the People's Republic and in powerfully voicing their demands for change. But lacking overall organization and thus an acknowledged and coordinated set of elites, they were incapable of formulating and implementing strategies. Even simple decisions, such as to abandon Tiananmen Square on May 30,

¹⁵⁸ L Svesand & A Tostensen, 'Non-state Actors and Democratic Consolidation,' CIM Working Paper NUFU: Project on Democratic Consolidation in Malawi (2009) 1 <<https://www.cmi.no/publications/file/3324-non-state-actors-and-democratic-consolidation.pdf>> accessed 17 June 2019.

¹⁵⁹ Way and Levitsky (note 154) at 56.

could not be enforced; instead, the leader of the moment was displaced by those who favoured sticking it out to the tragic end.¹⁶⁰

Co-optation is a particularly common way in which democracy-demanding groups are disorganized and their metier weakened so that they pose no serious threat to power holders and the constitutional apparatus that supports them. This is a particularly popular strategy in neopatrimonial societies.¹⁶¹ The effect of co-optation, as Markus Holdo portrays, is that “the challengers become politically irrelevant”.¹⁶²

Lastly, the success of this constituency is contingent on the strength of the incumbent power holders. The initiatives of democracy-demanding groups are consequently more effective where the ruling regime is weakened by inability to sustain its supporting bases or internal disintegration.¹⁶³ Citing the Russian example, Bertocchi and Spagat have observed in this respect that:

governments with a weak hold on power are those most inclined to make large gestures to widen even slightly their support base. This idea is roughly consistent with the actual practice of post-Communist privatization. The Russian government (Group 1), facing the opposition of industrial ministries, managers, workers, and regional and local governments (Group 2), which held formidable power, handed over huge amounts of wealth to a very narrow section of the society that, in turn, supported Boris Yeltsin’s re-election. On the other hand, Poland and Hungary, where even the successors to the local.¹⁶⁴

To a large extent, though, the success of democracy-demanding groups is parasitic upon “crisis”. DDGs more often than not rely on social, economic and political crisis to attract popular or external support, attention or sympathy towards their initiatives. Crises are in turn always triggered or shaped by an underlying structural condition as discussed in a separate sub-section. In summary, the existence of effective democracy-

¹⁶⁰ M Burton, R Gunther & J Higley ‘Introduction: elite transformations and democratic regimes,’ in M Burton, R Gunther & J Higley *Elites and Democratic Consolidation in Latin America and Southern Europe* (New York: Cambridge University Press) 2012 1 at 9.

¹⁶¹ See, Graziella Bertocchi Michael Spagat, ‘The Politics of Co-optation’ (2001) 29 (4) *Journal of Comparative Economics* 591.

¹⁶² Markus Holdo, Cooptation and non-cooptation: elite strategies in response to social protest (2019) 4 *Social Movement Studies*, 442.

¹⁶³ Levitsky and Way (note 154 above) at 56.

¹⁶⁴ Bertocchi and Stagat (note 161 above) at 606. See also Levitsky and Way who observe as follows:

Cohesion is crucial to preventing elite defection, particularly during periods of crisis, when the incumbent’s grip on power is threatened. Where cohesion is high (e.g., Malaysia, Mozambique, Nicaragua, Serbia, and Zimbabwe), allied ministers, legislators, and governors routinely support the government, implement presidential directives, and vote the party line. Internal rebellion or defection is rare, even in the face of major crises or opposition challenges; when defections occur, they tend not to attract many followers. For example, the Sandinistas did not experience a single public schism during the 1980s in the midst of civil war and severe economic crisis. Levitsky & Way (note above) at 65.

demanding groups that push for political or constitutional reforms is supposed at this stage to be a condition precedent for real constitutional change.

4.4.1.3 Candid promotion of democracy by international actors

International actors, either individually or as a community, can be a force for authoritarian disintegration as much as they can also stabilise or consolidate a constitutional regime.¹⁶⁵ As early as the 18th century, the helping hand which the French offered to the thirteen American colonies played a significant role in the ultimate defeat of the British in the American Revolutionary War that culminated in the adoption of the American Declaration of Independence.¹⁶⁶ Following the second World War, too, winning alliances forced Germany, Austria and Italy to reform their political systems, while a democratic system was literally imposed in Japan by the United States military.¹⁶⁷ Also, colonial rule was imperilled by President Roosevelt's "vigorous and persistent opposition to colonialism".¹⁶⁸ Such examples abound and justify a supposition that frank propagation of democracy by the international community could drive real constitutional change.

The main ways through which this occurs are first, when countries gain membership, commit to or separate from supra-national entities such as the European Union; through "internationalized democratic diffusion" as is often the case with the different so-called "waves of democratisation"; and most importantly – which is of focus here – through propagation of ideologies of powerful nations for their geostrategic interests.¹⁶⁹ The first mode of influence is best exemplified in modern

¹⁶⁵ See, Larry Diamond 'The Globalization of Democracy,' In RO Slater, BM Schutz, and SR Dorr (eds) *Global Transformation and the Third World* (Boulder, CO: Lynne Rienner Publishers, 1993); L Diamond *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives* (Carnegie Corporation of New York, 1995); L Whitehead (ed.) *The International Dimensions of Democratization: Europe and the Americas*. (Oxford, UK: Oxford University Press, 1996)

¹⁶⁶ James B Perkins, France and the American Revolution (1904) 4 *Proceedings of the New York State Historical Association* 74-88.

¹⁶⁷ Sonja Grimm, 'External Democratization after War: Success and Failure,' (2008) 15 (3) *Democratization* 525. See also, RL Merritt, *Democracy Imposed. US Occupation Policy and the German Public, 1945-1949* (New Haven, CT: Yale University Press, 1995); P Merkl, "Allied Strategies of Effecting Political Change and Their Reception in Occupied Germany" (1968) 17 *Public Policy* 59-103; JD Montgomery, *Forced to be Free. The Artificial Revolution in Germany and Japan* (Chicago, IL: University of Chicago Press, 1957). JW Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W. W. Norton, 2002).

¹⁶⁸ Rhea Dulles and GE Ridinger 'The Anti-Colonial Policies of Franklin D. Roosevelt,' (1955) 70 (1) *Political Science Quarterly*, 1 at 1.

¹⁶⁹ See Levitsky and Way (note 154 above) at 38-39.

times through membership of the European Union.¹⁷⁰ Without mention of the real constitution, Lord Denning observed about the UK's substantial reformation through its accession to the European Union in the following words in a judgment:

But when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the treaty is henceforward to be part of our law... It is equal in force to any statute. The statute ...is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own.¹⁷¹

Denning's story about the UK can also be told about many other countries that joined the European Union perhaps in a more profound way. The entry of the Czech Republic to the EU, which was preceded by what is called a "Euro amendment", is described as "the most extensive and most important constitutional amendment in the Czech Republic."¹⁷² In Finland, the constitutional framework became open to the pressure of the EU and tended to "incorporate at least the basic features and consequences of EU membership in the Constitution".¹⁷³ In Italy, too:

The Italian Constitution has also been changed by the European Integration process: in Italy this has happened without a single formal amendment to the 1948 text. Italy is the only European nation with a textual Constitution which has never been amended in order to allow the ratification of any treaty European Treaty, Maastricht Included.¹⁷⁴

This influence is certainly not confined to the EU, which is cited here as an illustration that membership of or departure from a supra-national body can significantly alter the constitutional arrangements of a polity. In Canada, for instance, the adoption of the North American Free Trade Agreement is said to have "effected constitutional change in Canada."¹⁷⁵

Even if entry into or exit from a supra-national legal order leads to constitutional change, it is not always the case that such a venture results in real constitutional

¹⁷⁰ F Hoffmeister 'Constitutional Implications of EU Membership: A View from the Commission,' (2007) 3 *Croatian Yearbook of European Law and Policy* 59-97. A Kellermann, J Czuczai *et al* (eds) *The Impact of EU Accession on the Legal Orders of the New Member States and (Pre-)Candidate Countries* (Asser Press, The Hague, 2006).

¹⁷¹ *H P Bulmer Ltd and another v J Bollinger SA and others* [1974] 2 All ER 1226 at 1232-3.

¹⁷² Tomoszek (note 26 above) at 62.

¹⁷³ Markku Suksi 'Finland' in Carlo Fusaro, in Dawn Oliver and Carlo Fusaro (eds.) *How Constitutions Change: A comparative Study* (Oxford Hart Publishing, 2011) above at 114)

¹⁷⁴ Carlo Fusaro 'Italy' in Dawn Oliver and Carlo Fusaro (eds.) *How Constitutions Change: A Comparative Study* (2011, Oxford Hart Publishing) at 223.

¹⁷⁵ Kahana (note 26 above) at 10.

change. As already mentioned, change of elements of the real constitution does not automatically translate into real constitutional change. Even if such an exit or entry is profound, the influence of the supra-national body and enforcement of the ensuing arrangements is what determines whether real constitutional change is registered. Entry of African countries into the United Nations or the formation of the OAU did not change the overwhelmingly authoritarian nature of real constitutions in the region, as Chapter 1 revealed. This is in spite of the fact that the OAU was formed to inter alia “promote democratic principles and institutions, popular participation and good governance”.¹⁷⁶ Membership of such bodies could, however, play an important role in preventing real constitutional change towards authoritarianism for countries that have either a hybrid or a democratic constitution. In the African set-ups for instance, military coups and other forms of unconstitutional change of government have become relatively few in the post-1990 period given the stance that the African Union has taken on coups.¹⁷⁷ The role that European Union institutions have played in resisting complete democratic breakdown in Poland and Hungary also shows how supra-national bodies can help cushion a democratic constitution against complete breakdown.¹⁷⁸

The second mentioned way through which the international community impacts on real constitutional change is through democratic or authoritarian diffusion. Happenings in one country can and have in the past had an influence on the affairs of another.¹⁷⁹ Following the Russian Revolution of 1917 and the taking over of power by the Communist Party of the Soviet Union, Leninism or Marxist-Leninism percolated into many legal systems of the world as the ideology behind revolutionary movements.¹⁸⁰ It then became the basis for the exercise of political authority in many revolutionary regimes, especially in the 1970s and 1980s. This is an example of authoritarian diffusion.¹⁸¹ Conversely, at the end of the cold war, Marxism and related

¹⁷⁶ *Constitutive Act of the African Union*, article 3.

¹⁷⁷ See, e.g. Muna Ndulo, ‘The Prohibition of Unconstitutional Change of Government,’ in A.A. Yusuf and F Ougergouz (eds) *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (Leiden: Brill, 2012) Chapter 12.

¹⁷⁸ See DW News, EU slams Hungary and Poland over democratic standards 30 September 2020 <<https://www.dw.com/en/eu-slams-hungary-and-poland-over-democratic-standards/a-55106932>> accessed 15 October 2020.

¹⁷⁹ See, Samuel P Huntington *The Third Wave* (Norman: University of Oklahoma Press, 1991).

¹⁸⁰ S White ‘The Impact of Marxism-Leninism,’ in S White, *Political Culture and Soviet Politics*, (1979: London, Palgrave) 113-142; E Ofari, Marxism-Leninism – The Key to Black Liberation (1972) 4 (1) *The Black Scholar*, 35-46.

¹⁸¹ A Cooley ‘Countering Democratic Norms’ (2015) 26(3) *Journal of Democracy* 49.

ideologies lost international acceptability paving the way for the resurgence of liberal constitutionalism.¹⁸² As a result, real constitutional change towards democratic constitutions was registered in many polities. There have so far been three waves of democratisation, a phenomenon characterised by widespread establishment of democratic governments.

Third, and a seemingly more prominent way, is “efforts by the world’s most powerful liberal state to promote democracy abroad”.¹⁸³ Though there are many ways through which this occurs, one such means is through the imposition of conditionalities on aid for aid-reliant countries. As Way and Levitsky put it:

Forms of conditionality range from negative conditionality – or the withdrawal of external assistance to recalcitrant autocrats – to positive or membership conditionality employed by regional organizations such as the EU. The EU offered aid and extensive integration into Western Europe in exchange for far-reaching political, administrative, and economic reform.¹⁸⁴

Also, in addition to support towards capacity building or financial support to strengthen institutions,¹⁸⁵ other ways that the international community/actors have gone about it is through “diplomatic persuasion, threats, and – in a few cases (e.g., Haiti, Panama, and Serbia) – military force.”¹⁸⁶ The US has been a particularly notorious candidate for this type of venture as well as colonial rulers towards their respective former holdings.¹⁸⁷ The way through which the interventions of international actors contribute to democratisation has been well summarized by Levitsky and Way as follows:

Western pressure at times has played a major role in toppling authoritarian regimes (e.g., Haiti and Serbia) or forcing them to liberalize (e.g., Kenya, Mozambique, Malawi, and Nicaragua); in blocking or rolling back coups (e.g., Guatemala, Haiti, and Paraguay) or stolen elections (e.g., the Dominican Republic, Serbia, and Ukraine); and in dissuading governments from stealing elections in the first place (e.g., Romania and Slovakia).¹⁸⁸

The extent of influence of external forces is dependent on a number of factors, key among them being the vulnerability of the regime to external demands as well as the

¹⁸² See, Robert Gideon ‘Democracy Promotion and American Foreign Policy: A Review Essay,’ (2000) 25 (3) *International Security* 186–203.

¹⁸³ Mark Peceny, ‘Democracy at the Point of Bayonets,’ (University Park: Pennsylvania State University Press, 1999) at 185.

¹⁸⁴ Levitsky & Way (note 155 above) at 39.

¹⁸⁵ Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999)

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Levitsky & Way (note 154 above) at 46.

support, if any, that such regimes receive from powerful external forces. As hinted to, aid-reliant countries are more susceptible to conditionalities than those that are self-reliant.¹⁸⁹ China and Russia's economic and military might makes them less vulnerable to demands for democratisation even if they are made at all.¹⁹⁰ Levitsky and Way observe that these "have the bargaining power to prevent pressure from being applied".¹⁹¹ Secondly, the influence which external actors can have also relies on the nature of the interest that those actors may have which could act as a support base for the regime and make whatever pressure for change less exacting.¹⁹² As Levitsky and Way have put it:

Where Western powers have countervailing economic or strategic interests at stake, autocratic governments often possess the bargaining power to ward off external demands for democracy by casting themselves – and regime stability – as the best means of protecting those interests.¹⁹³

In summary, international actors or the international community can be an exogenous force towards real constitutional change over a polity in three main ways. First, through democratic or authoritarian diffusion. Second, through imposition of political conditionalities to aid and third, through demands for democratisation by powerful countries. These efforts depend largely on the geostrategic/national interests that the international community and powerful nations have over the polity in question and the vulnerability that such a polity has towards pressure from outside.

4.4.2 Structural conditions

Though it may be thought that actors determine real constitutional change almost exclusively going by the foregoing analysis, initiatives of these actors can be understated or overstated if the environment in which they are pursued is ignored. In fact, the success or failure in one context over another could simply be explained by the underlying "environmental" influence delineated here as "structural conditions".¹⁹⁴ Hence, and without belabouring this theme, the initiatives of various actors are presumed to be shaped by these conditions that either trigger, facilitate or frustrate real constitutional change.

¹⁸⁹ *Ibid* at 41.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Gordon Crawford "Foreign Aid and Political Conditionality: Issues of Effectiveness and Consistency" (1997) 4 (3) *Democratization* 69 at 87.

¹⁹³ Levitsky & Way (note 154 above) at 41.

¹⁹⁴ On structural conditions, see G Pop-Eleches & GB Robertson "Structural Conditions and Democratization" (2015) 25 (3) *Journal of Democracy* 144-156.

Broadly stated, these conditions include (a) wealth status (b) demographic attributes and (c) historical facts. The wealth factor is a wide one and could affect real constitutional change in a number of ways. For instance, as mentioned, poor economic conditions of a polity can make it vulnerable to external pressure for democratisation and create an impetus for real constitutional change. In a different sense, relative economic affluence can facilitate gradual change of a polity's real constitution towards a democratic constitution in line with the so-called Lipset hypothesis that links democratisation to wealth.¹⁹⁵ Demographics on their part include racial, gender, ethnic, class, religious and regional cleavages. Literature exists on how these facts influence society and political transformations.¹⁹⁶ Demographic features in most times shape informal aspects of real constitutions and consequently can be the fault lines to drive real constitutional change as the various interests clash in pursuit of equal concern by the state or preservation of a place of advantage. Last among the list of influential environmental factors, past experiences and their legacies can shape the real constitutions as well as a society's transformation, its institutions and psyche in profound ways. Without delving into detail, the influence of phenomena such as colonialism, civil wars, apartheid and epidemics just to list a few cannot be overemphasised.

The manner in which these structural conditions affect real constitutional change is multivariate but two ways appear to be more obvious. First, modifications – especially in a drastic and negative way – to these facts can destabilize the equilibrium required for sustenance of a constitutional order as a whole or its at least its real constitution. Put differently, a serious shock to structural conditions could result in a social, economic or political crisis on which domestic or international actors can rely

¹⁹⁵ Seymour Martin Lipset 'Some social requisites of democracy: Economic Development and Political Legitimacy,' (1959) 53 *American Political Science Review* 69.

¹⁹⁶ See e.g. Jocelyne Cesari *Religion and Democratisation: When and How it Matters* (2016) 2 (2) *Journal of Religious and Political Practice* 131-134; B Leventoglu, 'Social Mobility, Middle Class, and Political Transitions,' (2014) 58 (5) *The Journal of Conflict Resolution* 825-864; W Sarvasy & B Siim, Gender, Transitions to Democracy, and Citizenship (1994) 1 (3) *Social Politics: International Studies in Gender, State & Society* 249–255. Teri L. Caraway, 'Inclusion and Democratization: Class, Gender, Race, and the Extension of Suffrage,' (2004) 36 (4) *Comparative Politics* 443-460.

as they push for real constitutional change. It is unsurprising thus that constitutional change associated with constitutional and political change, especially but not exclusively in the third world, has often been preceded by social, political or economic crisis. The second way is through disintegration of elements of the real constitution – through say desuetude – as these conditions undergo their gradual evolution over time. This could occur when, for instance, a country incrementally secularises with the effect that its real constitution loses some of its underlying values and ideas, paving the way for others. In this sense, real constitutional change can happen, though in a less dramatic and perhaps even unnoticeable way.

In summary, structural factors and the changes that they undergo can assist actors that are able to capitalize on them as they demolish or seek to transform constitutional arrangements and norms.

4.4.3 Design-based factors

This category encompasses change to formal powers and judicial review.

4.4.3.1 Change to formal powers

Given that real constitutions consist inter alia of the enforced aspects of the written constitution, formal changes matter.¹⁹⁷ Indeed, democratic regimes that are rapidly disintegrating into autocratic ones are characterised by constitutional and legislative reforms, Hungary being a paradigmatic case.¹⁹⁸ On the other side of the aisle, consolidation of authoritarian constitutions in autocratic regimes, as happened in post-colonial African societies, was mostly preceded by formal constitutional change, either through substitution or amendment, as Chapter 1 showed.¹⁹⁹ Conversely for these regimes, when authoritarian constitutions were threatened in the wake of the TWD, adoption of new constitutions or amendment of existing ones became rampant too.²⁰⁰ In the case of hybrid regimes, competition over the rules of the political game, which is an attribute of electoral regimes, is often characterised by frequent law reform. The

¹⁹⁷ See e.g. M Popova, Putin-Style 'Rule of Law' & the Prospects for Change (2017) <<https://www.amacad.org/publication/putin-style-rule-law-prospects-change> accessed 15 January 2019.

¹⁹⁸ Gabor Halmai, Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective <https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/09/Illiberal_Constitutionalism_WHK17_Halmai-3.pdf> accessed 15 June 2019.

¹⁹⁹ See the abstract to Fombad (note 1 above)

²⁰⁰ Generally, see, CM Fombad 'Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions,' (2014) 13 (4) *African and Asian Studies* 429.

point here is that formal powers have a central role to play in different regimes and changes to them could have, it is supposed, an implication for real constitutional change.

In the case of a written constitution, formal change occurs in two main ways: amendment or substitution.²⁰¹ Its enforceable meaning can change though in many ways, including “desuetude”²⁰² or “informal change”.²⁰³ Change through substitution occurs when the entire text is replaced with a different one.²⁰⁴ Amendment at the time denoted as revision occurs when change is effected to the text following the procedure (often) set out in the constitutional text itself. In this regard, certain constitutions are considered as flexible, to the extent that they are easy to amend, while others are considered rigid (those which are difficult to amend).²⁰⁵ Several actors can trigger this process and it is mostly done through either a popular or a parliamentary initiative. Informal change, for its part, which is mentioned in the preceding part, is achieved when the enforceable meaning of the constitution is changed through change of political practice or judicial interpretation which confers a new meaning to the one hitherto enforced.²⁰⁶ Desuetude is simply change through constitutional disuse, what Albert has called the situation “when a constitutional provision loses its binding force upon political actors as a result of its conscious sustained non-use and public repudiation by political actors”, which happens through the establishment of a new convention.²⁰⁷

A cursory inquiry into most legal orders reveals, though, that change to written aspects of real constitutions, through whatever means, does not usually precede real constitutional change. Instead, real constitutional change is often followed by change

²⁰¹ Lutz (note 140 above).

²⁰² Richard Albert, ‘Constitutional Amendment by Constitutional Desuetude,’ (2014) 62 (3) *American Journal of Comparative Law*, 641.

²⁰³ Oran Doyle ‘Informal Constitutional Change,’ (2017) 65 *Buffalo Law Review* 1021; C Martin ‘The Legitimacy of Informal Constitutional Amendment and the ‘Reinterpretation’ of Japan’s War Powers,’ (2017) 40 *Fordham International Law Journal* 427.

²⁰⁴ Gabriel Negretto, ‘Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America,’ (2012) 46 (4) *Law & Society* 749-779.

²⁰⁵ Lutz (note 140 above); R Dixon, ‘Constitutional Amendment Rules: A Comparative Perspective,’ (University of Chicago Public Law & Legal Theory Working Paper No. 347, 2011) <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1070&context=public_law_and_legal_theory> accessed 15 June 2019.

²⁰⁶ Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford, Oxford University Press, 2019)

²⁰⁷ R Albert (note above 206) at 641.

to written aspects of the real constitution.²⁰⁸ When, for instance, infra-constitutional norms change by desuetude, as was the case with the onslaught on socialism in the late 1980s, written aspects of real constitutions in polities that had embraced this ideology changed to adapt to the new reality. As Tomoszek observes about the Czech Republic:

The fall of the communist regime on 17 November 1989 had to be reflected in constitutional changes. The first step was the abolition of the leading role of the Communist Party in Article 4 of the 1960 Constitution. This was followed by changing the mandating of deputies by the Communist Party to a representative role and vesting sovereignty in the people, not the working class.²⁰⁹

On the other hand, formal powers in the text and change to these powers could play a consolidating role. Formal rules influence informal powers and politics and are also the main device through which other elements of the legal order adapt or find legitimation.²¹⁰ In this respect, change to formal rules and the powers that they create could enable certain norms to endure or push them to give way. Contrary, thus, to the claim that normatively attractive formal powers don't matter, especially in authoritarian domains, real constitutional norms thrive well and are more stable where they have a formal propping.²¹¹ In this regard, authoritarian norms endure where the institutional framework – in the form of authoritarian enclaves – does not allow for effective operation of ideas that undergird democratic governance, such as separation of powers and checks and balances.²¹² These are achieved through the creation of formal constitutions that vest enormous power in one institution or individual, especially the presidency, so that all the other institutions are literally subordinate to it. When a formal constitution vests too much power in, say, a president, it amplifies the place and role of informal politics that coagulate around him. Structures provided either by a formal legal apparatus, be it the institutional framework or norms, can also provide a haven for other norms, such as those found in legislation, to thrive. In the analysis of legislation as a source of constitutional authority, mention was made, for instance, of “by law” clauses that are invoked by authoritarian regimes to weaken democracy-

²⁰⁸ Elkins et al (4) at 114.

²⁰⁹ M Tomoszek (note 26 above) at 54.

²¹⁰ Henry Hale, 'Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia,' (2011) 63 (4) *World Politics* 581-617.

²¹¹ On the role that Constitutions play in authoritarian regimes, see L Chien-Chih, "Constitutions and courts in Chinese authoritarian regimes: China and pre-democratic Taiwan in comparison" (2016) 14 (2) *International Journal of Constitutional Law* 351.

²¹² Caroline Beer, *Electoral Competition and Institutional Change in Mexico*, (University of Notre Dame Press, Notre Dame, IN, 2003)

supporting rights because these clauses clothe real constitutional norms in enabling legislation.²¹³

In summary, it is supposed that (a) the structure of formal powers matters in whatever constitutional domain; (b) change to formal powers is less likely to trigger real constitutional change, especially in a rapid way; (c) instead, real constitutional change most often triggers change to written aspects of the real constitution such as legislation and constitutions either formally or informally and (d) change to formal powers is an instrument for consolidation of constitutional regimes to the extent that it may provide a conducive environment through which norms, especially in an authoritarian set-up, survive. In the case of democratic or hybrid regimes, formal rules could prevent regression. In accordance with this analysis, we do not expect a society that has effected formal change to attain real constitutional change towards a democratic constitution. However, we expect that countries that attained real constitutional change and in so doing reworked their formal constitutions to entrench democratic and constitutional ideals – such as dispersal and separation of powers – to consolidate and not to regress into a more authoritarian constitution.

4.4.3.2 Existence of effective judicial review

Though being an aspect of institutional design – which may be part of the formal powers – judicial review may affect real constitutional change in a distinctive way.²¹⁴ Already, it was pointed under section 4.2.3, enforced judicial decisions are part of the real constitution. Consequently, when these decisions are overturned or departed from, the real constitution evolves. In the realm of conventional constitutional change, what is delineated as informal constitutional change occurs when courts change the enforceable meanings of formal prescriptions.²¹⁵ This happens when, for instance, courts overturn previous decisions. Also, courts can strike down other elements of the legal order, such as executive directives or statutes, even those that have been in place for a long time, for being non-conforming to constitutional prescriptions or

²¹³ Generally, see Gordon Silverstein, 'Singapore: The Exception that Proves Rules Matter,' in T Ginsburg & T. Moustafa (Eds.) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, New York, 2008) 73-101.

²¹⁴ See E Epstein, J Knight and O Shvetsova. 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government,' (2001) 35 (1) *Law & Society Review* 117-163.

²¹⁵ See Albert (n 206); Doyle (n 203 above).

principles.²¹⁶ Related to these are situations where courts decline to strike down, say, legislation that permits the state to abrogate rights. When this happens, they confer constitutional authority on such a legislation and confirm the law-making power of parliament. These are some of the different ways through which judicial review affects real constitutional change.

There is, though, a much profound way that courts can be thought of as drivers of real constitutional change, especially in societies with hybrid and authoritarian real constitutions. This involvement becomes clearer when we consider the phenomenon dubbed the “judicialisation of politics”, a phrase that has been used to explain judicial empowerment that followed constitutional developments in Eastern Europe after the collapse of the Berlin Wall.²¹⁷ This empowerment provided a challenge to the traditional understanding that there were matters that were in the preserve of politics and courts would be trespassing if they ventured into them. The post 1989 judicial empowerment thus puts courts at the centre of political intrigues, including what has been delineated as “mega politics”, an arena dominated by informal politics.²¹⁸ In so doing, it is contended here, courts are able to shape real constitutional change and stability in more profound ways than just through the mere striking down of legislation or executive action. Some of these more profound ways include instances when constitutional amendment processes or electoral contests are reviewed and invalidated, such as happened in Mali and Malawi respectively.²¹⁹

Though judicial review can be part of the many mechanisms through which elements of the real constitution may be altered, it is doubted that judicial review can on its own drive real constitutional change, especially of a rapid kind. It can, however, contribute to the gradual overhaul of pathological components of a legal order so that the process of evolution of the real constitutions happens in a continuing way over

²¹⁶ For instance, in *S v Makwanyane and Another* (CCT 3/94), the Constitutional Court declared section 277(1)(a) of South Africa’s the *Criminal Procedure Act* 51 of 1977 as unconstitutional and invalid.

²¹⁷ Ran Hirschl, ‘The Judicialization of Politics,’ in R Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press, 2013) 253.

²¹⁸ See Ran Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts,’ (2008) 11 *Annual Review of Political Science* 93–118.

²¹⁹ See 24 France, Constitutional court dissolution plunges Niger in crisis 01 July 2009, available at <<https://www.france24.com/en/20090630-constitutional-court-dissolution-plunges-niger-crisis->> accessed 30 June 2019; *Mutharika and Another v Chilima and Another* (Msca Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (08 May 2020).

time as understandings of the relationship between law and politics get transformed. At best, therefore, after the actors mentioned in section 4.4.1 have secured real constitutional change, judicial review can guard against regression. In this sense, judicial review can hedge against real constitutional change towards a more authoritarian constitution. This, it is felt, is the rationale behind the abovementioned empowerment of courts after the collapse of autocratic post-soviet regimes. In this regard, we expect a society with an effective judicial review system to consolidate its hybrid or democratic constitution. An ineffective institution of judicial review is conversely a condition for real constitutional change towards an authoritarian constitution.

4.5 Summary and concluding observations

If transition into different constitutional conditions is to be understood, attention needs to be paid to de facto norms that authorise or explain power acquisition, distribution and use. This chapter has endeavoured to show that elements such as legislation, conventions, and case law, as well as informal power and politics, contribute to the constitutional conditions of polities just the same way as formal constitutions do. Hence, the existence, change and endurance of these “constitutional-effect-producing” elements should be considered when investigating the different transitional outcomes that SSA countries achieved after their encounter with the TWD. These outcomes are either authoritarian (where there was no transition at all or a relapse from a hybrid constitution); hybrid (where there was a partial transition or a relapse from an authoritarian constitution); or democratic (where there was a complete transition). The observable features of different real constitutions are also described for the sake of classifying the outcomes.

In instances where the constitutional conditions of a polity changed from one constitution to another, real constitutional change is said to have occurred. Two forms of real constitutional change are portrayed in this thesis, one towards a democratic and another towards an authoritarian constitution. Change towards a democratic real constitution is what is synonymously referred to in this project as democratisation, while change towards an authoritarian one is delineated herein as regression. When real constitutional change happens, it is assumed that there is a corresponding change to its elements in various ways depending on the elements in question. The mere change of certain elements of the real constitution does not, however, necessarily result in real constitutional change.

If real constitutional change is to occur, this Chapter has suggested, certain conditions are necessary. These conditions can be disaggregated into three broad categories, namely (a) actor-based (b) structural and (c) design-based. Under actor-based conditions, change to incumbent power holders, the existence of effective democracy-demanding groups and candid promotion of democracy by international actors are the surmised conditions for real constitutional change. When examining the successes or failures of these actors, regard should also be paid to underlying structural conditions which include the society's wealth status and demographic attributes, as well as its historical encounters and their legacies. Lastly, design factors (change to formal powers and judicial review) matter, but it is unlikely that real constitutional change towards a democratic constitution can be fostered by them in a rapid way. At best, this chapter has claimed, change to formal powers as well as judicial review can thwart real constitutional change towards an authoritarian constitution. The following three chapters discuss real constitutional change in Cameroon, Kenya and Benin in an effort to investigate whether these theoretically-derived conditions are borne out in practice.

CHAPTER FIVE: AUTHORITARIAN CONSTITUTIONAL ENDURANCE IN CAMEROON

5.1 Introduction

Cameroon's de facto constitution has been overwhelmingly authoritarian, both prior to and after the TWD. According to Freedom House, the country is "not-free", a status it has held for the last thirty years.¹ At the same time, however, Cameroon is generally regarded as "politically stable" in as much as it has not experienced any significant breakdown of its legal and political order akin to what has happened in other West and Central African countries.² Cameroon may thus be classified as stably authoritarian in real terms. Over the years, as shall be shown in this Chapter, there have been several amendments to its formal constitution in an attempt to trigger a transition to a more liberal mode of governance. These efforts, however, have simply led to the stabilisation of Cameroon's authoritarian real constitution. Further, despite increasing commitment to democratic rule on paper, civil rights and liberties have been systematically repressed.

In understanding Cameroon's failed transition and the concomitant endurance of its real constitution, reliance has been placed on first, empirical information obtained (a) through personal interviews undertaken in Yaoundé and Bamenda and also through Skype and (b) databases that empirically collected information for other purposes: especially Freedom House. Unlike in the other case studies, respondents particularly those residents in Cameroon were cowering, mostly seeking anonymity and offered general responses. Others insisted on an interview without disclosure of their names or particulars. Much reliance was placed on interviews conducted especially by Skype to respondents that were not resident in Cameroon. This information is supplemented by secondary materials especially academic articles and

¹ See Freedom House statistics, <<https://freedomhouse.org/report-types/freedom-world>> last accessed 20 July 2020. According to the Democracy Index, Cameroon's score is at 3.8 out of 10. <<https://infographics.economist.com/2018/DemocracyIndex/>> Accessed 7 July 2019 It is classified as at 2019 by Freedom House as "Not free" a status it has held since and before 1989.

² Susan Dicklitch 'Failed Democratic Transition in Cameroon: A Human Rights Explanation,' (2002) 24 Human Rights Quarterly 152–176; Charles Fonchingong, "Exploring the politics of identity and ethnicity in state reconstruction in Cameroon Exploring the Politics of Identity and Ethnicity in State Reconstruction in Cameroon" (2005) 11 (4) *Social Identities* 363-380. Fochongong observed for instance that "Cameroon- a country marked by enormous ethnic/regional diversity- has continued to display a remarkable degree of stability compared with other African countries trapped in ethnic cleansing and genocides".

books that address democracy in Cameroon in general, the Anglophone problem or Cameroon's constitutional developments.

This chapter seeks to explain the reasons behind the endurance of Cameroon's authoritarian real constitution. To date, the dominant narrative stresses, on the one hand, the personalisation of state power under Presidents Ahidjo and Biya and, on the other, Cameroon's failure to confront and address its so-called "Anglophone problem",³ i.e. the "under-representation [of English speakers] and [their] inferior role in national decision-making councils; the neglect of their region's infrastructure and the rape and drain of its rich economic resources, especially oil, by successive francophone regimes; and the attempts at 'frenchification'".⁴ The impression created by this line of thought is that if the Anglophone problem were satisfactorily addressed and President Biya's reign brought to an end, prospects for transition to liberal democracy would improve considerably.⁵ While there is some merit in this view, the Anglophone problem, is symptomatic, rather than the independent cause, of authoritarian constitutional endurance in Cameroon. The real cause is the ability of beneficiaries of the current constitutional order to elicit support from external actors for their rule, which has enabled them to resist calls for change from pro-democracy voices.

This chapter develops and elaborates this argument as follows. The first part offers an overview of the social, political and institutional context within which Cameroon's real constitution has developed. The second section takes stock of the past and presents the three historical epochs through which Cameroon has lived – the colonial, Ahidjo and Biya periods. This history is important in understanding the structural context under which Cameroon's real constitution has developed. The third

³ Part of this problem, as Chofor explained, was in failure by the government to acknowledge that the Anglophone/Francophone divide is a real issue that needs redress. It was not until 15 September 2018 that he announced that there was going to be a national dialogue to discuss the issue. Interview with Christian Aime Chofor, Bamenda Cameroon, 28 August 2019. See also, P Konings & F B Nyamnjoh, 'The Anglophone Problem in Cameroon, (1997) 32 (2) *The Journal of Modern African Studies* 207- 229; G Tapuka, 'The Anglophone Press in Cameroon: Mediating the Anglophone Problem (2017) 7 (2) *African Conflict and Peace Building Review* 99- 114'; P.J.J. Konings 'President Biya and the "Anglophone Problem" in Cameroon,' in J.M. Mbaku, and J. Takougang *The leadership challenge in Africa : Cameroon under Paul Biya,* (Africa World Press, NY, 2002) 191-134; WG Nkwi 'The Anglophone Problem,' VJ Ngoh *Cameroon: From a Federal to a Unitary State 1961–1972* (2004, Limbe: Design House,) 185–209.

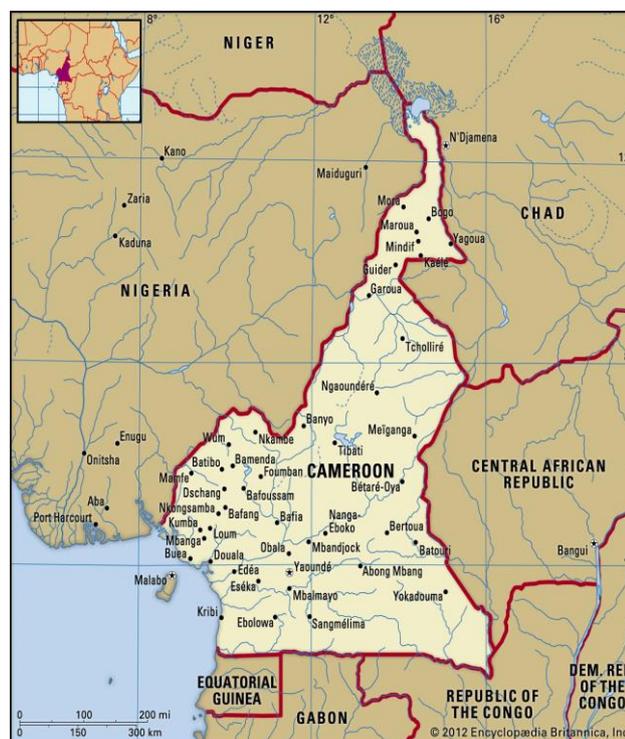
⁴ Konings (note 3 above).

⁵ Jean-Francois Bayart, 'The Neutralisation of Anglophone Cameroon,' in R Joseph (ed.) *Gaullist Africa: Cameroon under Ahmadou Ahidjo* (1968); Charles M Fombad, 'Developments in Cameroonian Constitutional Law: The Year 2016 in Review,' in R Albert *et al* *The I-CONnect-Clough Center 2016 Global Review of Constitutional Law* (August 3, 2017).

part looks more closely at the conditions under which the transitions between these three epochs occurred and the reasons for the endurance of Cameroon's authoritarian real constitution in each case. The conditions are divided into structural and actor-based conditions. Among the former are Cameroon's relative economic affluence, its relationship with France, neo-patrimonialism, and the Anglophone problem. Among the latter are the role played by incumbent power holders, pro-democracy voices and other international actors.

5.2 Social, political and institutional context

A developing country, Cameroon is in the western part of Central Africa, bordered by Nigeria to the west and north, Chad to the north-east, the Central African Republic to the east and Equatorial Guinea, Gabon and the Republic of Congo to the west.



A map of Cameroon. Source: Britannica Encyclopedia, Cameroon, Context, People, History:⁶

As of 2018, it had a population of about 25 million people.⁷ Like most other African countries, Cameroon is not ethnically homogenous. On the contrary, it is home to

⁶ Britannica, <<https://www.britannica.com/place/Cameroon>> accessed 9 November 2020

⁷ World Bank, Cameroon <<https://data.worldbank.org/country/cameroon>> accessed 10 July 2019.

more than 250 ethnic groups.⁸ For a long time, ethnic fault-lines were not strongly expressed in its politics and were generally not as pronounced as has been the case in other African countries, such as Kenya. This was arguably because of President Ahidjo's and President Biya's successive firm control over the political system. In more recent years, however, beginning with the 2018 elections, the ethnic factor has begun to become more prominent in the form of rivalry between the two major groups, the Bulu-Bexi and the Bamileke.⁹ The other major social cleavage in the country, religion, has not played a significant role in spite of Cameroon's being a multi-religious society with a 70% Christian population.¹⁰

Cameroon's political system was established under the 1972 Constitution with substantial revisions in 1996. It has a unitary government with an executive President who heads the state.¹¹ Before a 2008 amendment (discussed below), presidents were limited to two terms of seven years. Parliament consists of two houses, the National Assembly and Senate.¹² The National Assembly comprises 180 members elected through direct suffrage while the Senate has 100 members, 70 of whom are elected through an electoral college and the other 30 appointed by the President. The President's nomination power ensures that even though he may not himself be a member of parliament, he has strong de facto influence. This is an example, then, of apparent strong commitment to the separation of powers on paper not being borne out in practice. Another major gap between Cameroon's formal and real Constitution is the fact that the bicameral legislature, although formally introduced in 1996, only began functioning in 2013.¹³

Cameroon was a single-party state from independence in 1969 until the early 1990s when its politics began to liberalize in the wake of the TWD, as is elaborated in

⁸ See World Atlas, Ethnic Groups of Cameroon, <<https://www.worldatlas.com/articles/ethnic-groups-of-cameroon.html>> accessed 20 July 2019.

⁹ Yuhniwo Ngege, 'Cameroon's three deepening divides all have one thing in common,' African Arguments, 13 August 2019 <<https://africanarguments.org/2019/08/13/cameroon-crisis-three-deepening-divides/>> accessed 20 July 2019.

¹⁰ See World Atlas, 'Religious Beliefs in Cameroon,' available at <<https://www.worldatlas.com/articles/religious-beliefs-in-cameroon.html>> accessed 20 July 2019.

¹¹ The Commonwealth, 'Cameroon: Constitution and Politics,' <<https://thecommonwealth.org/our-member-countries/cameroon/constitution-politiacs>> accessed 25 July 2019.

¹² *Ibid.*

¹³ Ripley Rendall, 'Assessing the Senate: Political Opinion Among Cameroonian Youth,' (2013), Independent Study Project (ISP) Collection 1728. <https://digitalcollections.sit.edu/isp_collection/1728> accessed 30 July 2019.

a subsequent section. The Cameroon People's Democratic Movement (CPDM), previously known as the Cameroon National Union, has been the dominant political party in the country since independence, first under President Ahidjo and presently under President Biya.¹⁴ In the 1992 elections, the CPDM lost its parliamentary majority for the first time, winning 88 out of 180 seats.¹⁵ It was able to retain power, however, by forging an alliance with an opposition party, the Movement for the Defense of the Republic (MDR).¹⁶ The CPDM's absolute majority was restored in the 1997 elections in which it won 109 seats.¹⁷ In 2002, its majority in Parliament rose again to 149 seats.¹⁸ In 2007, a year before the 2008 constitutional amendment that allowed Paul Biya to run for additional presidential terms, the CPDM won 153 seats out of 180. This majority decreased slightly to 148 in the 2013 elections.¹⁹ Apart from the MDR, the other major political parties to emerge after the liberalisation of politics in 1989, include the main Anglophone party, the Social Democratic Front (SDF), the Democratic Union of Cameroon (*Union Démocratique du Cameroun*), the Union of the Peoples of Cameroon (*Union des Populations du Cameroun*) and the Cameroon Renaissance Movement (*Mouvement pour la Renaissance du Cameroun*, MRC).²⁰

Apart from the legislative and executive branches, the Cameroonian constitutional order consists of various structures that are intended as a check on the exercise of political power. These include the ordinary courts, with a Supreme Court at the helm, and a host of other specialized courts, including the Courts of Appeal, the Economic and Social Council and various Tribunals. Under its 1996 constitution, judicial power in Cameroon is supposed to be "independent of the executive and legislative powers" and "magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience."²¹ Alongside the judicial system, the "Constitutional Council" has the power to review the constitutionality of political processes such as legislative and presidential elections as well as the constitutionality

¹⁴ Interview with Eric Chinje, Cameroon, 3 September 2019.

¹⁵ See Inter-parliamentary Union, Cameroon <http://archive.ipu.org/parline-e/reports/arc/CAMEROON_1992_E.PDF> accessed 30 July 2019.

¹⁶ Michael rennerich & Thibaut, B (1999) *Elections in Africa: A Data Handbook* at 180.

¹⁷ See African Elections Database, Elections in Cameroon, <<http://africanelections.tripod.com/cm.html>> accessed 30 July 2019.

¹⁸ *Ibid.*

¹⁹ See News 24, Cameroon's Parliamentary Elections postponed, <<https://www.news24.com/Africa/News/cameroon-parliamentary-elections-postponed-20180703>> accessed 30 July 2019.

²⁰ N Heath-Brown, *The Statesman's Yearbook 2016: The Politics, Cultures and Economies of the World* (Palgrave MacMillan, 2007) at 206.

²¹ *Ibid.*, Article 37 (2).

of legislation.²² In this sense, politics in Cameroon have been “judicialized”.²³ In addition to these institutions, power is further vertically dispersed into Regional Councils and Local Authorities, of which there are presently 10 and over 300 respectively.²⁴ These lower-tier representative structures are given responsibility for the “economic, social, health, educational, cultural and sports development” of Cameroonians.²⁵

5.3 The pre-1989 constitutional conditions

Cameroon does not have a constitutional history that is very different from most other African countries except that the constitutional order has not witnessed bloody civil strife nor been the subject of violent suspension or ouster as has been the case in many African states.²⁶ Indeed, for the post-independence epoch, it is only Cameroon and Gabon that have been hailed as stable in the Central African region.²⁷ Cameroon has had only two presidents since independence and the unification of its previously autonomous units: Ahidjo from the time of independence and Biya, who took over in 1982 having been handpicked when Ahidjo resigned due to illness.²⁸ There has not been a time when leadership turnover has occurred at the instance of either democratic elections or an ouster of the constitutional order. No successful military or civilian coup has been registered in Cameroon nor have there been any instances of constitutional suspension as was the norm in the 1960s and 70s in other African countries.²⁹

The similarity Cameroon shares with many other countries for the period before the TWD is that its post-independence political life was characterized by de facto and de jure authoritarianism.³⁰ Its political and constitutional life before 1989 (and largely

²² *Ibid*, at part III.

²³ *Ibid*, Article 48.

²⁴ See Commonwealth, <http://www.commonwealthofnations.org/sectors-cameroon/government/regional_local_government/> accessed 6 August 2019.

²⁵ *Ibid*, Article 54.

²⁶ E Breitinger, ‘Lamentations Patriotiques: Writers, Censors and Politics in Cameroon’ (1993) 92 (369) *African Affairs*, 558.

²⁷ P McGowan and T H Johnson, ‘African Military Coups d'Etat and Underdevelopment: A Quantitative Historical Analysis,’ (1984) 22 (4) *Journal of Modern African Studies* 650.

²⁸ See Amazon <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/anotes_1191.pdf> accessed 27 July 2019.

²⁹ See, OECD, African Development Bank, African Economic Outlook: Cameroon, 2007 174 (on file).

³⁰ Agendia Aloysius, ‘Cameroon; 1966-2011: From a Totalitarian to a Competitive (Advanced) Authoritarian Regime Masked as a “Democracy”’ <<http://agendia.jigsy.com/entries/africa/cameroon-1966-2011-from-a-totalitarian-to-a->

to date) can be disaggregated into three broad phases: first, the pre-independence period, second, the pre-Biya period, and lastly, the period that started in 1982 when President Biya took over. In all these phases, it cannot be said that Cameroon's real constitution has been democratic though the period just after independence displayed some inclination towards fulfilling these ideals. There was also some impetus for real change immediately after Biya took over in 1982. For the remainder of the period, authoritarian norms and practices have been dominant. The only real change has been the liberalisation of party-political competition after 1990, but this change has not as yet resulted in the actual alternation of power.

The first epoch, of colonial rule, set into motion the most pervasive of Cameroon's authoritarian governance norms. Though the post-colonial state has exacerbated these trends, it was the participation of the French and the British in Cameroon that has shaped not only enduring understandings of power but has also the so-called "Anglophone Problem."³¹ Though the Portuguese were the first to explore present-day Cameroon, the starting point for most expositions of her governance problems is the German invasion.³² The German annexation of Cameroon did not elicit a response that was any different from how colonial rule was received in other African societies.³³ There are communities in present-day Cameroon that resisted the occupation, such as the Nso and the Bakweri people, while there are others that collaborated, such as the Bali and Bamum.³⁴ Those that resisted were met by the German soldiers' wrath, resulting in loss of life, abandonment of native homes and escape to friendly colonies, such as Spanish Guinea and Gabon.³⁵ For the collaborators, support was offered by the Germans against antagonistic groups with other advantages, such as exemption from harsh taxes and labour as well as general security. In the case of Cameroon, the already-mentioned Bali and Ewondo people are

competitive-advanced-authoritarian-regime-masked-as-a-
%E2%80%9Cdemocracy%E2%80%9D> accessed 20 June 2019.

³¹ See Fombad (note 5 above).

³² *Ibid.*

³³ Generally see, George Ndakwena Njung 'Soldiers of their Own: Honor, Violence, Resistance and Conscriptioin in Colonial Cameroon during the First World War,' (2016) PhD Dissertation submitted at the University of Michigan, available at <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/135824/njung_1.pdf?sequence=1&isAllowed=y> 10 August 2019.

³⁴ German Imperial Rule in Cameroon, <http://worldviews.gei.de/open/CM_2008_Batey_EffectiveModernHistoryForColleges_25__30_32__39_40/7/eng/#fulltext_fn8_cnt> accessed 10 August 2019.

³⁵ *Ibid.*

considered as collaborating beneficiaries.³⁶ From these dealings, one can tell that unwritten conventions began to develop in consequence of the German invasion whose terms are that unquestioning support for a governing establishment translates into prosperity, while denunciation brings negative implications for personal and communal security and wellbeing. Native interests were contingent on unquestionable acceptance of the governance formation and its interests.

A significant change of actors occurred in 1916 following the defeat of the Germans by the allied powers: Britain and France.³⁷ For reasons not well comprehended, the French took over the eastern and northern part of Cameroon while the British appropriated a small part of the western territory, which is now commonly referred to as Anglophone Cameroon.³⁸ This partition of Cameroon into two unequal parts, with the approval of the League of Nations, had no greater ambition than that which other colonial powers had – resource exploitation – and the surrender of the territory by the Germans had nothing to do with relieving the (resisting) natives from the legacy or brutalities of colonial rule. Instead, it is this partition of Cameroon that is thought to have created the present-time cultural, social, legal and political differences that have strong expressions and profound ramifications.³⁹ Political rhetoric in present-day Cameroon centers on this divide, at times creating the impression, as mentioned, that the Francophone region enjoys democratic rule.⁴⁰ This is the source of the Anglophone problem, discussed below.

French colonial rule came to an end in 1960.⁴¹ A bloody civil war that was triggered by French reaction to activities aimed at establishing self-rule on the part of “independence” leaders, such as Felix-Roland Moumie and Reuben Um Nyobe, set the stage for self-rule in the Francophone region.⁴² French authorities wanted to suppress the agitations that were pursued under the umbrella of the Union of the People of Cameroon (UPC), while at the same time encourage the emergence of “alternative

³⁶ John N Mokake, *Basic Facts About Cameroon Since 1884* (Cure Series, 2006) 28, 33.

³⁷ Fombad (note 5 above).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Interview with Y (via skype) 3 September 2019; Skype Interview with Jonatan Morse, 15 January 2020.

⁴¹ Martin Atangana *The End of French Rule in Cameroon* (University of America Press, 2010) 11.

⁴² Amy McKenna *The History of Western Africa: Britannia Guide to Africa* (Britannica Educational Publishing, 2011) 95.

leadership".⁴³ This did not, however, bear fruit and by 1960, independence was granted to Francophone Cameroun. At the time that independence was being granted, the Francophone region already had well-established institutions.⁴⁴ Meanwhile, the British had to let go of Anglophone Cameroon as part of its departure from Nigeria in 1960. As Fombad has observed, the main question for the Anglophone region was whether it was to join Nigeria or be part of Francophone Cameroon.⁴⁵ A plebiscite organized by the United Nations was conducted to determine that question in 1961.⁴⁶ Though the northern part mostly voted in favor of joining Nigeria, the southern part managed to tilt the scales towards re-uniting with Francophone Cameroon.⁴⁷ This is what led to the making of the Federal Republic of Cameroon – a union of two different political entities with uncommon foundations.

The period that followed the immediate post-independence era under President Ahidjo's reign witnessed reform of the political system towards Anglophone assimilation and most importantly towards authoritarian real constitutional consolidation. Through this initiative, which mostly occurred courtesy of constitutional amendments, the political system became extremely illiberal. Some of Ahidjo's efforts included conversion of the country from a parliamentary to a semi-presidential system and most importantly, the creation of a *de facto* one-party state.⁴⁸ In the description of David Mokam, Ahidjo "liquidated opposition politics".⁴⁹ He orchestrated the dissolution of major political parties to pave the way for the formation of the Cameroon National Union (Union Nationale Camerounaise-UNC) which he headed.⁵⁰ Ahidjo then banned opposition parties, more specifically, the UPC, which had been established earlier.⁵¹ One of the leaders of the UPC, Ernest Ouandiï, was accused of

43 *Ibid.*

44 Fombad (note 5 above).

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 See, Bongfen Chem-Langh 'The Road to the Unitary State of Cameroon,' 1959-1972 (1995) *Paideuma: Mitteilungen zur Kulturkunde* 41.

49 D Mokam, 'The Search for a Cameroonian Model of Democracy or the Search for the Domination of the State Party: 1966-2006,' (2012) 23 *Varia e Recensxes* 83.

50 *Ibid.*

51 *Ibid.*

launching and perpetuating a guerilla movement.⁵² Ouandiï was arrested and put through a trial that sentenced him to death in 1970.⁵³ In the following year, he was executed.⁵⁴ The execution of Ouandiï silenced opposition movements.⁵⁵ From that time, until 1992, the UNC was the only political party. According to Richard Joseph, Cameroon witnessed “the internalisation of censorship and authoritarian control by the educated strata”, which escalated to the extent that, “after the long night of Ahidjo’s dictatorship”, it was only in “the most private and secure circumstances” that any person could voice his opinion if the opinion “var[ied] in the slightest respect from the ruling orthodoxy.”⁵⁶ Ahidjo’s reign is therefore considered to have been the darkest time in Cameroon’s political history, Agendia describing it as “the worst time in Cameroon in terms of political freedom of association, religious worship etc.”⁵⁷

As observed, Ahidjo dramatically resigned from office in 1982. A source attributed his resignation to a diagnosis of terminal illness by a French doctor.⁵⁸ Paul Biya, who then was his Prime Minister, succeeded him as President. When Ahidjo resigned, there was a seeming prospect for real constitutional change epitomized by Biya’s imitation of US President Franklin D. Roosevelt’s famous “New Deal” social and economic programme.⁵⁹ However, following a failed coup, to which Ahidjo is claimed to have been party, Biya abandoned his version of the New Deal, and

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- ⁵² See, Thomas Sharp, ‘The International Possibilities of Insurgency and Statehood in Africa: The U.P.C. and Cameroon, 1948-1971,’ A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities 2013 available at https://www.research.manchester.ac.uk/portal/files/54549482/FULL_TEXT.PDF. 10 August 2019. See also, Andrew Aseh, *Political Philosophies and Nation-Building in Cameroon: Grounds for Remaking of post Colony* (Langaa Research & Publishing CIG Mankong, Bamenda, 2016)
- ⁵³ Carlson Anyangwe, *Imperialistic Politics in Cameroun: Resistance and the Inception of the Statehood in Southern Cameroon* (Langaa Publishing CIG Mankong, Bamenda, 2008) 147.
- ⁵⁴ *Ibid.*
- ⁵⁴ *Ibid.*
- ⁵⁴ See, Bongfen Chem-Langhɔ, ‘The Road to the Unitary State of Cameroon 1959-1972,’ (1995) *Paideuma: Mitteilungen zur Kulturkunde* 41.
- ⁵⁴ David Mokam, ‘The Search for a Cameroonian Model of Democracy or the Search for the Domination of the State Party: 1966-2006,’ (2012) 23 *Varia e Recensxes* 83.
- ⁵⁴ *Ibid.*
- ⁵⁴ *Ibid.*
- ⁵⁴ See, Thomas Sharp, (note 52 above).
- ⁵⁴ C Anyangwe, *Imperialistic Politics in Cameroun: Resistance and the Inception of the Statehood in Southern Cameroon* (2008, Langaa Publishing CIG Mankong, Bamenda) 147.
- ⁵⁵ *Ibid.*
- ⁵⁶ Richard A. Joseph, Cameroon Under Ahidjo.
- ⁵⁷ Aloysius (note 30 above).
- ⁵⁸ See [Amazon, <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/anotes_1191.pdf>](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/anotes_1191.pdf) Also, interview with X, Yaoundï. 10 August 2019.
- ⁵⁹ A Aseh, *Political Philosophies and Nation-Building in Cameroon: Grounds for Remaking the Post Colony* (Langaa RPCIG, Bamenda, 2016) 82.

consolidated his authoritarian rule. Some plotters involved in the failed 1984 coup were arrested, charged and executed.⁶⁰ No political parties were formed or operated after Biya took over and, by the late 1980s, Cameroon was still like many other African countries – a de facto single-party state. These political conditions are reflective of the de facto authoritarian constitutional norms that drove state action during this period.

5.4 Transitional outcome

In spite of its influence elsewhere, the TWD was not as vivid an experience – or rather as serious a constitutional moment – in Cameroon as it was in some other countries in Africa.⁶¹ Akoko and Mbuagbo describe the early 1990s events as a “brief spell of euphoria”.⁶² The biggest gain of that time, and perhaps even today, was “accommodation” of multi-party politics. In the early 1990s, democracy-demanding groups, taking advantage of the economic crisis of the time and international support for democracy in authoritarian states in general, started to coalesce with the avowed intention of setting up political parties.⁶³ Unusually, a journalist, Pius Njawe, published a sensational critical article about the President, at a time when Yondo Black, a barrister, was also attempting to form a political party.⁶⁴ These two were arrested and charged together with others for the offence of holding illegal meetings against the person of the President.⁶⁵ Their conviction and imprisonment, together with a march that was staged by the ruling party as a bid to counter the emergence of multi-party politics, did not however bar another group, the Social Democratic Front, from launching its political party in Bamenda under the leadership of John Fru Ndi, then a book seller.⁶⁶ The Biya regime reacted towards these initiatives using force, its usual way of dealing with dissidents, leading to the deaths of few people during that time.⁶⁷ This incident attracted the attention of external actors and, conscious of the regime collapse in other parts of Africa at that time, the ruling party passed a law in December

⁶⁰ Aloysius (note 30 above).

⁶¹ R M Akoko and OT Mbuagbo, ‘Roll-Back: Democratization and Social Fragmentation in Cameroon,’ (2004) (1) *Nordic Journal of African Studies* 1.

⁶² *Ibid.*

⁶³ Milton Krieger, ‘Cameroon's Democratic Crossroads 1990-4,’ (1994) 32 (4) *Journal of Modern African Studies* 607- 608.

⁶⁴ *Ibid.*

⁶⁵ See Human Rights Watch, Cameroon, Government Cracks Down on Demands for Multiparty System 15 June 1990 available at <https://www.hrw.org/reports/archives/africa/CAMEROON690.htm> 10 August 2019.

⁶⁶ Milton Krieger *Cameroon's Social Democratic Front: Its History and Prospects as an Opposition Party* (1990- 2011) (Langaa Research & Publishing CIC Mankon, Bamenda (2008) 80-81.

⁶⁷ George Ngwane, ‘Opposition Politics and Electoral Democracy in Cameroon,’ 1992-2007, (2014) XXXIX (2) *Africa Development* 104.

1990, the Law of Association of 19 December 1990 (Law No. 90/056), that allowed for the establishment of political parties.⁶⁸

At that time, Biya trivialized the need for deeper constitutional reforms and only acted out of convenience.⁶⁹ According to Gros:

President Biya brushed aside calls for his personal participation and sent his prime minister instead. Next Biya succeeded in restricting the main agenda to constitutional questions...Third and perhaps most important, while the government led everyone to believe that constitutional reform would take place *before* the upcoming legislative and presidential elections, this did not happen. The 1992 elections—for the legislature in March and the presidency in October—went ahead under the still-unchanged electoral laws, with the minister of territorial administration at the helm.⁷⁰

The outward manifestation of the effects of the TWD in the early 1990s that can be clearly identified are thus legislative reforms that dismantled the one-party state and allowed opposition parties as well as NGOs to proliferate.⁷¹ Because of these reforms, prospects for democratic change began to improve, especially in the early 1990s. Following this liberalisation of politics, Cameroon had its first election in 1992, which displayed real prospects for leadership change through the ballot. Biya won about 40% of the votes cast followed by John Fru Ndi, of the Social Democratic Party. Biya is actually thought to have lost the election and his “victory” is strongly attributed to French involvement.⁷² Even with the rigging, opposition parties had more votes in total than Biya, such that, had there been opposition unity in the 1992 election, Biya’s reign could possibly have come to an end.⁷³ SDF’s John Fru Ndi’s votes, which were at 36%, added to those of Bello Bouba Maigari, sponsored by the National Union for Democracy and Progress (NUDP), which were 19.2 % of the total votes cast, were sufficient to oust Biya.

⁶⁸ *Ibid.*

⁶⁹ George Ngwane, Cameroon’s Democratic Process: Vision 2020, p 3-4. <https://jimbicentral.typepad.com/ngwane_individual/files/cameroons_democratic_process.pdf 10 August 2019>; M.A. Yanou ‘Democracy in Cameroon: A Socio-Legal Appraisal’ (2013) *Verfassung und Recht in bbersee / Law and Politics in Africa, Asia and Latin America* 46 (3) 303.

⁷⁰ Jean-Germain Gros, ‘The Hard Lessons of Cameroon’ (1995) 6 (3) *Journal of Democracy* 118-119.

⁷¹ Joseph Takougang, ‘The 1992 multiparty elections in Cameroon,’ (1996) 31 (1-2) *Journal of Asian and African Studies* 52.

⁷² Bruce Baker, ‘The Class of 1990: How Have the Autocratic Leaders of Sub-Saharan Africa Fared Under Democratization?’ (1998) 19 1 *Third World Quarterly* 122.

⁷³ Nick Cheeseman, ‘Democracy in Africa,’ (Cambridge University Press, 2015) 150. This was corroborated in the interview as Chofor confirmed that the electoral body is believed to have assisted the ruling party to win the elections.

The case made here is not that the TWD required every society to respond by introducing formal constitutional change. As theorized under Chapter 4, formal constitutional change usually follows real constitutional change and, in the absence of significant formal change in the early 1990s, it can be assumed that there was no real constitutional change.⁷⁴ Alteration of the informal political norms built up during the German, French and British colonisation of Cameroon and the cumulative de facto norms, institutions, understandings and practices that were generated during both Ahidjo and Biya's rule would have manifested itself in the formal text, it is assumed, rather than through mere legalisation of opposition politics. They were unfortunately left unattended to when the impetus created by the TWD started to dissipate. The important constitutional revision exercise that followed the TWD and which culminated in the revised Constitution of 1996 came when the Biya regime had already thwarted the momentum for deeper political reform caused by the TWD. As if that was not enough, though the revisions of 1996 altered the institutional arrangements that support democratic rule, such as a bicameral legislature, some of the amendments introduced were ineffective, an example being the Constitutional Council. In other cases, the arrangements did not come into actual being until many years later, the Senate being an illustration. Viewed holistically, the net effect of the 1996 amendments was to create a wider gap between the authoritarian practices of the post-1990 epoch and the formal Constitution. As Morse put it in an interview:

The set of reforms that came about in 1996 ... liberalized things like freedom of expression, [and] created a senate which might coincide with more liberalism, more checks and balances on power; but actual implementation of the constitution is still used for authoritarian purposes. [sic].⁷⁵

Following the 1992 elections and the threat that liberalisation of politics posed to the Biya regime, real constitutional change towards liberal-democratic constitutionalism was blocked. The full range of authoritarian strategies from the 1970s was deployed in earnest, including the use of political violence and the pursuit of outright victory. In the 1997 presidential elections, a 92.57 % win for Biya was secured following a boycott by the main opposition parties, the SDF, NUDP and the Cameroon Democratic

⁷⁴ For political change that took place See, Charles M Fombad and JB Fonyam, 'The Social Democratic Front, Opposition and Political Opposition in Cameroon in Biya and the Promise for a Better Society,' in JM Mbaku & J Takougang *The Leadership Challenge in Africa: Cameroon under Paul Biya* (Africa World Press, Asmara, 2004) 543.

⁷⁵ Skype Interview with Jonatan Morse, 15 January 2020.

Union (CDU).⁷⁶ The opposition made a comeback in 2004, but lost to Biya, who won by a 70% margin following claimed massive and open malpractices.⁷⁷ The 2011 elections also delivered a 77% win in favor of Biya, though some of the opposition leaders, particularly Daniel Soh Fone, had already withdrawn from the elections to support Biya.⁷⁸ As such, Biya garnered a 71.2 % win in an election where the major opposition party with great influence in Anglophone Cameroon, the SDF, did not participate.

Since democratic change threatened regime survival, democracy-supporting rights also became a subject of concern for the ruling regime from the 1990s. As evidence, the naked use of violence, frequent invocation of state-of-emergency or public order laws became a key characteristic of Biya's reign whenever a challenge was launched by pro-democracy groups.⁷⁹ Any report on civil liberties and political rights about Cameroon is often about breaches by security agencies.⁸⁰ Predictably also, any organized and serious forms of political agitation resulted in declarations of states of emergency, while sporadic outburst were met with counter measures that were mostly at odds with what the Constitution contemplated.⁸¹ In regard to the first approach, the use of emergency powers in Cameroon has been as pervasive after 1989 as it was in the preceding period.⁸² In 2016, the deployment of almost 1000 officers to control protesters in the Anglophone region is illustrative of the use of coercive measures has become. Security agencies exploited these moments as licence for the violation of rights, as documented by the International Crisis Group (ICG), which has explained how they enforced curfews, proscribed demonstrations of more than four

⁷⁶ See MK Tesi, 'The State, Politics and Struggle for Democracy,' in J Takougang & JA Amin, *Post-Colonial Cameroon: Politics, Economy, and Society* (Lexicon Books, NY, 2018) 16.

⁷⁷ B Udeze *Why Africa?: A Continent in a Dilemma of Unanswered Questions* (2009: Xlibris Corp) 302.

⁷⁸ See B Tuner, *The Statesman's Yearbook 2011: The Politics, Cultures and Economies of the World,* (Palgrave Macmillan UK, 2011)

⁷⁹ See Human Rights Watch, Human Rights in Cameroon, <<https://www.hrw.org/world-report/2019/country-chapters/cameroon>> accessed 10 August 2019. J Irish, 'As violence rages, Cameroon govt in denial, HRW say' <<https://af.reuters.com/article/topNews/idAFKCN1T90BS-OZATP>> accessed 10 August 2019.

⁸⁰ Human Rights Watch, *Ibid.*

⁸¹ *Ibid.*

Gerard Emmanuel Kamdem Kamga, "Starting the Emergency Process: Some Reflections on Presidential Prerogatives in South Africa and Cameroon in Time of Turmoil" (2016) 49 (1) *Verfassung und Recht in bbersee / Law and Politics in Africa, Asia and Latin America* 92.

people, and closed borders or regions, at times reinforced by the military.⁸³ The state banned movements from one region to another and cut off social networks.⁸⁴ In October 2016, people were literally barred from leaving their homes.⁸⁵

Disregard for political rights and the use of violence affects the quality of electoral democracy. Though periodic elections have been conducted from the TWD (and even before then), they are a charade and the prospects of leadership turnover since 1992 have been ever-diminishing for opposition parties.⁸⁶ As noted, the goal of total victory is pursued, which is characteristic of closed authoritarian regimes. Yonatan L. Morse's article in the *Washington Post*, "Cameroon has an election Sunday — and everyone already knows the winner" presents a fairly accurate description of the prospects of leadership change through elections.⁸⁷ Commenting on the 2018 elections, Morse assessed that Biya would "win these elections — but not because he is the most popular candidate."⁸⁸

Indeed, and as mentioned, Freedom House rated Cameroon as a "not-free" country as of 2017 and indeed since 1992. Its freedom rating stands at 6/7 for all the indicators used - political rights and civil liberties, with an index of 1/7 being most free and 7/7 being least free. As an overview, Freedom House remarks about Cameroon as follows:

President Paul Biya has ruled Cameroon since 1982. His Cameroon People's Democratic Movement (CPDM) has maintained power by rigging elections, using state resources for political patronage, and limiting activities of the opposition parties. Security forces use violence to disperse anti-government protests.⁸⁹

Cameroon is ranked 36 out of 54 by the Ibrahim Index of African Governance, with an average score of 46.2. Its overall trend is profiled as "Increasing Deterioration", implying that, for the last 10 years, overall governance has been in sharp decline. The

⁸³ International Crisis Group, 'Cameroon's Worsening Anglophone Crisis Calls for Strong Measures,' 19th October 2017, <<https://www.crisisgroup.org/africa/central-africa/cameroon/130-cameroon-worsening-anglophone-crisis-calls-strong-measures>> accessed 10 August 2019.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Interview with Morse (note 77 above)

⁸⁷ YL. Morse, 'Cameroon has an election Sunday — and everyone already knows the winner,' 6 October 2018, *Washington Post*, available <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/06/cameroon-has-an-election-sunday-and-everyone-already-knows-the-winner/?utm_term=.5fdb8eb599ed> accessed 10 August 2019.

⁸⁸ *Ibid.*

⁸⁹ See Freedom House (note 1 above)

period of review from 2008 to 2017 showed a stable trend, with an index of 46.5 being registered in 2008 and one of 46.2 being returned in 2017. This higher profile, it would seem, is attributable to Cameroon's reasonably sound economy, where it ranks 24 out of 47. Its score in another index, "Participation and Human Rights", places Cameroon at 38.8/100 in 2008 and 39.0 in 2017, the highest score having been 39.6 in 2016 and the lowest 38.0 in 2015. Another study, the Safety and Rule of Law index, registers Cameroon with a negative deviation of -9.6 in 2017 and a sharp decline from 49.9 in 2008. The World Justice Project, Rule of Law Index, whose indicators are "Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice" ranks Cameroon at position 120 out of 126 countries that were the subject of the Survey.⁹⁰ All these statistics show that it is safe to conclude that not much has changed in Cameroon in spite of the TWD.

In an interview conducted for this study, Morse maintained that classification of Cameroon as an authoritarian regime was 100% accurate, noting that it is "one of the most authoritarian countries in the continent".⁹¹ He described it as a repressive electoral authoritarian regime because its post-1992 political life is defined by a system where elections are held according to a regular schedule, people get to compete for them, and the opposition wins some seats, but power never changes hands. In his view:

In Cameroon, the CPDM does mobilise people to vote in kind of a quasi-democratic manner. It has its core supporters, mostly from the south like the Beti ethnic group. The Francophone use that division with the Anglophone to mobilise people to vote. It uses patronage, neo-patrimonialism, and that is a very undemocratic way to perpetuate yourself in power. It gives resources to the most loyal, it uses repression, arrests – there's people in jail, most recently in the MRC party has been a target of this ... So, Cameroon is clearly, no matter what you set the definition of authoritarianism as, it has all these features, a party, a military, a person – Paul Biya has been in power since 1982, that's personal. If you're looking at the practice of power, is it people oriented or is it repressing? So, I would call it a very repressive electoral authoritarian regime.⁹²

The state of affairs today in Cameroon is that the real constitution is illiberal and since that has been the case since the early 1990s and prior, it counts as a stable real

⁹⁰ See World Justice Project, <<http://data.worldjusticeproject.org/>> accessed 10 August 2019.

⁹¹ Interview with Morse (note 75 above).

⁹² *Ibid.*

constitution. The section that follows delves into the reasons behind the persistence of this state of affairs.

5.5 Conditions of interest

There is no single cause to which the state of affairs in Cameroon can be attributed. As pointed out in the introduction, President Biya and the CPDM's firm grip on the political order, as well as the failure to address the Anglophone problem, are what are thought to be the cause of constitutional disappointments in Cameroon.⁹³ Linked to the CPDM's control is that fact that there is frequent use of coercive measures as well as the subordination of nominally independent institutions – such as the electoral body – to the dictates of President Biya and the party that he leads. Whereas these are observable features of its political order, however, they are more in the nature of symptoms than the cause. Indeed, it cannot be doubted that the 1996 constitutional revision exercise conferred *de jure* powers on institutions such as the Senate and the Constitutional Council. Given the relationship between *de jure* and *de facto* powers, one could have expected these initiatives to translate into gradual real constitutional change after 1996. That did not, however, happen as the previous section has revealed. What is claimed therefore in this section is that conditions necessary for change to the real Cameroonian constitution are largely absent in the political order. Formal change has simply facilitated authoritarian real constitutional entrenchment while structural factors, such as its relatively stable economy, its strategic connections with France, and the Anglophone-Francophone divide, have militated against actor-led substantive constitutional change. These conditions are discussed in detail in the sub-sections that follow.

5.5.1 Actor based conditions

This section examines the actor-based conditions and the role each has played in shaping the present state of affairs in Cameroon. As noted, the actors in question are (a) incumbent power holders (b) democracy demanding groups and (c) international actors.

⁹³ P Konings, F B Nyamnjoh, *Negotiating an Anglophone Identity: A Study of the Politics of Recognition and Representation* (Brill, Leiden 2013) 7.

5.5.1.1 Change to incumbent power holders

Change to the incumbent political actor is an absent condition in Cameroon after the TWD. The main political figure in post-1989 Cameroonian politics remains Paul Biya, ruling through his CPDM party. As observed, Biya came to power in 1981 following the resignation of Ahidjo and has remained at the center of Cameroonian politics ever since. While there has been a change of Prime Ministers and Members of Parliament, including the entry of opposition parties into the political order, there are certain individuals that have stayed in Biya's government over the years with him. Informant George wondered, for instance, how the claim that Cameroon was a democratic country could be reconciled with the fact that "someone is a parliamentarian for 47 years, and Speaker of the National Assembly for 28 years and still counting."⁹⁴

As mentioned, the only time when there has been a change to the incumbent political power holder in Cameroon was in 1981, following Ahidjo's resignation. This change confirms the hypothesis in Chapter 3 to the extent that, following the exit of Ahidjo, Biya's next initiative was to formulate a philosophy and roadmap that was dubbed the "new deal".⁹⁵ The essence of this programme was to "distinguish the new Cameroon polity under Biya from that of the Ahidjo years".⁹⁶ In his own words, Biya believed that this was to be achieved through the establishment of "a truly humane democracy".⁹⁷ Restoration of democracy and self-rule was thus presented as part of this "deal", which would mark a change to the real constitution under which Ahidjo ruled. In this set-up, newspapers that had gone under in fact sprung up.⁹⁸ He thus fronted the idea that elections should be multi-party in nature.⁹⁹ Indeed, he sent a delegation to northern Cameroon to eliminate private jails, illegal taxes and feudal works that had been imposed on non-Muslims.¹⁰⁰ But this short outburst of enthusiasm for democracy was short-lived as he soon resorted to the same tactics as Ahidjo and effectively abandoned the new deal.

⁹⁴ Interview with G, Yaoundé, Cameroon 8 March 2020.

⁹⁵ See, J Takougang, "The demise of Biya's New Deal in Cameroon" 1982-1992 (1993) 23 (2) *African Insight* 91.

⁹⁶ MD DeLancey, et al, *Historical Dictionary of the Republic of Cameroon* Dictionary 276.

⁹⁷ Paul Biya, *Communal liberalism*, London: Macmillan, 1987, III.

⁹⁸ Mario Azevedo, *The Post-Ahidjo Era in Cameroon (1987)* 86 (520) *Current History* 217.

⁹⁹ Victor Julius Ngho, *Cameroon 1884-1984: A hundred years of history*, (Navi-Group Publications, Limbe: 1988), 331.

¹⁰⁰ Mario Azevedo (above) at 217.

Why did the new deal idea fail to change the real constitution and why was it abandoned? Herein lies a second confirmation of the hypothesis, namely, that where an existing leader retains control over the political vehicle under use, in this case a party, a mere change in leadership is an ineffective instrument for real constitutional change. Joseph Takougang has undertaken an excellent analysis of the reasons behind abandonment of this initiative and offers illuminating views. First, he identifies what he calls the “Ahidjo factor.”¹⁰¹ Ahidjo remained the ruling party’s leader in spite of his resignation as president and sought to retain his *de facto* influence. Behind the scenes were profound power struggles seeking to define where ultimate political authority and legitimacy lay.¹⁰² This tussle is described in some texts as the “Ahidjo-Biya Rupture” and “magnified itself in trivial aspects like protocol treatment, picture on party uniforms, and decision-making formalities”.¹⁰³ Ahidjo thus retained some of his close allies in top government posts, which not only distracted Biya but also made it difficult for him to implement his new deal without consultation with Ahidjo and his allies.¹⁰⁴ The second factor is that, two years after he took charge, there was an attempted coup.¹⁰⁵ Following the 1984 attempted coup, Biya banked on the military supporting the decisions he made, including those that were purely political. The problem with this overreliance on the military, however, was that he could not enact and implement his policies or even pursue the new deal without consulting or obtaining the concurrence of the military heads. This handicap, it is said, assumed ugly dimensions when he tried to bypass the army commanders in pardoning some chiefs, only for the military to overrule and disobey him.¹⁰⁶ With so much reliance on the military, Takougang remarks, “the president found himself in a position where he was unable, if he so desired, to make independent decisions”.¹⁰⁷ The new deal, unfortunately, was not an idea supported by the military. The state of liberal democracy therefore did not change in spite of the new leadership, and political practice in Cameroon remained authoritarian until the arrival of the democratic revival dubbed the TWD.

¹⁰¹ J Takougang above at 93.

¹⁰² *Ibid.*

¹⁰³ Mark Dike DeLancey, Mark W. Delancey, Rebecca Neh Mbuh, ‘Historical Dictionary of the Republic of Cameroon Dictionary,’ 29.

¹⁰⁴ J Takougang above.

¹⁰⁵ Susan Dicklitch above, 164.

¹⁰⁶ Joseph Takougang above, at 96.

¹⁰⁷ *Ibid.*

But why has the political order in Cameroon not been able to oust Biya? There are several explanations. First, there is a fear, particularly within the CPDM, that if Biya loses power, he is likely to be prosecuted. Biya's ambitions are certainly bolstered by the CPDM, which has, even before the TWD, held a majority seats in Parliament. With its majority, the only change that can come through Parliament is inevitably change from which the CPDM profits. It is not just Biya alone who wants to remain in power. The interviews disclosed that there is a contingent of politicians within the CPDM who profit from the status quo and would not allow any meaningful reforms that expose their hold on power to the vagaries of democratic politics.¹⁰⁸ The CPDM and its main agent, Biya, thus control and manage significant reform exercises, with the result that authoritarian norms and practices endure. The argument, therefore, is that if Biya paves the way for another leader within the CPDM, as happened when Ahidjo handed over power to him, there is little likelihood of any change to the real constitution, whether towards liberalism or not. Unfortunately, the CPDM does not have structures that allow for transitions even within the party. Morse remarked in an interview that:

Biya doesn't have the ability to leave the way Dos Santo decided to leave in Angola. Santos decided to retire, and because the MPLA is a much more institutionalized party than CPDM, and because the politics aren't the same in Angola, you could create a consensus candidate to succeed Santos. Biya can't do that.... That doesn't happen in Cameroon. Too many divisions, not enough consensus, too much repression. Biya is coup-proof because of the way he set up the military. So, I don't see the exit for Cameroon. I am pessimistic for Cameroon. And he is not going to exit voluntarily. He is going to stay in office until he dies. Long period of uncertainty that could be very violent, and it remains to be seen what would happen during that period. Whether France, the US step up, exert strong international pressure to create more decentralized powers of politics, but it doesn't happen until Paul Biya dies.¹⁰⁹

Though the CPDM does not have structures to allow for transitions, the inner circle also fears that any change can have far-reaching ramifications. Because of the long-standing ills of the Biya regime, it is dreaded that a change of government would result in arrest and prosecution of individuals that perpetuated these ills. Morse remarks in this regard that:

the fear in the inner circle of the president is that any concession, towards any social group due to pressure unravels the effects. Giving in to Anglophones means giving into the Fulani in the North. Giving into Fulani in the North means you have to give in to the Bamineke in the drier western regions. Giving in to the Bamineke means giving in to the Baka in the east. Giving in to the Baka means that the differences with the people in the south. The whole distributive scheme in Cameroon depends on authoritarianism.

¹⁰⁸ *Ibid.*

¹⁰⁹ Interview with Morse (n 77 above).

And that's why Paul Biya has been in power for so long. Because the fear is, one is that if he loses that power, his entire inner circle goes to jail. And two, and I think this is a sincere fear, that Cameroon falls into civil war or suffers a military coup or civil strife. Because there is no mechanism, there is no true democratic accountability, there are no institutionalized process in Cameroon to choose who comes to power next. So, it is the most acute zero-sum game.¹¹⁰

The endurance of authoritarian constitutionalism is attributed, in part, to the fact that Biya has remained in circulation and has spent a significant amount of time to secure his place in power. He and some of his close allies are afraid of letting go of the power they hold, particularly when it is uncertain what will become of him and his close associates when they get out of office. This might also be the reason why he is unprepared to expose himself to the misfortunes of competitive democratic politics.

5.5.1.2 Existence of effective democracy demanding groups

From a historical point of view, the ruling party in Cameroon has been adamant in not allowing organized dissent or any alternative voices in the political order. Through either co-optation or coercion, successive regimes have made the rise of a united and effective democratic lobby group a near impossibility. This has been the case both before and after the TWD. The very unification process initiated by Ahidjo was undergirded by a concern to retain control over the anticipated unified territory in view of the challenge that Anglophones posed.¹¹¹ Already at that time, Anglophone Cameroonians were interested in protecting their "language, culture, and legal and educational systems", which would have acted as a potential political faultline for dissent. Ahidjo – taking advantage of the relatively weak bargaining powers of the Anglophone representatives – "was under no pressure to make anything more than token concessions".¹¹² As a result, he effected amendments that obliterated the safeguards that had been offered to English-speaking Cameroon.¹¹³ One would wonder why he would go to these lengths to assimilate Anglophone Cameroonians if his intention was not the creation of an environment where no form of organized dissent would arise.

In the end though, the 1990s witnessed an explosion of both opposition political parties as well as civil society organisations. These voices did not, however,

¹¹⁰ *Ibid.*

¹¹¹ Nicodemus Fru Awasom, 'The Reunification Question in Cameroon History: Was the Bride an Enthusiastic or a Reluctant One?' (2000) 47 (2) Africa Today 90-.

¹¹² Fombad above.

¹¹³ Nicodemus Fru Awasom (note 111 above)

end up as a common force to address the main problem of the time, the entrenchment of authoritarian rule.¹¹⁴ Indeed, since the TWD, opposition parties and movements have always been fragmented. The first multi-party parliamentary elections were held on 1 March 1992. In those elections, opposition parties garnered 50.1% of the seats, being 92 against 88 by the ruling party.¹¹⁵ The CPDM did not, therefore, command a parliamentary majority in spite of the fact that the two main opposition parties, the Social Democratic Front (SDF) and the Cameroon Democratic Union (UDC), boycotted the elections.¹¹⁶ One of the opposition parties that had won 18 seats in the 1992 parliamentary elections, the Movement for the Defense of the Republic (MDR), formed a coalition with the ruling party and as a result Biya attained a parliamentary majority. Biya subsequently passed a series of laws that amongst others, proscribed alliances, notwithstanding that he had just formed one with the MDR, and introduced a single-round vote.¹¹⁷ While the Presidential elections were expected to be held in early 1993, President Biya called for early polls in 1992 in the “midst of opposition disarray”.¹¹⁸ In Ngwena’s view, “had the opposition parties presented a single candidate, they would have won the presidential elections of 1992.”¹¹⁹ The SDF, which had serious internal wrangles epitomized by its lack of concern for francophones as well as exclusion of influential individuals, such as its treasurer Djokou,¹²⁰ came second with 35.9% against Biya’s 39.9%.¹²¹ Intriguingly, in the 1997 parliamentary elections, the MDR only managed to get one seat and was excluded from the government.¹²² Its leader, Daissala, was, however, given a government appointment in 2004.¹²³ A more elaborate account of opposition co-optation is set out by Morse as follows:

Biya was also able to split the UPC by coopting its Bassa wing. Shortly after the presidential election, smaller parties like the National Party for Progress dismantled and its chairman Antar Gassagay became a deputy minister. To regain more northern support, Biya coopted two members of the NUDP, Hamadou Mustapha and Issa Tchiroma, with cabinet positions. The party’s chair joined the government a few years

¹¹⁴ See, Ngwena (note above).

¹¹⁵ Ngwena above 108.

¹¹⁶ *Ibid.*, 106.

¹¹⁷ Minorities at Risk Project, *Chronology for Westerners in Cameroon, 2004*, <https://www.refworld.org/docid/469f3876c.html> accessed 29 May 2020.

¹¹⁸ See, Article 19, *Cameroon A Transition in Crisis* (1997) <<https://www.refworld.org/pdfid/4753d3aa0.pdf>>

¹¹⁹ Ngwena above at 109.

¹²⁰ Tom Muller, (eds) *Political Handbook of the World* (Sage, 2012) 227.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

later. Finally, Biya made overtures to Bamilekū leaders with offers to serve on the party's central committee, act as appointed mayors, or join lists for future elections.¹²⁴

This trend – of opposition parties joining the ruling party or being divided on whether to participate in an election or other democratic processes – did however end with the 1992 elections. For instance, in 1997, three major opposition parties, the Social Democratic Front (SDF), the National Union for Democratic Progress (NUDP), the Cameroon Democratic Union (UDC) and a smaller one, the Union of African Population (UPA), boycotted the presidential elections.¹²⁵ Other smaller parties insisted on participating, giving Biya a 92.57 % win followed by Henri Hogbe Nlend, who got 2.5% of the votes.¹²⁶ In 2004, the UNDP that had boycotted the 1997 elections supported Biya's candidature as well as the UPC.¹²⁷ The Front for the National Salvation of Cameroon (FNSC) supported the 2008 amendment that gave Paul Biya the leeway to run for subsequent terms.¹²⁸ Ngwena has described these kinds of parties as an "Opposition of Co-optation", epitomized by the "desire to share power and the proceeds or spoils of power with the ruling party."¹²⁹ It is because of these inclinations that Ndifor Richard urged for opposition parties' need to:

bury their differences and pull their resources together and form a united front against Biya and his party. As the country looks forward to next year's parliamentary and council elections, the opposition has to go to work immediately. They must be ready to give up their greed and self-centeredness, and dissolve their various political parties to create a single party to challenge the ruling party in next year's parliamentary election. It is only through this that they can hope to overturn the ruling party's control of parliament and create new laws. The Cameroonian people must also be ready to accompany the opposition in their efforts to bring about meaningful change in Cameroon.¹³⁰

What is thought to prevent political parties' effectiveness as a pro-democracy voice in Cameroon includes (a) the absence of internal democracy (b) the absence of opposition

¹²⁴ Yonatan L Morse, 'Electoral Authoritarianism and Weak States in Africa: The Role of Parties Versus Presidents in Tanzania and Cameroon (2018) 39(1) *International Political Science Review*.

¹²⁵ Ngwena above at 107.

¹²⁶ *Ibid.*

¹²⁷ Emmanuel Kendemeh, 'Election 2004: CPDM Patiently Awaits Results,' *Cameroon Tribune* (Cameroon-info.net). October 18, 2004 <https://archive.vn/20120729073302/http://www.cameroon-info.net/cmi_show_news.php?id=15407> accessed 9 November 2020.

¹²⁸ Tom Muller, (ed) *Political Handbook of the World* (SAGE Publications Inc, Washington, 2012) 227.

¹²⁹ Ngwena at 110.

¹³⁰ Ndifor Richard, 'Opinion: Cameroon's opposition parties must bury their differences,' DW 7 November 2011, <<https://www.dw.com/en/opinion-camerouns-opposition-parties-must-bury-their-differences/a-46181990>> accessed 8 November 2020.

consensus (c) the broken strategic alliances and, most importantly, (d) the absence of any linkage with civil society movements. Regarding this last state of affairs, though NGOs and faith-based organisations are present in in Cameroon, they have over the years focused mainly on social service provision and are less prone to political involvement. The relationship of the activist ones with the opposition political parties is “strained” in Ngwena’s assessment. According to an interview with, Okeoga Darlington, “opposition parties do not connect with civilian populations”, which has been capitalized on by the Biya regime.¹³¹

What this means is that Biya and his political party, the CPDM, have remained the sole directors of the reform agenda after the TWD. Asked whether NGOs, opposition movements and faith-based originations have been meaningfully involved in the reform process, an interviewee who sought anonymity said that these entities are often “ignored” by the government.¹³² It is unsurprising that some of the amendments that have been effected over the years benefited Biya and his party too.¹³³ The reform agendas that culminated in the 1996 formal constitutional revision – including the introduction of a Senate – can also be seen as creating the impression that President Biya was determined to reform the legal order towards liberalism and to show that he is a reformist. If these were not his limited ambitions, then the 2008 constitutional amendments that permitted an extension of his term beyond what had hitherto been set would not have been resorted to. In all these endeavours, the opposition parties and other pro-democracy voices as well as civil society have not had their say, let alone their way.¹³⁴

5.5.1.3 Candid promotion of democracy by international actors

Far from supporting pro-democracy voices in Cameroon, international actors’ support for the Biya regime has been a major source of legitimation for authoritarian practices. This is in spite of the fact that the liberalisation of politics in the early 1990s is attributed to the role that western countries and the Bretton Woods Institutions played in condemning repression, and more particularly, the use of violence against pro-democracy voices. As we have seen, democratic diffusion associated with the TWD also had a huge influence at that time. Biya indeed confessed in a conference in New

¹³¹ Interview with Darlington Okeoga, Abuja, Nigeria, 24 March 2020.

¹³² Interview with William (pseudo name), Bamenda, 10 March 2020.

¹³³ Interview with Eric Chinje (note 22 above).

¹³⁴ *Ibid.*

York that the changes in Eastern Europe had led to a challenge to one-party rule.¹³⁵ The initial transition to “multi-partyism” in Cameroon is consequently traceable to the involvement of external actors. But since then, their influence has worked in the opposite direction. Today, Biya’s concession of the need to have a national conference to discuss the Anglophone problem, is seen as a convenient device to relieve “pressure from the international community”.¹³⁶ According to Chofor, “the government reacts more from the pressure from the outside”.¹³⁷ In spite of this influence:

The EU’s and UNDP’s engagement in electoral reforms in Cameroon have left room for bilateral actors to invest in the electoral agenda according to their own interests and perceptions.¹³⁸

As a result, external interest has shaped the transitional outcome in Cameroon in a profound way. The role that France has played in the democratisation process in Cameroon as an inhibitor of other forces has structural dimensions and is accordingly discussed in a subsequent section. Suffice it to note here that, because of France’s strategic interest in Cameroon, more so its interest in Francophone domination, other international actors have been unable to effectively offer support for democratic transition. Armed with support from the French government, the Biya regime mostly ignores concern from other quarters. As Gregory put it in an interview:

The international society most often just sits on the fence. They keep repeating the same advice and exonerate themselves from concrete action saying they are respecting the autonomy of [the country] state. Take the case of the crisis that is ongoing in the North and South West regions of Cameroon (Southern Cameroons). The international society has been calling on the government to call a dialogue, respect human rights, etc. Yet nothing concrete is being done...¹³⁹

In Chapter 3, it was noted that the United States has been particularly interested in propagating democracy. Its interests have not, however, been uniform and Cameroon is one of those places. It has in this respect played a rather obstinate role in Cameroon and like other influential countries, it has simply ignored the governance circumstances

¹³⁵ Joseph Takougang, ‘The Demise of Biya’s New Deal in Cameroon in in Cameroon,’ in J.M. Mbaku, and J. Takougang *The leadership challenge in Africa: Cameroon under Paul Biya/* ed. by John Mukum Mbaku and Joseph Takougang (Africa World Press, NY, 2002) 220, 117.

¹³⁶ Christian Aime Chofor (note 3 above).

¹³⁷ *Ibid.*

¹³⁸ Marie-Emmanuelle Pommerolle, Donors and the making of ‘credible’ elections in Cameroon in Tobias Hagmann, Professor Filip Reyntjens (eds), ‘Aid and Authoritarianism in Africa: Development without Democracy,’ (Tobias Hagmann and Filip Reyntjens, London, 2016) 119, at 125.

¹³⁹ Interview with Gregory, Younde, Cameroon 10 March 2020

there.¹⁴⁰ The US has thus played a significant role in legitimating the Biya regime. Morse argued in the interview:

But I say today, just as influential in propping up the regime is not just France but the United States. Part of that is a change that happened in 2003, when Cameroon was wooed by the Bush administration, because Cameroon had a temporary seat at the UN Security Council, and at the time 2003, it was the build-up to the Iraqi war. So, for the US, it did matter in the end for the US wanted Cameroon to at least abstain from a vote. And they offered military aid to Cameroon, and they also offered support for Cameroon in the dispute over the Bakassi peninsula with Nigeria. And the exchange also gave Cameroon a lot of legitimacy. Paul Biya's first trip to the white house was during the Bush administration in 2003. Since then Cameroon has lobbied itself. It actually hires lobbyist firms in the United States to convince US lawmakers and people in the US government that Cameroon is an important strategic partner of the new priorities of the 21st century. And so, if in the 20th century US doesn't really care too much about Cameroon, and it didn't want to upset the French too much. By the 21st century the US takes a much more active role. Because it sees Cameroon as a partner in the war on terror. It sees Cameroon at least now as a critical partner in the fight against Boko Haram, in security operations. As a result, democracy promotion is just dropped off the agenda in the US foreign policy. It views Cameroon through this lens as meaning the same person is in power, we can work with them. So even the US has rescinded some military aid in trying to censure Cameroon a little bit more about the Anglophone crisis but nothing substantial really happened ultimately.¹⁴¹

Also, the French and the American governments have expressed support for Biya's initiatives in fighting the terrorist group in its Northern territory, Boko Haram, but this support has not been unqualified, especially when there are reports of violations of rights by security forces. Around July 2018, the French President, Emmanuel Macron, declared support for Biya's regime against the terrorist movement, "in a clear national context".¹⁴² These sentiments were expressed at a time when Amnesty international had issued a statement authenticating a video that showed security officers killing two young women and their children by the roadside¹⁴³ and also at a time when the European Parliament had just passed a resolution expressing "concern that the 2014 anti-terrorism law is being misused to restrict fundamental freedoms" and supporting "the requests made by UN experts that the law be reviewed to ensure that it is not used

¹⁴⁰ Julius Amin, 'The World's Major Powers are Still Ignoring Cameroon's Spiralling Anglophone Crisis,' Quartz Africa 28 September 2018 <<https://qz.com/africa/1406320/cameroons-anglophone-crisis-is-being-ignored-by-us-china-eu-others/>> accessed 22 August 2019.

¹⁴¹ Interview with Morse (note 77 above).

¹⁴² Melchisedek Ch̄t̄ima and Meredith Terretta 'The US and France Backs Cameroon's Reign of Terror,' 8 September 2018 <<https://africasacountry.com/2018/08/the-us-and-french-backed-reign-of-terror-in-cameroon>> accessed 22 August 2019.

¹⁴³ Amnesty International, 'Cameroon: Credible evidence that Army personnel responsible for shocking extrajudicial executions caught on video,' 12 July 2018 <<https://www.amnesty.org/en/latest/news/2018/07/cameroon-credible-evidence-that-army-personnel-responsible-for-shocking-extrajudicial-executions-caught-on-video/>> 22 August 2019.

to restrict the rights to freedom of expression, peaceful assembly and association.”¹⁴⁴ Whereas it is laudable that the Cameroonian government is receiving support from international actors to suppress terrorism, in a legal order where violence is frequently invoked to suppress pro-democracy initiatives, use of repression becomes justified, and not only within the confines of addressing terrorism. According to Morse, the support that France and the US give to Paul Biya:

limits any access that opposition actors have to raising their profile. It gives Paul Biya a constant flood of questionable loans even though China has been playing a big role as well in Cameroon, but concessional loans from the World Bank and the IMF without having to reform any of its economic principles or infrastructure. So yes, international actors play a very direct role in Cameroon.¹⁴⁵

Another powerful international actor, Germany, seems to have a different interest. It is the second largest bilateral donor but “left aside diplomacy to focus on commercial aspects”.¹⁴⁶ Pommerolle recounts an incident where a German firm was awarded a tender for the supply of biometric registration, regardless of the fact that the firm had not tendered for it. This award was because a German Secretary of Trade and a lobbyist had visited Cameroon.¹⁴⁷

The other external actor with a theoretically better chance of addressing governance issues in Africa in general is the African Union. Morse contended in this regard that:

The AU like all the other institutions view stability in the near-term. They don't have a plan after Paul Biya, as long as he delivers on what the AU cares about. I don't know what the AU cares about these days. The return of the military coups in the past 5 years, has been a challenge to the AU. I just don't think it's a strong enough institution.¹⁴⁸

Governance is apparently a core concern of the AU, at least from reading its various legal documents, but the Union is yet to play a significant role in changing authoritarian practices if the fact that most countries in Africa are authoritarian is anything to go by. In the case of Cameroon, the African Union has intervened in the Anglophone problem, particularly in 2018 following a visit by the Chairperson of the

¹⁴⁴ European Parliament Resolution of 18 April 2019 on Cameroon (2019/2691(RSP)) http://www.europarl.europa.eu/doceo/document/TA-8-2019-0423_EN.html 22 August 2019.

¹⁴⁵ Interview with Morse (note 77 above).

¹⁴⁶ Marie-Emmanuelle Pommerolle, 125.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

African Union Commission, Moussa Faki Mahamat, there to facilitate dialogue.¹⁴⁹ However, the African Union's main concern has been the absence of violence rather than a demand for a resolution to the underlying problems facing the Anglophone region. It is no wonder that the African Union has been accused of failing to confront the situation, despite its call for so-called African solutions to African problems.¹⁵⁰ In the matter of elections also, the African Union has generally offered a clean bill of health to Cameroon and, in cases where there has been manifest rigging, it has merely offered advisory interventions.¹⁵¹ Unlike, say, the European Union, which has been deeply concerned with governance in countries such as Hungary and Poland, the African Union has largely been a club of autocrats with democracy-embracing countries like Botswana being in the minority. Its role as an entity that can foster a change in political practice towards liberalism is restricted and largely ineffective.

5.5.2 Influence of structural conditions

Despite the desire for democratic change in Cameroon, certain structural conditions have impinged or shaped the transitional outcome. These include: its relative economic stability, the neopatrimonial nature of the society, the Anglophone problem and, last but perhaps most importantly, its relationship with France. To start with first factor: Cameroon has been a fairly economically stable country when compared to her neighbors, both before and after the TWD. In the early 1980s, most African countries were facing serious economic challenges, but Cameroon was not one of them. Around that time, President Ronald Reagan had profiled Cameroon (and Kenya) as the "shining example for Africa" because of the 7 percent annual GDP growth that it had attained until 1986.¹⁵² Matters, however, went south from 1987 when Cameroon's GDP fell by around 3 percent as it succumbed to the economic crisis afflicting many other African countries. This crisis forced Cameroon to lean towards the Bretton Woods Institutions

¹⁴⁹ Moki Edwin Kindzeka, 'Commonwealth, AU, OIF Call for Peace and Unity in Cameroon,' 30 November 2019, Voice of Africa, <<https://www.voanews.com/africa/commonwealth-au-oif-call-peace-and-unity-cameroon>> 1 September 2019.

¹⁵⁰ Mausi Segon, Africa Should Not Fail, (Published in Jean Afrique) <<https://www.hrw.org/news/2019/06/28/africa-should-not-fail-cameroon>> accessed 1 September 2019.

¹⁵¹ See Fred Mavunyi, Opinion: Paul Biya's re-election is an insult to the people of Cameroon, DW 22 October 2018, available at <<https://www.dw.com/en/opinion-paul-biyas-re-election-is-an-insult-to-the-people-of-cameroon/a-45986017>> accessed 1 September 2019.

¹⁵² Nantang Jua, 'Cameroon: Jump-starting an Economic Crisis Africa Insight, Volume 21, Issue 3, Jan 1991, p. 162 – 170.

whose view at that time was that the problems in Africa were associated with bad governance and attached conditions to foreign aid, one of which was embracing democracy. France also said that it would only support, “wholeheartedly” countries that resorted to democratisation following the experience in Benin. These voices were heeded by the ruling regime, which was battling at that time with a pro-democracy movement. Though the economic crisis had nothing directly to do with democracy, it had an influence on the democratisation process at this time of economic vulnerability.

Cameroon’s relative economic stability, it is arguable, has made it less vulnerable to external pressure, especially from the Bretton Woods institutions. This explains perhaps why Biya was only willing to make a few concessions. After the TWD, Cameroon has continued on the path of economic recovery and stability,¹⁵³ a position also attributed to its relative political stability. According to the African Development Bank, it remains one of the “most resilient in Central Africa in terms of diversification” economically.¹⁵⁴ This is not just in the post-1989 epoch. As at 1989, at the dawn of the TWD, Cameroon had a GDP of about 11.14 billion USD, which was a slight fall from 12.49 billion USD in 1988, according to the World Bank.¹⁵⁵ Its economy has continued to grow, attaining a GDP of about 38.7 billion USD in 2018, with a projected economic growth of 3.6 percent in 2019.¹⁵⁶ Though it has also relied on foreign aid, especially from France and the European Union, its economic development is linked to domestic elements also.¹⁵⁷ Like other African countries, it has a huge public debt, mostly in the form of development aid though, as mentioned, it is less reliant on foreign aid than its next-door neighbours. This reduced reliance on external aid makes it less vulnerable to pressures from external forces.

In spite of its relative economic comfort, and contrary to the usual relationship between wealth and democracy, Cameroon, like most other African countries, has been deeply neopatrimonial. This is the second structural condition that has influenced

¹⁵³ See World Bank in Cameroon, <<https://www.worldbank.org/en/country/cameroon/overview>> accessed 30 July 2019.

¹⁵⁴ African Development Bank, <Cameroon Economic Outlook,’ <https://www.afdb.org/en/countries/central-africa-cameroon/cameroon-economic-outlook> accessed 30 July 2019.

¹⁵⁵ World Bank, <<http://pubdocs.worldbank.org/en/819481492188154977/mpo-cmr.pdf>> accessed 30 July 2019.

¹⁵⁶ *Ibid.*

¹⁵⁷ Joseph Bayiah Ngang, ‘The Impact of Foreign Aid on Economic Growth and Economic Development in Cameroon Master’s Thesis,’ <<http://www.diva-portal.org/smash/get/diva2:2456/FULLTEXT01.pdf>> accessed 30 July 2019.

its transitional outcome. While neopatrimonialism is “a constant feature of politics” in Africa, in Cameroon it is particularly profound.¹⁵⁸ Herein partly lies the explanation for opposition party co-optation and disunity and the consequent absence of effective pro-democracy forces. Informal politics is sustained by the neopatrimonial set-up of the society, to the extent that most elites viewed, and continue to view, association with public power as a means of personal or communal advancement.¹⁵⁹ Communal advancement could have real or symbolic significance, but as a perceptual issue, it can be treated as an enduring constitutional convention.¹⁶⁰ At a communal level, this claim manifests itself in at least two main forms. First, and in a less pronounced form, communities or clans that are close to the presidency are seen as having preferential access to state resources or concern. Takougang summarized this consciousness when Biya took over from Ahidjo in the following words:

Many from the President’s clan saw the transfer of power simply as an opportunity to, in Bayart’s words, promote “ethnofacism”. For instance, Basil Emah, one of the party bosses and an associate of the President argued that it was the turn of the Beti clan to enjoy the fruits and power which the Northerners had monopolized during Ahidjo’s administration...a middle-level party official in Fako Division (South West Province) indicated thatGaroua Barons....had simply been replaced by “Beti Mafia.”¹⁶¹

This is not just to be downplayed as a perceptual matter, though, considering that a report in one of Cameroon’s newspapers disclosed that, as of August 1991, 37 of 47 senior prefects (administrative heads of division), three-quarters of the directors and general managers of parastatal corporations in the country, and 22 out of 38 high-ranking bureaucrats who had been appointed in the newly created office of the Prime Minister, were from the president’s clan.¹⁶² Second, and perhaps on a broader front, the Anglophone-Francophone divide could be understood as expressing this consciousness.¹⁶³ Anglophones believe that their circumstances would most likely be different if the President were to come from the Anglophone region, if their voting patterns whenever the SDF offers itself for elections are anything to go by. The SDF is

¹⁵⁸ Interview with X, Yaoundé, Cameroon 9th September 2019.

¹⁵⁹ See Fochongong above.

¹⁶⁰ *Ibid.*

¹⁶¹ Joseph Takougang ‘The demise of Biya’s New Deal in Cameroon,’ 1982-1992 95.

¹⁶² *Le Messenger*, 3 August 1991

¹⁶³ Francis Nyamnjoh and Michael Rowlands, Elite Associations and the Politics of Belonging in Cameroon (1998) 68 (3) *Journal of the International African Institute*.

indeed perceived as an “Anglophone party”.¹⁶⁴ Anglophones’ detachment from the government can also be seen as manifesting a “communal” sense of neopatrimonialism. It is noteworthy, though, that there are actually elites from the Anglophone region that have over the years been co-opted by the ruling regime and held high office. Biya, for instance, appointed Mr Yang, an Anglophone, as his Prime Minister, who was also the longest-serving Prime Minister, to replace Ephraim Inoni, who was also an Anglophone. This has not, however, changed the perception that Anglophones are treated badly.

At an individual level, most people view public office as a fount of personal advancement. The “primary goal of politics in Cameroon”. Mbaku and Takougang have observed, “has been to serve the president and a small group of elites”.¹⁶⁵ Fonchingong also recounts that:

in Cameroon, we see the political elites canvassing for votes, projecting identity consciousness, paying lip service to statehood and nationhood and jockeying for posts or responsibilities on the grounds of regional representation and thriving in divide and rule politics.¹⁶⁶

This phenomenon is not, however, confined to the political class. Among the citizens, a particularly common practice in Cameroon’s bureaucracy has for a long time – been the act of “chasing files.”¹⁶⁷ This, Nyamnjoh has explained, is essentially the need for citizens to travel to Yaoundï to ensure that their issues receive speedy attention by administrative bodies.¹⁶⁸ The high costs of living in Yaoundï, he observes, coupled with the fact that all government services have been centralized, makes this practice particularly popular.¹⁶⁹ It is no wonder that Cameroon is one of the most corrupt countries in the world. Indeed, in 1998, Transparency International classified

¹⁶⁴ Canada: Immigration and Refugee Board of Canada, Cameroon: The Social Democratic Front (Front social dïmocrate, SDF), including its current status, its organization and structure, its membership card and the treatment of its members by the state authorities (2012) <<https://www.refworld.org/docid/4f9e36172.html>> accessed 6 August 2019.

¹⁶⁵ *Ibid.*

¹⁶⁶ Fochongong above.

¹⁶⁷ See, Angwafo, Peter Tse ‘Cameroon's Predicaments,’ (Langaa Research and Publishing CIG Mankon, Bamenda, 2014) 78.

¹⁶⁸ Francis B. Nyamnjoh, Cameroon: A Country United By Ethnic Ambition And Difference, at 12 <https://www.nyamnjoh.com/files/united_by_ethnic_ambition.pdf> accessed 9 November 2020

¹⁶⁹ *Ibid.*

Cameroon as the most corrupt country in the world.¹⁷⁰ According to Transparency International, the public perception of corruption in Cameroon was in 2019 ranked at ,152 out of 180 with a score of 25 percent. Cameroon is just a deeply corrupt constitutional order,¹⁷¹ and has ranked twice as the most corrupt country in the world in both 1998 and 1999 by Transparency International.¹⁷²

The Anglophone problem is also a structural factor that has influenced Cameroon's transitional outcome. Beneath the rather harmonious ethnic co-existence, is a pronounced sharp Francophone/Anglophone divide. This divide, characterized by less than equal concern and treatment of the Anglophone Cameroonians over the years, is an integral part of Cameroon's real constitution. As Chofor disclosed in an interview, it is "a real issue" and it manifests itself in many forms. One of these is that an Anglophone "would have different treatment" from a Francophone Cameroonian particularly when they have a problem that requires administrative relief.¹⁷³ Its origin lies in the defeat of the Germans in 1916 by the allied powers – Britain and France – and the attendant unequal division of Cameroon into two parts.¹⁷⁴ Following that triumph, the two powers adopted different modes of interaction with the inhabitants of each portion, which generated potentially irreconcilable politico-legal understandings.¹⁷⁵ The British, for their part, preferred to use indirect rule by appointing elites.¹⁷⁶ This system was the most cost-effective and practical method of achieving their objectives and it should not be seen as intended to facilitate some sort of self-rule.¹⁷⁷

¹⁷⁰ Journal du Cameroun, 'Cameroon Ranked Among World's Most Corrupt Countries (2019) <<https://www.journalducameroun.com/en/cameroon-placed-among-worlds-most-corrupt-countries/>>. See also, BBC News, Cameroon country profile available at <<https://www.bbc.com/news/world-africa-13146029>> accessed 6 August 2019.

¹⁷¹ Charles Fombad, 'Endemic Corruption in Cameroon: Insights on Consequences and Control,' in Hope K.R., Chikulo B.C. (eds) *Corruption and Development in Africa* (2000) Palgrave Macmillan, London).

¹⁷² See, Bernard Gauthier & Albert Zeufack, 'Governance and Oil Revenues in Cameroon, OxCarre Working Papers 038, Oxford Centre for the Analysis of Resource Rich Economies, University of Oxford, 2010, at 27 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.908.5281&rep=rep1&type=pdf>> accessed 6 August 2019.

¹⁷³ Interview with Christian Aime Chofor, Bamenda Cameroon, 28 August 2019.

¹⁷⁴ Fombad above.

¹⁷⁵ *Ibid.*

¹⁷⁶ Hans-Georg Wolf, 'English in Cameroon,' (New York Mouton de Gruyter, 2001) 67-.

¹⁷⁷ Aime above. See also Mufor Atanga, 'The Anglophone Cameroon Predicament,' (Langaa Research & Publishing CIG, Bamenda, 2011)

In the end, British traditions became the basis for social and political life in Anglophone Cameroon. Chofor explains further that “the British had their own style”.¹⁷⁸ They were governing the Anglophone part of Cameroon, he contended, like an annexure of Nigeria.¹⁷⁹ Because they had a greater interest in Nigeria, they had less concern for Cameroon’s growth and development.¹⁸⁰ When even this weak interest declined, Britain simply abandoned the region. According to Morse, Britain:

never cared as much about the Anglophone regions as it seems like the only thing they did was when Cameroon entered the commonwealth in 1997/1997 despite not meeting the standard required to enter the commonwealth. UK has very little influence in Cameroon. And the truth is the Cameroonian diaspora, the Anglophone diaspora are primarily in the United States and in Nigeria and not in the UK.¹⁸¹

Nevertheless, the Anglophone region’s institutional traditions imitated those in Britain and bore their heritage.¹⁸² The French, for their part, embarked on an assimilation programme towards the natives in their section in a bid to convert them into French Cameroonians.¹⁸³ France offered enormous support to its holdings, even after independence, Francophone Cameroonians then commenced a politico-legal project aimed at assimilating their Anglophone counterparts within this profoundly different system. At present, as Chofor disclosed in an interview, the French legal system has become “dominant” over the common-law one, which is still applied in the Anglophone region. The tensions that have been witnessed in Cameroon, Chofor observed, were partly caused by this dominance of the civil law system and the need to “assimilate” Anglophone legal traditions. This seems true considering the contribution of Anglophone lawyers to the 2018 Cameroonian crisis.¹⁸⁴ Over the years, attempts by Anglophones to seek recognition of their distinctiveness, or at least to secure fair treatment from successive governments, have failed.

¹⁷⁸ Christian Aime Chofor (note 3 above)

¹⁷⁹ *Ibid.*

¹⁸⁰ Christian Aime Chofor (note 3 above).

¹⁸¹ *Ibid.*

¹⁸² Farouk Chothia, Cameroon's Anglophone Crisis: Red Dragons and Tigers - The Rebels Fighting for Independence BBC News 2018, <<https://www.bbc.com/news/world-africa-45723211>> accessed 23 July 2019.

¹⁸³ Lotsmart N. Fonjong, ‘The Challenges of Nongovernmental Organisations in Anglophone Cameroon,’ (Nova Publishers, New York, 2007) 17.

¹⁸⁴ Moki Edwin Kindzeka, ‘Cameroon Courts Paralyzed as Lawyers Strike Over Human Rights Violations, Voice of Africa,’ <<https://www.voanews.com/africa/cameroon-courts-paralyzed-lawyers-strike-over-human-rights-violations>> accessed 15 January 2020.

Elite Francophone Cameroonians exploited their position of relative advantage during the unification process.¹⁸⁵ An important Constitutional Conference in 1961 at Lounban did not address the ills attached to colonial rule. The authoritarian norms that had been generated and applied during the colonial period thus remained unchanged. During the said Lounban Constitutional Conference, the main interest of the Francophone delegation was to entrench the French governance model and expand Ahidjo's ensuing dominion.¹⁸⁶ It is for this reason that Mbaku attributes the post-TWD problems bedeviling Cameroon to constitution-making at independence.¹⁸⁷ Citing Mbaku, Fochingong, observes:

Cameroon's present political and economic problems can be traced to non-democratic constitutionalism at independence. Elite driven, top down, non-participatory constitutionalism left the country with institutional arrangements that discouraged entrepreneurship but encouraged political opportunism.¹⁸⁸

The core of this argument is the "political problem" whose origins lie in the "politics of reunification and the failure of the country's founding fathers to insist on democratic, people driven, participatory constitutionalism".¹⁸⁹ For the period that followed the independence era, there has been what Mbaku describes as an attempt at securing forced "uniformity".¹⁹⁰ In his assessment, the failure to establish a constitutional infrastructure that could permit the pursuit of liberal democracy is attributable to three factors. First, there was a desire to retain the "Gaullist" political system that had existed in Francophone Cameroon in the place of one that could accommodate Anglophone perspectives.¹⁹¹ Second was the arguably contestable fact that the negotiating Anglophones did not have strong bargaining power in so far as the "southern Cameroon delegation to the constitutional negotiation was inexperienced, financially handicapped and poorly counseled".¹⁹² Contestable because the southern Cameroon delegation outnumbered the Francophone one.¹⁹³ Third, as has been alluded to already, the Francophone region, "La Republique du Cameroun", already existed as an "independent country" and had attained international recognition as a state by the time

¹⁸⁵ Makum Mbaku, 'Cameroon's stalled transition to democratic governance: Lessons from Africa's New Democrats (2002) 1 (3) *African and Asian Studies* 125.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Fochingong 45.

¹⁸⁹ Mbaku (above).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* at 132.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

of unification.¹⁹⁴ This is the context underlying the claim that the 1961 Constitution encapsulated conceptions of governance that were at odds with Anglophones' experiences under the British. This engendered opposition towards the Constitution and institutions under it, more so from the Anglophones.

The effect of the Anglophone-Francophone divide on Cameroon's transition to democracy was and still is manifold. First, it redirects genuine discussion about the presence or absence of liberal democracy in the entire Cameroon to a narrow, though significant, issue: whether Anglophone Cameroonians are receiving less than privileged concern. Second, the Anglophone problem also militates against the emergence of a united pro-democracy group. As said already, the SDF, which is considered an Anglophone party, did not want to accommodate Francophone interests, hence its internal wrangles in the early 1990s that contributed to its narrow loss to Biya. Third, the Cameroonian government's apparent inability or unwillingness to reconcile the differences between Anglophone and Francophone legal culture, assuming that is possible, influences even the nature of legal norms themselves within the polity. Lastly, the Anglophone problem, epitomized by France's desire for Francophone domination, has shaped the relationship between France and Cameroon and its vulnerability to external forces.

The last structural condition that has impacted the transitional outcome is the relationship that France has with its former colonies in general and with Cameroon in particular.¹⁹⁵ A saying in Cameroon popularized in 1995 goes that "La France est incontournable chez nous." ("There's no getting around France in these parts.")¹⁹⁶ Jean-Germain Gros has explained how the relationship with France has impacted on transitions in its former colonies as follows:

More than any other external power, France was in a position to play a positive role in the democratization process, yet it chose not to do so. The reason for this refusal must be sought in the context of France's policy toward its former colonies. This policy is grounded not only in economic interests but in cultural, strategic, and emotional concerns as well.¹⁹⁷

¹⁹⁴ *Ibid.*

¹⁹⁵ John A. McKesson, 'France and Africa: The Evolving Saga,' *French Politics and Society* 11 (Spring 1993).

¹⁹⁶ Jean-Germain Gros, The Hard Lessons of Cameroon (1995) 6 (3) *Journal of Democracy* 122.

¹⁹⁷ *Ibid.*

These sentiments were confirmed and amplified in the interviews. According to Morse, for instance:

In Francophone Africa levels of democracy are generally lower than levels of democracy in Anglophone Africa. Part of it has to do with the legacy of constitutionalism. The French style of colonial rule [assimilation] led to longer-term ties between the colonial metropole and newly independent countries, because French countries were to the French, it gave political powers a lot of influence in politics.¹⁹⁸

He then summarized, at great and comprehensive length, the place of and role of France in Cameroon as follows:

There's a number of incentives here for France. First is pure economics.... there are strong economic incentives to remain influential in Cameroon. The other thing is also that France is playing an international politics game. Unlike Great Britain and the United States, France, as a medium-sized power, is looking to expand its area of influence, and particularly to counter Great Britain... Cameroon is a long-standing ally to the French. In a moment of transition between 1988 to 1992, if it wasn't for France, you know other countries cut aid to Cameroon. The United States, Great Britain, the IMF had cut out loans and the French basically gave cash transfer of money to Paul Biya, billions of dollars to pay civil servants and politicians. I think that made a huge difference during the 1992 elections. I think Paul Biya is in power because of the loan guarantee that the French made. The French later would be very influential in international institutions, and helping Cameroon consistently secure funds in favourable loan terms. And it's amazing because Cameroon is one of the worst performers in all benchmarks that the World Bank and the IMF care about. If you read between 1996 through to the 2008 period, Cameroon has made very little progress, in terms of curtailing corruption, privatisation, liberalisation of customs and exports, again it's a centralized political economy.¹⁹⁹

The main way that France influenced the transitional outcome is that in the early 1990s its major call for democratisation in places such as Benin led Biya to loosen up the political order. However, France is claimed to have meddled in the elections of 1993 out of fear that an Anglophone presidency in John Fru Ndi would undermine investment by French Cameroonians. Morse believed that the misfortunes of Anglophones could be attributed to the desire of France to entrench the dominance of its socio-cultural values all over Cameroon.²⁰⁰ The French are not interested in seeing Anglophone culture and traditions remain in Cameroon and even the unification exercise that started just after independence – if what Cardinal Tumi disclosed in an interview is anything to go by – was intended to wipe out the influence of Anglo-

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ See Ngala Killian Chimtom, 'Cameroon cardinal says France to blame for 'Anglophone crisis'' *Crux* 4 November 2017 <<https://cruxnow.com/global-church/2017/11/cameroon-cardinal-says-france-blame-anglophone-crisis/>> accessed 28 August 2019.

Saxon culture.²⁰¹ The 1990s liberalisation of politics appeared to open up a possibility for change to the status quo as it was feasible that an Anglophone – John Fru Ndi – could win the 1992 elections. For this reason, allegations that France intervened in rigging the 1992 elections in favour of Biya are common. The Anglophone problem could therefore have been different if the French had expressed a desire to have it resolved in favour of maintaining the existence of both legal and social cultures.

In summary, Cameroon's relative economic stability, the neo-patrimonial nature of its politics, the Anglophone problem and French support for the Biya regime,²⁰² make the ruling regime less vulnerable to the demands of non-French external actors. This has helped Biya to enter into relationships of "convenience" with other countries, considering its rich natural resources. The point made here is not that if there was greater reliance on foreign aid there would be a justification for democratic states to meddle in Cameroonian affairs in a bid to foster democratisation. In any case, there is not much that international actors can do in promoting democracy other than being a trigger factor, if the situation in Kenya is anything to go by. However, if influential international actors, such as France or the African Union, were more concerned about the state of liberal democracy in Cameroon, the environment through which pro-democracy claims are pursued would be more supportive. At the very least, such international support would unveil the legitimating and co-optation strategies resorted to by the Biya regime to sustain Cameroon's authoritarian real constitution.

5.5.3 Design based conditions

Under this sub-section, two conditions of institutional design are considered namely, change to formal powers and existence of effective judicial review and how they have shaped the obtaining constitutional conditions.

5.5.3.1 Change to formal powers

As observed, and unlike many African countries, Cameroon did not amend its formal constitution in the early 1990s to liberalize politics. Biya had declared when calls for political reform started that *"Je l'ai dit et je le maintiens, la conférence nationale est sans objet pour le Cameroun"* ('I insist that the National Conference is baseless in

²⁰¹ *Ibid.*

²⁰² World bank in Cameroon, <<https://www.worldbank.org/en/country/cameroon/overview>> accessed 1 September 2019.

Cameroon').²⁰³ In the end as table 3 in Chapter 1 shows, the first significant revision to the Cameroonian constitution was effected in 1996.²⁰⁴ The Cameroonian case shows consequently, as claimed in Chapter 3, that formal change usually follows real constitutional change. In chapter 4 also, it was pointed out that formal change plays a very significant role in preventing a real constitutional relapse or degeneration. In the Cameroonian case, the revision of the formal constitution occurred almost 5 years after prospects for real constitutional change had been lost though with some dividend paid already: multipartyism. At this time, there was already a relapse to pre-1989 authoritarian strategies, such that by the time the formal changes were being effected, there had already been a substantive regression. Consider for instance that in 1992, following the flawed elections, Biya resorted to the revised state of emergency law and subsequently placed an entire region under heavy police presence.²⁰⁵ Several opposition figures, such as John Fru Ndi, were also physically arrested or placed under house arrest, a strategy that was commonly used under Ahidjo's reign.²⁰⁶

In any case, the formal revisions of 1996 did not result in a normatively attractive formal constitution to the extent that enormous powers are still vested in the president and democracy-supporting rights are subject to claw-back clauses. The President is for instance vested with the duty of ensuring "respect for the constitution".²⁰⁷ No term limit is imposed on him.²⁰⁸ He is also solely responsible for defining the policy of the state. The revised 1996 constitution provides in this regard that "the Government shall implement the policy of the Nation as defined by the President of the Republic".²⁰⁹ The President also appoints the Prime Minister who heads the government.²¹⁰ He similarly participates in the appointment of the Ministers that run the government.²¹¹ In effect, actors are answerable to the President and there is no

²⁰³ George Ngwane, 'Opposition Politics and Electoral Democracy in Cameroon,' (n 67 above).

²⁰⁴ On presidential influence, see Randy Joe Sa'ah, 'President Paul Biya: Cameroon's 'Lion man' BBC New,' 6 November 2012 <<https://www.bbc.com/news/world-africa-20219549>> accessed 8 November 2020.

²⁰⁵ Human Rights Watch, *Human Rights Watch World Report 1992 - Cameroon*, 1 January 1992, <<https://www.refworld.org/docid/467fca3e23.html>> accessed 29 May 2020. See also, John Makum Mbaku, 'Decolonisation, reunification and Federation in Cameroon,' in John Makum Mbaku, Joseph Takougang (eds) *The Leadership Challenge in Africa: Cameroon Under Paul Biya*, (Africa World Press, Eritrea, 2004) 34.

²⁰⁶ Francis B. Nyamnjoh, 'Mass Media and Democratisation in Cameroon in the Early 1990s,' (Langaa Publishers, Bamenda, 2011) 20.

²⁰⁷ Article 5, Constitution of Cameroon.

²⁰⁸ Article 6, Constitution of Cameroon.

²⁰⁹ Article 11, Constitution of Cameroon.

²¹⁰ Article 10, *Ibid.*

²¹¹ *Ibid.*

separation of state from government in practice. He is allowed to table bills in Parliament and can for that reason use his party dominance to pass whatever legislation he pleases.²¹² In addition, article 28 of the Constitution provides that he can to legislate by way of ordinances.²¹³ Likewise, the powers of Parliament to check the president are highly curtailed. For instance, while he is empowered to “message” the National Assembly, the Senate or the two houses, they are not allowed to deliberate/debate that message in his presence by dint of article 32 of the Constitution.²¹⁴ The propensity of Parliament to act as an institution of control of the powers of the president is thus whittled down by these formal proscriptions.

In addition, various claw-back clauses in the formal constitution enable the CPDM-dominated parliament to make use of other elements of the real constitution especially ordinary legislation to stifle democracy. Freedom and security under the formal constitution is “subject to respect for the rights of the others and the higher interest of the state”;²¹⁵ the right to settle anywhere and to move is predicated upon “statutory provisions concerning public law and order, security and tranquility”. While the home is inviolable, a search can be conducted “by virtue of law”; privacy is protected, though interference with correspondence is allowed “by virtue of decisions emanating from the judicial power”.²¹⁶ While no person can be harassed on the grounds of his or her origin, religious, philosophical or political opinions or beliefs, this protection is subject to “respect for public policy”.²¹⁷ These formulations allow the state a wide margin to intervene and violate rights while appearing to respect the principle of legality. As a result, Cameroon retains several repressive laws, including those criminalizing conduct that would otherwise be protected by the freedom of speech. These laws form the basis of what Fombad has called “judicial” and “administrative” controls that have been used to stifle the freedom of expression.²¹⁸ Also, the enforcement of “law and order” in Cameroon is undertaken under a

²¹² Article 25, Constitution of Cameroon.

²¹³ Article 28, Constitution of Cameroon.

²¹⁴ Article 32.

²¹⁵ Preamble.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ See Charles Manga Fombad, ‘Freedom of Expression in the Cameroonian Democratic Transition,’ (1995) 33 (2) *The Journal of Modern African Studies* 215- 218. see also. Joseph Takougang, *The Press and The Democratization Process In Africa: The Case of the Republic of Cameroon* (1995)

legislative framework that is often predatory towards rights and liberties. Abel Enyinga argues in this regard that:

The notion of public order does not have in Cameroon the same meaning as elsewhere, even in France. In French public law, public order refers to the minimum conditions considered necessary for the maintenance of a normal social life, i.e., security of persons and property, sanitation, peace and tranquility, etc. In Cameroon however, “public order” has been transformed and now comprises two fundamental principles: the maintenance of the political status quo and implicit in the first, the retention in power... All acts, all proposals, and even all abstentions, capable of being interpreted by the regime as bringing into question one or another of these fundamental principles, are treated as consisting of grave threats to public order and consequently, as instances of subversion subject to prosecution.²¹⁹

On the question, therefore, whether Cameroon has a normatively attractive formal constitution, the answer is negative. The dominant answer from interview participants was that there was a need to review, if not overhaul, the entire constitution.²²⁰ However repressive state action is, it still has formal legality. In this sense, an enabling legal environment is created for the survival of de facto authoritarian norms, ensuring their stability. The only improvements are the entrenchment of multi-party politics, the creation of a Constitutional Council (its effectiveness notwithstanding), and the bicameral legislature (despite the design limitations associated with its empanelment).

In terms of the relationship between Cameroon’s formal constitutional change processes and its real constitution, it is fair to say these have mostly led to authoritarian consolidation. In respondent G’s, “the country’s constitution is like a toy”.²²¹ Biya’s term was scheduled to end in 2008 because the 1996 Constitutional Amendments had limited the number of presidential terms to two.²²² However, he orchestrated an amendment that enabled him to contest again for another term. The use of formal constitutional revision in this way to entrench authoritarian norms and practices has been a common practice both before and after the TWD. For instance, the 1970 amendment that proscribed the holding of any other office by the Vice President was significant in that it essentially changed the arrangement in terms of which the Prime Minister was also the Vice President.²²³ This rendered the position of the Prime Minister less influential than was previously thought. Also, the 1972 enactment led to

²¹⁹ See Dibussi <<https://www.dibussi.com/2007/11/trail-of-death.html> > accessed 22 August 2019.

²²⁰ Interview with Gregory (Presudoname), Younde 10 March 2020; Interview with Eric Chinje (above); Interview with Chofo (note 3 above); Interview with Jean, Younde Cameroon, 11 March 2020.

²²¹ Interview with Gregory, Younde, Cameroon 10 March 2020.

²²² J Butty, ‘Cameroon’s Parliament Lifts Presidential Term Limit,’ Voice of America. 11 April 2008.

²²³ *Ibid.*

the establishment of what was perceived to be a new outfit, the United Republic of Cameroon, but simply conferred even greater powers on President Ahidjo – the father of the nation.²²⁴ Further, the 1984 amendment, which followed tussles between President Ahidjo and President Biya, following the former's resignation in 1982, was a final de jure blow to Anglophone Cameroonians' claim for constitutional recognition to the extent that it changed the name of the country from the United Republic of Cameroon to the Republic of Cameroon.²²⁵ This particular amendment affected the formal separation of state from government by doing away – temporarily – with the position of Prime Minister, but most importantly by changing the hitherto terms of accession to the presidency from the Prime Minister to the speaker of the National Assembly.²²⁶ The 1996 amendment that followed the 1992 political liberalisation saw the extension of the presidential term limit from 5 years to 7 years.²²⁷ Though this amendment introduced some improvement, such as the creation of a Senate as an Upper House, it also fostered constitutional dismemberment. In Fombad's view:

the amended 1996 Constitution turned out to be far more illiberal and restrictive than the original 1972 Constitution. It reinforced the already highly centralized autocratic system by creating what effectively amounted to an "imperial" President of the Republic whilst considerably weakening the role of both the legislature and the judiciary.²²⁸

While, therefore, formal change may not matter as a trigger factor for real constitutional change, the failure to divest the president of his vast formal powers under the 1972 constitution during the constitutional moments of the early 1990s, may be to blame for the poor democratic outcome and credentials afterwards. On formal powers, Morse contended in an interview that it is not, in fact, the informal aspects of

²²⁴ Mark Dike DeLancey, Mark W. Delancey, Rebecca Neh Mbuh, 'Historical Dictionary of the Republic of Cameroon' (2019: 5th ed.) 32-33. See Martin Ayong Ayim, describing the 1972 referendum as 'illegal.' Martin Ayong Ayim, *Former British Southern Cameroons Journey Towards Complete Decolonization, Independence & sovereignty: A comprehensive Compilation of effort and Historical Documentation Vol 1.* (2010: Authorhouse) 101.

²²⁵ See C Fombad 'An Experiment in Legal Pluralism: The Cameroonian Bi-Jural/Uni-Jural Imbroglia' (1997) 16 (2) *University of Tasmania Law Review* 212 describing the 1984 amendment as 'the last nail on the coffin' See also in Ngwa, Canute Ambe, Funteh, Mark Bolak *Crossing the Line in Africa: Reconsidering and Unlimiting the Limits of boarder within Contemporary Value* (2019: Langaa Research and Publishing Common Initiative Group, Bamenda) 360.

²²⁶ Aime above.

²²⁷ *Ibid.* See also JA Amin, 'Understanding the protest of February 2008 in Cameroon,' (2012) 58 (4) *Africa Today* 21 at 28. CM Fombad, 'Protecting constitutional values in Africa: a comparison of Botswana and Cameroon' 36 (1) *The Comparative and International Journal of Southern Africa* 89-90.

²²⁸ CM Fombad, *Cameroon's Emergency Powers: A Recipe for (Un) Constitutional Dictatorship?* (2004) 48 (1) *Journal of African Law* 68.

the real constitution that matter only, because if that were the case, there would be no need for constitutional revision to be made or laws to be passed by Cameroon, as is always the case.²²⁹ Informal politics – the neopatrimonial set-up – is pursued through a formal apparatus, and thus the regime is indeed concerned about formal rules. Morse observed in the interview:

the formal prescriptions in the Cameroonian constitution have not changed in a democratic or liberal manner... you still have ... provisions that ... basically give the government the power to declare states of emergency and impose curfews. And these types of things are very anti-democratic. So, I understand the constitution in Cameroon, both in its formal structure and in practice, is backing the trend.²³⁰

For Morse, further, the state always has a hidden agenda in enacting legislation in that, while it would outwardly seem to be concerned about a legitimate issue – such as the Anglophone situation – it would use new laws to empower the President to set the parameters for addressing the issue, thus centralizing his control. He explained further:

In Cameroon we have the special-status bill. Part of it is legitimacy-[communicating] to the international community, [that we] are making concessions, we made these rules. Part of it is perhaps to signal to the regime supporters, to Francophones, “look we are doing everything that we can to resolve the crisis, look at what we offered the Anglophones, special status. You don’t even have the special status.” But at the same time the special-status bill has formal elements that give the regime power, particularly for Cameroon it’s the power of appointment and the ability to centralize appointment.²³¹

In conclusion, formal powers matter in Cameroon. But the 1996 constitutional revision, following the liberalisation of politics in the early 1990s, far from consolidating the incipient shift to liberal democracy, in fact reserved enormous powers in the hands of the President and introduced claw-back clauses that have allowed the use of ordinary legislation to stifle rights.

5.5.3.2 Existence of effective judicial review

Cameroon’s legal order has not, since the TWD, benefited from judicial review in spite of its conferring this power on the Constitutional Council in 1996.²³² Unlike other institutions of a similar stature, members of the Council are not independent, nor have citizens had direct access to it to challenge constitutional breaches. In Agendia’s

²²⁹ Skype Interview with Jonatan Morse, 15 January 2020.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Charles M Fombad ‘The New Cameroonian Constitutional Council in a Comparative Perspective: Progression or Retrogression? (1998) 42 (2) Journal of African Law 172 at 186.

assessment, “the judiciary is presented as free but judges face serious backdoor intimidation, extortion and bribery”. Some are punished through punitive transfer and others sent to early retirement.”²³³ The President, as Okeoga explained, chairs the Higher Judicial Council, the highest body on judicial matters.²³⁴ In this set-up, he adds, “there is no way a judge will be bold enough to perform his duties without fear or favour not to talk of enforcing long lasting liberal and democratic values.”²³⁵ The impression gained from the literature is thus that the institution of judicial review is under capture by the ruling regime for various reasons. One of the design limitations that are thought to occasion its poor performance is citizens’ inability to access it. This Chofo reasoned, “has a serious impact.”²³⁶ As for the court system, he argued, it “is virtually reserved for the top ranking an ordinary citizen cannot bring a case.” According to Morse, “the courts in Cameroon” are “entirely beholden to the regime. The courts look like what they were in Kenya under Moi.”²³⁷ This he agreed, was because partly of how the formal constitution had designed the judicial power. He observed:

the judiciary in Cameroon unlike in Kenya is subordinate to the executive... The Constitution says that the president is the guarantor of judicial independence, and so the President is responsible for the appointments, promotion and disciplinary sanctions, under the advice of a Higher Judicial Council. But, in the constitution too, the President chairs the Higher Judicial Council. Thus, it’s not independent. He appoints most of its members, and therefore wields ultimate control over the careers of justices and magistrates. Magistrates enjoy tenure but the President as the guarantor of judicial independence can exercise disciplinary standards to transfer justices to courts, stifle promotions, and use temporary dismissals or impose early retirement. Because power is centralised, the judiciary depends on the executive for its budget and financing, so the President can use his formal power to undermine the judiciary by delaying salaries.²³⁸

Though there are also other judicial organs, such as the Supreme Court, which have the power to review the constitutionality of democratic processes, they are only effective in “low stakes politics.” For instance, in the several elections, the Supreme Court has previously invalidated individual parliamentary seats.²³⁹ Where the stakes are higher, however, a predictable result ensues – the court showing sensitivity to the political environment. As G put it: “After the last presidential elections in 2018, all petitions filed by the opposition, with glaring and indubitable evidences were all

²³³ Agendia Aloysius (note 31 above).

²³⁴ Interview with Darlington Okeoga, Abuja, Nigeria, 24 March 2020.

²³⁵ *Ibid.*

²³⁶ Interview with Chofo (note 3 above).

²³⁷ Interview with Morse (note 77 above).

²³⁸ *Ibid.*

²³⁹ See Ngwane (note 67 above).

thrown out.”²⁴⁰ He also explained that “Socio-Political Upheavals in the North West and South West Regions of Cameroon are a current example of how courts could not be bold enough to enforce liberal and democratic values in Cameroon.”²⁴¹ While as ordinary courts, they do not have jurisdiction over the Presidential elections, they are also subject to his control and at times available for his use. Morse explained in this regard:

Now there are a number of other special courts in Cameroon that give the President, because he has the power of appointment, this informal ability to control and manipulate politics. For instance, in 2011, they created the special criminal court which was meant to deal with high profile corruption cases. But the President can use this – because he is the one who appoints the special criminal court and budgets for it – to target opponents. The most consequential change is the 2014 Anti-Terror law which defines terror so broadly that any activity that threatens the territorial integrity can allow the government to fast track the trial through the military courts. That’s why I say Cameroon also has an element of a military regime. And now it prosecutes most of its opposition in military tribunals. So, it doesn’t depend on the courts.²⁴²

In a society whose Parliament is subservient in practice to the executive, one would expect a judiciary whose legal security is entrenched. That is not, however, the case in Cameroon. The President is not only vested with the power of appointing members of the bench and the legal department in terms of article 36(3) but he is also required, as already pointed out, to “guarantee the independence of judicial power”.²⁴³ Further, while a “Constitutional Council” has been established and vested with jurisdiction “in matters pertaining to the Constitution”, the President is responsible for appointing its members. He is also one of the very few persons that can refer a matter to the Constitutional Council.²⁴⁴ By and large, thus, the semblance of judicial review as practiced in other societies remains, in the case of Cameroon, a paper imitation. Fombad reflected on this state of affairs as follows:

In sealing the only viable outlet for challenging unconstitutional acts and electoral fraud by injudiciously opting for the obsolete and discredited mechanism of a politically controllable and manipulable Constitutional Council, the authors of the 1996 constitutional amendment have left Cameroon moving dangerously into an uncertain 21st century.²⁴⁵

²⁴⁰ Interview with G.

²⁴¹ Interview with H, Bamenda, Cameroon, 24 February 2020.

²⁴² *Ibid.*

²⁴³ Article 36 (3).

²⁴⁴ Articles 47 (2); 51 (2).

²⁴⁵ Charles M Fombad, ‘The New Cameroonian Constitution in a Comparative Perspective: Progress or Retrogression?’ (1998) 42 (2) *Journal of African Law* 172 at 186.

The idea that the judiciary can check the political arms of government is thus largely illusory in Cameroon, in spite of the existence of the Constitutional Council and other courts.²⁴⁶ The point made here is that it is noble for Cameroonians to have envisaged an institution with the stature of their Constitutional Council, but the fact that that institution is subservient to the President divests the institution of its ability to change the real constitution through informal constitutional change. When the Council enforces the constitution by interpreting it in a particular way or by sanctioning non-compliant practice, it contributes to authoritarian entrenchment.²⁴⁷ It is no wonder that Fombad describes the Constitutional Council as a “Faithful Servant of an Unaccountable System.”²⁴⁸ While some aspects of the real constitution, such as neopatrimonialism, can easily avoid judicial review, this state of affairs means that other authoritarian norms, such as repressive laws that stifle freedom of expression, are left unattended to. As a result, the judicial machinery is essentially part of the formal state apparatus, playing the usual strategic role that courts play in authoritarian regimes,²⁴⁹ and also, in the case of Cameroon,²⁴⁹ creating a conducive environment for the survival of authoritarian norms and practices.

5.6 Concluding observations

Cameroon’s political order is repressive and sustained by a stable formal and real constitution, both of which are authoritarian. A review of Cameroon’s political life reveals that, like many other African countries, colonialism generated a huge corpus of authoritarian practices which remained unattended to at independence. When President Ahidjo took over from the colonial government, he entrenched these practices and institutionalized them. Paul Biya’s turn came about when Ahidjo handed over power to him. He did not purposefully address the problems associated with the norms generated by the colonial encounter, let alone the ones that Ahidjo had fostered. At first, he embarked on a programme that could have set the stage for the establishment of a liberal order in practice – his “New Deal”. Unfortunately, Biya did

²⁴⁶ *Ibid.*

²⁴⁷ For a nuanced understanding of the Cameroonian constitutional council, see, Charles Fombad, *The Cameroonian Constitutional Council: Faithful Servant of an Unaccountable servant* in Charles M Fombad (eds) *Constitutional Adjudication in Africa* (2017, Oxford University Press, Oxford) at 80.

²⁴⁸ *Ibid.*

²⁴⁹ T Ginsburg & T. Moustafa ‘Introduction: Functions of Courts in Authoritarian Regimes,’ in T Ginsburg & T. Moustafa (eds.) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008: New York, Cambridge University Press) 1.

not implement his vision and the state of affairs has remained as it was when he took over power. Even at the dawn of the TWD, the minimal reforms introduced did not supplant the norms enforced by the colonial powers, the Ahidjo regime and under Biya's reign.²⁵⁰ Instead, Cameroon's real constitution slid back into authoritarianism, a position from which it has never recovered.

Over the years, after the TWD, there have been token reforms of the legal and political order both towards and away from liberalism. These have not, however, succeeded in changing certain stubbornly problematic aspects of the legal order. Central among them is that the Anglophone problem has remained largely unattended to and prospects for democratic change have diminished. As a result, the state of liberal democracy in Cameroon remains bothersome, notwithstanding the fact that its formal constitution is stable and makes reference to these ideals. Though there existed prospects for leadership change through democratic politics in the early 1990s, these have since dissipated. Elections since 1992 are a mere legitimating exercise and are not intended to secure leadership change. Change by devices such as term limits has also been thwarted by formal constitutional amendment. The exercise of democracy-supporting rights, such as freedom of speech and expression, exposes individuals and associations to the coercive force of the state. It is no wonder that statistics from reviews such as those conducted by Freedom House have consistently classified Cameroon as being an authoritarian state from 1989 at the dawn of the TWD in Africa through to 2019. Its real constitution is thus stably authoritarian, which is obviously the wrong kind of stability.

It has been explained that a number of factors are behind the endurance of authoritarian constitutionalism in Cameroon. The actor-based conditions that were theorized under Chapter 4 are largely absent. Failure to transition is attributed in this regard on the one hand to the absence of any change to the incumbent political actor, the lack of effective pro-democracy voices and the absence of any genuine interest in the promotion of democracy, particularly by the United States. On the other hand, despite various attempts at democratic transition, the absence of a genuinely liberal constitution as well as counterproductive formal changes enabled easy regression to

²⁵⁰ See, C Fonchingong, 'The Travails of Democratization in Cameroon in the Context of Political Liberalisation since the 1990s,' (2004) 3 (1) *African and Asian Studies* 33; Mbaku, John Mukum, 'Effective constitutional discourse as an important first step to democratization,' in *Africa Journal of Asian & African Studies*

and consolidation of authoritarianism. Though courts elsewhere have played a significant role in addressing democratic pathologies, particularly in emerging democracies,²⁵¹ the absence of both de facto and de jure independence in Cameroon after the TWD has rendered the institution of judicial review inefficacious. Underlying the dismal performance of various actors are certain structural conditions, namely Cameroon's relative economic wellbeing, the neo-patrimonial nature of society, the Anglophone problem, and its relationship with France. Controlling as they do a political system that is less vulnerable to external pressures, save for those with vested interests, such as France, the President and his party, the CPDM, remain the core initiators and managers of political reform. Given the absence of institutional procedures within the CPDM to facilitate the transfer of power, prospects for democratic change and disestablishment of de facto authoritarian norms will only improve after Biya's exit from the political scene, which is further unlikely to happen through a democratic election. Until then, Cameroon's authoritarian real constitution is likely to endure.

²⁵¹ J Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation,' 38 *Yale J. Int'l L.* (2013) <<http://digitalcommons.law.yale.edu/yjil/vol38/iss2/4>> 12 December 2019.

CHAPTER SIX: TRANSFORMATION TO AND ENDURANCE OF A HYBRID CONSTITUTION IN KENYA

6.1 Introduction

Kenya is one of the countries in Sub-Saharan Africa that did not successfully transition to a democratic constitution after the TWD. Like in most African countries, the TWD set into motion a robust institutional reform agenda that culminated in a new constitution in 2010.¹ The description of Stephen Ndegwa of the 1997 elections as “a disappointing confirmation of the extent to which the country's democratic transition has stalled” reveals the transitional trajectory taken just after the TWD.² Since 2002 and to date, Freedom House considers Kenya as a “partly-free” country.³ The quest for a democratic order, one would imagine, should have been satisfied following the enactment of normatively attractive constitution in 2010 through a process that is considered “people driven”.⁴ Instead, the fact that power cannot easily change hands at the instance of an election remains a reality. In virtually every election, competitive authoritarian strategies, epitomised by police brutalities and skilful manipulation of the electoral process in favour of the incumbent power holders, come into play.⁵ While one might argue that Kenya is on the way to democracy, the apparent stability of Kenya’s real constitution both before and after 2010 creates an impression that Kenya’s hybrid status was in fact the final transitional outcome after all.

This chapter, accordingly, seeks to understand Kenya’s partial transition and the stability of her real constitution that ensued. As observed under Chapter 3, it relies on

¹ For an understanding of the institutional reform process in Kenya, see Migai Akech, *Institutional Reform in the New Constitution of Kenya* (ICJ, Nairobi, 2010).

² Stephen N. Ndegwa, ‘The Incomplete Transition: The Constitutional and Electoral Context in Kenya,’ (1998) 45 (2) *Africa Today: The Future of Democracy in Kenya*. 193-211; Mai Hassan, ‘Continuity despite change: Kenya’s new constitution and executive power’ (2015) *Democratization* 22 (4) 587.

³ See Freedom House, ‘Freedom in the World Kenya,’ <<https://freedomhouse.org/country/kenya>> accessed 8 November 2020; (“Kenya is a multiparty democracy that holds regular elections, but its political rights and civil liberties are seriously undermined by pervasive corruption and cronyism, police brutality, and ethnic rivalries that are exploited by political leader”); Freedom House, *Freedom in the World 2004 - Kenya*, 18 December 2003, <<https://www.refworld.org/docid/473c549dc.html>> accessed 2 June 2020.

⁴ Willy Mutunga, ‘People Power in the 2010 Constitution: A Reality or an Illusion?’ *The Elephant* 6 March 2010 <<https://www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/>> accessed 8 November 2020; See also Grace Maingi, ‘The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women’s Rights’ (2011) *Feminist Africa* 63.

⁵ Aziz Rana, ‘Kenya's New Electoral Authoritarianism,’ *Boston Review*, <<http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism>> accessed 8 November 2020.

information available in existing literature, primary materials such as case law and empirically collected data to understand its transitional outcome. Interviewees in the case of Kenya included a judge, employees of parliament, academics, lawyers, other government employees. All these were, as pointed under Chapter 1, selected randomly on the basis of their willingness to participate. It was observable in the case of Kenya that fewer interviewees sought anonymity when compared with those in Cameroon.

In the case of Kenya, there are a number of interwoven conditions that have worked against complete transition. These include that there were minimal reforms at the dawn of the TWD, partly because there wasn't a substantial change to incumbent power holders and also because of the obstructive role that some international actors played in the early 1990s. With this leverage, incumbent power holders carefully controlled reforms to seemingly comply with the bare minimum demands of the international community while leaving the formal and informal institutional and legal apparatus that undergirded authoritarian rule intact. The problem with Kenya's constitutional development had been perceived, by pro-democracy forces, to be associated with the frequency of textual change and the resultant institutional arrangements that did not support power diffusion.⁶ They thus thought that the solution to transition lay in a new constitution with entrenched rules of formal change. As these groups pursued constitutional reform, new politicians were assimilated into the constitutional order and its political economy. Though therefore the 2010 Constitution is normatively attractive thanks to democracy-demanding groups, it was adopted way too late and has in the main simply helped to guard against change towards an authoritarian constitution. Judicial review, especially after 2010, has consequently been used as a "shield" against, rather a "sword" for attacking, real authoritarian norms and practices. The actor-based successes and failures registered in the political order are in turn attributed to two main structural conditions: first, Kenya's relative economic affluence and the geopolitical interest that other nations have in it; and, second, the neopatrimonial nature of Kenyan society and ethnic cleavages, both of which hinge on the land and settlement.

⁶ See, Githu Muigai, 'Amending the Constitution: Lessons from History,' (1993) Vol. 2, No. 3, *The Advocate*; Media Development Association and Konrad Adenauer Foundation, <History of Constitution Making in Kenya,> (2012). <http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057> accessed 8 November 2020.

This chapter expounds this argument and is structured as follows: The first section describes the social, political and institutional context within which Kenya's real constitution has developed and been enforced. The second presents the pre-1989 constitutional picture to show how authoritarian norms and practices have developed and been entrenched over time. This is followed by a section that addresses the transition from an authoritarian constitution to Kenya's present hybrid one. The fifth section examines at close range the contending political interests that contributed to the transitional outcome. This section has three sub-sections: the first considers the actor-based conditions, second looks at the underlying structural conditions while the last considers the design based: change to formal powers and existence of judicial review. The last section makes some concluding observations.

6.2 Social, political and institutional context

A country in East Africa, Kenya borders Uganda to the west, Tanzania to the south, Ethiopia and South Sudan to the north and Somalia to the east.⁷ It has a population of about 47 million people according to a 2019 survey.⁸ It is multi-ethnic and multi-religious with approximately 45 official ethnic groups and a 11 percent Muslims and 83 percent Christian population.⁹ The largest tribes in Kenya are the Kikuyu, Luhya, Luo, Kamba and Kalenjin.¹⁰ Three out of the four presidents that Kenya has had have been from the Kikuyu community whose members also occupy most positions in public offices according to Kenya's National Cohesion and Integration Commission.¹¹ Because of this disparity, as is revisited in the section addressing structural conditions, ethnic cleavages are an important part of Kenya's public life, and political affiliation is often mobilized on ethnic grounds especially after the introduction of multi-party "democracy" in 1991.¹²

⁷ East African Community, 'Republic of Kenya: Key Facts,' <https://www.eac.int/security/index.php?option=com_content&view=article&id=67&Itemid=143> accessed 8 November 2020.

⁸ Kenya National Bureau of Statistics, 2019 Kenya Population and Housing Census Results, <<https://www.knbs.or.ke/?p=5621>> accessed 8 November 2020.

⁹ On their relations, see Martin Olando Wesonga, 'Christian-Muslim Relations in Kenya,' (2007) 106:2, *The Round Table*, 225-229.

¹⁰ Hillary Orinde, Census report: Kenya's biggest ethnic communities listed *The Standard*, February 21 2010 <<https://www.standardmedia.co.ke/article/2001361344/kenya-s-biggest-ethnic-communities-listed#>> accessed 8 November 2020.

¹¹ See, National Cohesion and Integration Commission, 'Towards National Cohesion and Unity in Kenya,' Ethnic Diversity and Audit of the Civil Service Report 2016.

¹² Jacob M. Mati 'Ethnicity and Politics in Kenya,' in Steven Ratuva (eds) *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan, Singapore, 2019); Rok Ajulu (2002) *Politicised Ethnicity*,



A map of Kenya

Source: Britannia Encyclopaedia.¹³

Kenya's Governance is organised under her 2010 Constitution. It is a Presidential system with the President being both the Head of State and Government.¹⁴ The executive formation is radically different from the pre-2010 one.¹⁵ The executive consists of the President and a Deputy President, both of whom are popularly elected for a five-year term.¹⁶ Before 2010, the President simply appointed the Vice President and could sack him or her at any time.¹⁷ Members of the Cabinet, before 2010 known

Competitive Politics and Conflict in Kenya: A Historical Perspective, (2002) 61(2) *African Studies*, 251–268; Atieno-Odhiambo ES 'Hegemonic enterprises and instrumentalities of Survival: Ethnicity and Democracy in Kenya,' (2002) 61(2) *Afr Stud* 223–249; Michael and Mwangi Kimenyi, 'Voting in Kenya: Putting Ethnicity in Perspective,' (2008) 2(2) *J East Afr Stud* 272–289.

¹³ See Britannica Encyclopedia, Kenya, <<https://www.britannica.com/place/Kenya>> accessed 8 November 2020.

¹⁴ Chapter 9, Constitution of Kenya.

¹⁵ Ben Sihanya, 'Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects, FES Kenya Occasional Paper, No. 5 ISBN: 9966-957-20-0 <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/38845/full%20text%20.pdf?sequence=1>> accessed 8 November 2020

¹⁶ *Ibid.*

¹⁷ See Migai (note 1 above) 26 and 28.

as Ministers, were politicians appointed from Parliament by the President.¹⁸ After 2010, they are now known as Cabinet Secretaries and are not members of Parliament.¹⁹

This reconfiguration applies to Kenya's Parliament, too.²⁰ Whereas Kenya's Parliament previously consisted of just the National Assembly, there is now a Senate also.²¹ The National Assembly represents "the people" from all 290 constituencies.²² Its membership includes special seats for women, known as women representatives, who are forty seven in number from each county.²³ It also has twelve members who "represent special interests including the youth, persons with disabilities and workers".²⁴ The National Assembly participates in approving the National Budget and also in the oversight of how these funds are actually used.²⁵ The Senate, for its part, which has members from all of Kenya's 47 devolved units, as well as special seats, is designed to essentially protect the devolved government system.²⁶ It also participates in approving laws relating to devolved governments, in the oversight of their expenditure and more importantly in the impeachment of the President.²⁷

Other than the political branches, the constitutional order also includes the judiciary as well as Independent Offices and Commissions.²⁸ Most of these commissions and offices essentially took over powers that were previously exercised by the President or his appointees.²⁹ These offices include the National Police Service,³⁰ the National Defence Council,³¹ the Salaries and Remunerations Commission,³² the Attorney General,³³ the Judicial Service Commission,³⁴ the Office of

¹⁸ Amos Kareithi, 'From Jaramogi Woes to Taming Ruto: Why Number Two Seat is "Jinxed"' *The Standard* 7 July 2019.

¹⁹ Constitution of Kenya, 152 (3).

²⁰ See Sihanya (note 15) at 21; Migai (note 1 above) at 28. Kirui Kipkemoi and Murkomen Kipchumba, 'The Legislature: BiCameralism under the new Constitution', Constitution Working Paper No. 8, Society for International Development (SID), 2011.

²¹ See Chapter 8, Constitution of Kenya

²² Article 95 (1) Constitution of Kenya.

²³ Constitution of Kenya, 97 (1) (b)

²⁴ Constitution of Kenya, 97 (1) (c)

²⁵ *Ibid.*

²⁶ Constitution of Kenya, 98.

²⁷ *Ibid.*

²⁸ See Sihanya, (note 15 above).

²⁹ *Ibid.*

³⁰ Article 243, Constitution of Kenya

³¹ Article 241, Constitution of Kenya.

³² Article 230, Constitution of Kenya.

³³ Article 156, Constitution of Kenya

³⁴ See Constitution of Kenya, 171, 172 and 173.

the Director of Public Prosecutions,³⁵ the National Land Commission,³⁶ the Teachers' Service Commission,³⁷ and the Independent Electoral and Boundaries Commission, to list just a few.³⁸ Though the President appoints members of these offices and commissions, entry to them is through a competitive process involving public vetting and parliamentary approval.³⁹ Security of tenure is guaranteed for members of these commissions to the extent that for a person to be removed from office, a tribunal must be set up to try the charges against him or her.⁴⁰

Another set of institutions are the so-called "County Governments".⁴¹ The Constitution establishes a devolved system of governance essentially meant to substitute the pre-2010 arrangements: Provincial Administration and local governments. There are forty-seven Counties and County Governments established under the 2010 Constitution.⁴² Each county has its own popularly elected legislative body, the County Assembly, and an executive body, too, the County Executive, which consists of a popularly elected Governor and his Deputy as well as appointed members to the County Executive who are approved by the county assemblies.⁴³ Functions are shared between the National Government and the counties, though the National Government is still chiefly vested with policy-formulation functions.⁴⁴ These county governments, just like the National Government, have a five-year lifespan between elections.⁴⁵ Elections for the position of President, Members of Parliament and officials of the County Government take place at the same time.

6.3 Pre-1989 Constitutional conditions

Though Kenya did not experience dramatic constitutional ousters and subjugations like the ones that West African countries have been party to,⁴⁶ its de facto constitution was

³⁵ Article 157, Constitution of Kenya

³⁶ Article 67, Constitution of Kenya.

³⁷ Article 237, Constitution of Kenya

³⁸ Article 88, Constitution of Kenya.

³⁹ Constitution of Kenya, Chapter 15.

⁴⁰ Article 250, 251, Constitution of Kenya

⁴¹ Constitution of Kenya, Chapter 11.

⁴² Article 6, and 1st Schedule, Constitution of Kenya 2010.

⁴³ See Chapter 11, Constitution of Kenya.

⁴⁴ *Ibid*, Schedule 4.

⁴⁵ *Ibid*.

⁴⁶ Boubaca N'diaye, 'How Not to Institutionalize Civilian Control: Kenya's Coup Prevention Strategies,' 1964-1997 (2002) 1 *Armed Forces & Society* 619.

also authoritarian before the TWD.⁴⁷ From the colonial through to the post-colonial period, the idea of self-rule and the protection of political rights has been quite elusive. As in other African countries, the colonial administration was responsible for introducing democracy but as mentioned in Chapter 1, in a distorted form. The colonial authoritarian mode of governance was inherited by the African elites that were bequeathed power by the British, its terms being that if an individual or community supported the authority of the day, there would be an assurance of personal security and economic wellbeing.⁴⁸ This mode had been applied to communities that either resisted or collaborated with the British and also to the few individuals that were selected to serve as paramount chiefs.⁴⁹ These chiefs were appointed by the colonial administrators and were afforded great privileges and opportunities.⁵⁰ Their children accessed formal education as well as cheap or free labour like the white settlers and also had large amounts of land and some aspects of white privilege.⁵¹ Samson Ndai consequently remarks that Kenyatta had “accepted the colonial patron-client system that rewarded friends with public resources including land”.⁵² The understanding that was inculcated in the political consciousness of both the elites and the general populace during that epoch was that closeness to political power was a great source of personal advancement. Though this understanding could also have had pre-colonial foundations, it guided the relationship between individuals and the state even in the post-colonial period.

Colonial rule in Kenya had come to an end around 1962 although some Africans and Indians had already been integrated into British-Kenya political

⁴⁷ See PLO Lumumba, ‘A journey Through Time in Search for a New Constitution,’ in Morris Mbondenyi *et al*, *The Constitution of Kenya: Contemporary Readings* (Law Africa, 2011), 13

⁴⁸ Generally see, Henry Amadi, ‘Persistence and Change of Neo-patrimonialism in Post-Independence Kenya,’ (2009) Research Paper Prepared for the Project “Persistence and Change of Neopatrimonialism in Various Non-OECD Regions” Based at the GIGA German Institute of Global and Area Studies, Hamburg Funded by the German Research Foundation (DFG) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.909.9240&rep=rep1&type=pdf>> accessed 8 November 2020

⁴⁹ See e.g. Evanson N. Wamagatta, ‘British Administration and the Chiefs’ Tyranny in Early Colonial Kenya: A Case Study of the First Generation of Chiefs from Kiambu District, 1895–1920,’ (2009) *Journal of Asian and African Studies* 371.

⁵⁰ Benson Okello, *A History of East Africa* (Fountain Publisher, 2002) 157.

⁵¹ Walter Ochieng’, (1980) ‘A Pillar of Conservative Change: The Life and Times of Chief Jairo Okello Anam of Yimbo in Western Kenya, Circa 1880–1967’, in B.E. Kipkorior (ed.) *Biographical Essays in Imperialism and Collaboration in Colonial Kenya*, 178–208. Nairobi: Kenya Literature Bureau.

⁵² Mickie Mwanzia Koster, Michael Mwenda, ‘Introduction’ *Kenya After 50: Reconfiguring Education, Gender, and Policy*,’ (Palgrave Macmillan US, 2016)

institutions especially Kenya's legislative assembly, before then.⁵³ Contrary to the view that the British simply crafted a democratic constitution for Kenya, African nationalists had engaged Thurgood Marshall, an American jurist and civil rights activist, to represent them. Marshall wielded great influence over the process, to the consternation of the British.⁵⁴ In Kibwana's observations, "the Westminster modelled constitutional and legal infrastructure developed by 1963 was the idea for the operationalisation of liberal democracy".⁵⁵ Kamau Kuria described its attractiveness as follows:

American, and above all, English constitutional jurisprudence gave the Kenyan framers their model for self-government under law. Kenya would be a multi-party democracy, with powers divided amongst an independent judiciary, a bicameral legislature and an independent executive. The government's power would further be restrained by a justiciable bill of rights, federalism, a professional civil service, civilian supremacy over the armed forces, a tenured attorney general and restriction on the exercise of emergency powers.⁵⁶

Under the Independence Constitution, the first general elections that were held in Kenya in 1963 are said to have been democratic.⁵⁷ No less than four political parties participated in that election.⁵⁸ The Kenya African National Union (KANU) won with 53.6 percent of the seats in the House of Representatives and 59.18 percent in the smaller house, the Senate.⁵⁹ The rest of the seats were taken up by opposition parties including the Kenya African Democratic Union (KADU) which had 25.83 percent of the seats in the House of Representatives and 27.32 percent of the seats in the Senate.⁶⁰ KANU did not consequently have a super majority in Parliament and could not effect on its own any changes to the 1963 Constitution.

For some reason, the post-colonial government was concerned with formal legality and wanted to be seen as respectful of the rules of the Constitution. The way to

⁵³ See Stanley Rice, 'The Indian Question in Kenya (1923-1924) 2 *The Foreign Affair*, 258. Christopher P. Youn, 'The Threat of Settler Rebellion and the Imperial Predicament: The Denial of Indian Rights in Kenya, 1923' (2016) 12 (2) *Canadian Journal of History* 347-360; Charles O. Oyaya, Nana K. Poku, 'The Making of the Constitution of Kenya: A Century of Struggle and the Future of Constitutionalism,' (New York, Routledge, 2018).

⁵⁴ Mary L. Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya*, (2006) 56 *Duke Law Journal* 745.

⁵⁵ Kivutha Kibwana, 'Unfinished Business: The Transition to Multi-Party Democracy and Kenya's Post December 1991 Electoral Law Reforms,' in Kivutha Kibwana, 'Readings in Constitutional Law and politics in Africa: A Case Study of Kenya' (1998, 215)

⁵⁶ Gibson K Kuria 'Confronting Dictatorship in Kenya' (1991) 2 (4) *Journal of Democracy* 119.

⁵⁷ Rok Ajulu, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective,' (2002) 61:2, *African Studies*, 251-268, DOI:

⁵⁸ Clyde Sanger & J Nottingham, 'The Kenya General Election of 1963,' (1964) *The Journal of Modern African Studies* 20-25.

⁵⁹ *Ibid.*

⁶⁰ *Ibid*; National Elections Data Book by Institute for Education in Democracy (published in 1997).

get around the Constitution for them was to amend it.⁶¹ This could not, however, have succeeded because of the bare majority that KANU had in both houses and given the entrenched formal rules of change.⁶² KADU was consequently co-opted into government and KADU's leader Moi made the Vice-President following the abolition of the office of Prime Minister and its replacement with that of the President.⁶³ This happened just after the elections. The integration of KADU into KANU in turn set in motion a series of formal changes aimed at dismantling institutional structures intended to disperse power.⁶⁴ Other amendments targeted opposition politics, such that by the end of Kenyatta's reign, the first Prime Minister and President, Kenya was a de facto one-party state.⁶⁵

Though, as mentioned, there was never a single incident of violent constitutional ouster, the period between 1964 and 1969 was characterised by comprehensive formal constitutional amendments.⁶⁶ As at 1969, the country's political system had changed from a parliamentary to a presidential one, Kenya's bicameral legislature had been dismantled and supplanted with a single house, the regional governments had been done away with and the procedure for amendment of the constitution had itself been changed so that the process of changing the Constitution was synonymous with that of changing ordinary legislation.⁶⁷ In terms of managing dissent, and following an incident in 1964 just after KADU's dissolution and its assimilation into KANU, twenty-nine right-wing members of KANU defected and formed a new political party, the Kenya People's Union (KPU).⁶⁸ A constitutional amendment was passed to provide that if a person defected to a new party he would

⁶¹ Okoth-Ogendo H.W.O 'The Politics of Constitutional Change in Kenya Since Independence, 1963-1968' (1972) 71 *The African Affairs* 9.

⁶² *Ibid.*

⁶³ Jeffrey Steeves, 'Presidential succession in Kenya: The Transition from Moi to Kibaki (2006) 44 (2) *Commonwealth & Comparative Politics* 211- .

⁶⁴ Okoth-Ogendo H.W.O (note 61 above),

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* See also, N Kamunde-Aquino Kenya's Constitutional History REDD+ Law Project - Briefing Paper <<https://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Kenyas%20Constitutional%20History.pdf>.; PLO Lumumba & M Mbondenyi, M. and S Odero (eds.), *The Constitution of Kenya: Contemporary Readings*, (Law Africa Publishing (K) Limited, 2011), at 36.

⁶⁸ See Peter Anyang' Nyong'o, 'State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism,' 1963-78 (1989) 355 *African Affairs* (Apr., 1989) 229-25.

lose his parliamentary seat.⁶⁹ As a result, a “Little General Election” was held and defecting members from the region whence the President hailed were trounced.⁷⁰ Defectors from the western part of Kenya designated as Nyanza Province won, and became members of KPU in Parliament. These were only eight. In 1969, KPU clashed with President Kenyatta at an event in Nyanza Province and several people were shot. KPU was also banned.⁷¹ The leader of the outfit, Jaramogi Odinga, was jailed and Kenya became a *de facto* one-party state.⁷²

With the dismemberment of provisions that gave a platform to alternative political voices, Kenya had a full-blown authoritarian constitution. During and after this time, extra-judicial killings, the forcible transfer of communities from their ancestral homes, massive plundering of public resources and other phenomena typically associated with authoritarian regimes characterised the political order. Ghai and Cottrell observe in respect to this period that:

The institutions of the government and economy decayed under the shadow of a powerful president and his inner circle. These institutions became merely instruments of support to the ruling party, and even the electoral process was twisted to serve it. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability, such as an ombudsman, and such institutions as existed, like the auditor-general, were rendered toothless. Merit as the criterion for appointment or promotion in public services was replaced by political or ethnic connections, or monetary payments.⁷³

President Kenyatta’s reign came to an end in 1978 following his death.⁷⁴ The Truth, Justice and Reconciliation Commission set up in Kenya in 2008 to investigate historical injustices concluded that during Kenyatta’s time, there were “numerous gross violations of human rights” including “political assassinations of Pio Gama Pinto, Tom Mboya and J.M. Kariuki”, arbitrary detention of political opponents and activists and

⁶⁹ Martin Goeke & Christof Hartmann ‘The regulation of Party Switching in Africa,’ (2011) *Journal of Contemporary African Studies*, 29:3, 263-280, 269.

⁷⁰ George Bennett, Kenya's 'Little General Election' *The World Today* (1966) 22 (8) 336-343.

⁷¹ See, Joel D. Barkan. Okumu J.J., ‘Semi-Competitive’ Elections, Clientelism, and Political Recruitment in a No-Party State: The Kenyan Experience. In: Hermet G., Rose R., Rouquiñ A. (eds) *Elections Without Choice*, (Palgrave Macmillan, London, 1978).

⁷² *Ibid.*

⁷³ Jill Cottrell & Yash Ghai, Constitution Making and Democratization in Kenya (2000–2005) (2007) 14 *Democratisation* 1.

⁷⁴ See BBC, 1978: Kenya’s Founding Father Dies (1978) <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/22/newsid_2500000/2500553.stm> accessed 8 November 2020.

“illegal and irregular acquisition of land by the highest government officials and their political allies.”⁷⁵

Following the death of Kenyatta, Daniel Moi, the former KADU leader that was co-opted into KANU, took over as the President and leader of KANU. His philosophy “Nyayo” (footsteps) meant a commitment to rule in the same manner and style as Kenyatta and to stand for his ideology.⁷⁶ He was not any different from Kenyatta and ruled for four years without any serious political crisis. Things got turbulent for him around 1982, however, and his terms of governance changed, too.⁷⁷ At that time, there was an attempt to establish opposition political parties by alternative political voices. In particular, an avowed KANU opponent, Mr. Jaramogi Odinga, whose party had been banned in 1969 by Moi’s predecessor, Kenyatta, intimated to a gathering in Britain that he and others intended to form a new political party to challenge the status quo of the time.⁷⁸ A constitution for the new political party was under preparation when George Anyona, who was one of the leading proponents of the idea, was arrested on his way to launch the party.⁷⁹ Contemporaneously, there was increasing dissent, even from Moi’s own allies, and to deal with it, Parliament, which consisted of only one party, KANU, under Moi’s chairmanship quickly passed the famous section 2[a] amendment that provided that there would be only one political party: KANU.⁸⁰

The events of that year were worsened by an attempt by Kenya’s military faction to overthrow the government.⁸¹ Whereas there had been an apparently more elaborate plan staged by military officers from the Kikuyu ethnic fraction, a smaller group from the Luo ethnic community hijacked it and made an incomplete and weak attack, which was foiled. In response, President Moi, restructured the military and then became cruel towards his critics, this time drawn from many quarters, including the academy and civil society. He filled the military with loyalists, particularly from his

⁷⁵ Truth, Justice & Reconciliation Comm'n, 'The Final Report of the Truth, Justice & Reconciliation Commission of Kenya,' (2013), <<http://digitalcommons.law.seattleu.edu/tjrc/7>> accessed 8 November 2020.

⁷⁶ Judith M. Abwunza, *Nyayo: Cultural Contradictions in Kenya Rural Capitalism* (1990) 32 2 *Anthropologia* 183.

⁷⁷ Kamau Mutunga, 'Moment of Bravado that Changed Kenya,' *Daily Nation* 31 July 2012; <<http://www.nation.co.ke/lifestyle/dn2/How-1982-coup-changed-Kenya/957860-1467488-13v142az/index.html>>

⁷⁸ Elisha Stephen Atieno-Odhiambo 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya,' (2002) 61:2, *African Studies*, 223-249, 228.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Mutunga (note 77 above).

own Kalenjin tribe.⁸² In this way, he began to create a full-blown *de facto* ethnic state over whose institutions he maintained firm control. President Moi subsequently adopted very heavy-handed tactics and all attempts towards the emergence of opposition groups were dealt with firmly. From 1982 onwards, detention without trial was restored and unfair and politically instigated trials became commonplace.⁸³ Control of movement in and out of the country also became a serious concern for the state, the confiscation of John Mwau's passport and his unsuccessful attempt at getting it through the courts being a ready illustration.⁸⁴ The legal profession, which could have been an alternative voice, was also held captive and, in some cases, Moi would intervene in the Law Society of Kenya elections.⁸⁵ His concern for total control also extended to universities. Moi was the Chancellor of all public universities and teaching members of staff and students who criticised his government found themselves on the receiving end of harsh treatment. He removed the security of tenure of judges and extra-judicial killings became popular.⁸⁶ Kenya's economic conditions also deteriorated and corruption reached alarming levels.⁸⁷ The increasing repression and the deteriorating political and economic conditions did not, however, leave Moi unscathed.⁸⁸ By 1988, he and his governance style had become so unpopular that in the elections of that year, the voter turnout was a mere 32.5 percent.⁸⁹ This was the state of affairs when Kenya encountered the TWD.

6.4 Transitional outcome

Transition from a full-blown authoritarian state started in the late 1980s and can be mainly attributed to three interdependent factors: political crisis epitomized by widespread discontent with Moi's regime; economic crisis; and the reaction of

⁸² See, Charles Hornsby, *Kenya: A History Since Independence* (Tauris & Co Ltd, 2012).

⁸³ Kevin Patrick Conboy 'Detention Without Trial in Kenya,' (1978) 8 *Georgia Journal of International and Comparative Law* 441

⁸⁴ Kenya Human Rights Commission 139. See also *John Haroun Mwau v The Republic*.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Joel D. Barkan, 'Kenya After Moi,' (2004) 83 *Foreign Aff.* 87, 88-90. See Also, James Forole Jarso, *The Media And The Anti-Corruption Crusade In Kenya: Weighing The Achievements, Challenges, And Prospects* (2010) 26 (1) *AM. U. INT'L L. REV.* 39.

⁸⁸ David Throup and Charles Hornsby, *Multi-party Politics in Kenya: The Kenyatta & Moi States & the Triumph of system in the 1992 Election* (East African Educational Publishers, 1998, Nairobi) 31.

⁸⁹ African Democracy Encyclopaedia Project, Kenya: One party elections (1969-1988) <<https://www.eisa.org.za/wep/kenoneparty.htm>> accessed 8 November 2020.

international actors towards Moi's response to the crisis.⁹⁰ The political crisis was precipitated by a fallout with friends and allies starting around 1983. Moi detained one of his allies, Stephen Mureithi, who had rejected his transfer and unsuccessfully approached the High Court to review the powers of the President to hire and transfer civil servants.⁹¹ He also had problems with Charles Njonjo – who had favoured his succession and had been Kenya's Attorney General – and appointed a judicial commission of inquiry to investigate him.⁹² By 1985, disaffection towards Moi had risen to a level that necessitated the creation of a KANU Disciplinary Committee to deal with dissent within the party.⁹³ This fallout from within as well as his heavy-handed tactics were compounded by the fact that Moi had, since 1982, embarked on a systemic ethnicisation of the state and alienation of major ethnic fractions.⁹⁴

Though Kenya was going through an economic crisis like other African countries in the late 1980s, a series of events between 1989 and 1991 deepened the political crisis. One of them included the death of Robert Ouko, a minister in Moi's government, a few days after his mysterious disappearance.⁹⁵ It was believed that Moi had been involved in the killing and his implausible explanation irked even the international community.⁹⁶ Related to this political crisis was a failed attempt at tightly regulating NGOs that had become the major vehicles for donor funding. Moi's regime had prepared a law called the NGO Coordination Act, that sought to restrict NGO activities. The law's harsh provisions were successfully opposed, though this attempt also made some of the NGOs change focus from pure humanitarian support to agitations for a democratic society.⁹⁷ Third was the arrest and detention of opposition

⁹⁰ On Kenya's transition see Jasper Veen, 'Kenya's Flawed Transition in 1992 (Eindwerkstuk op niveau 3, TCG, Bachelor opleiding, 2012); Branch, D. and Cheeseman N., 'Democratization, Sequencing, and State Failure in Africa: Lessons From Kenya', *African Affairs*, (2008)

⁹¹ See their fall out is documented in *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR

⁹² E.S Atieno Odhiambo, *Hegemonic E& Instrumentalities of Survival: Ethnicity & Democracy in Kenya* in Berman, Bruce, Eyoh, Dickson, Kymlicka, Will *Ethnicity & Democracy in Africa* (2004: Athens, Ohio University Press 171.

⁹³ Africa Watch, *Kenya: Talking Liberties* July 1991.

⁹⁴ David Throup, Charles Hornsby (note 88 above) at 32.

⁹⁵ See David William Cohen, E. S. Atieno Odhiambo, *The Risks of Knowledge: Investigations into the Death of the Hon. Minister John Robert Ouko, 1990* (Ohio: 2004, Ohio University Press) 14.

⁹⁶ Mark Palmer, *Breaking the Real Axis of Evil: How to Oust the World's Last Dictators by 2025* (Rowman & Littlefield Publishing Inc., Maryland, 2005) 127.

⁹⁷ Juma Anthony Okuku, 'Civil Society and the Democratisation Processes in Kenya and Uganda: A comparative Analysis of the Contribution of the Church and NGOs (2003) 30 (1) *Politikon*, (2003) 51-63, at 55.

figures who had become recalcitrant to the Moi regime.⁹⁸ Kenneth Matiba and Jaramogi Odinga, the face of the anti-KANU crusade, had insisted on holding a public meeting to declare the formation of a new political party in spite of the then existing proscription on opposition political parties. According to the Human Rights Commission, the arrest of prominent pro-democracy advocates:

failed to stem the pro-democracy tide and on July 7, thousands of Kenyans gathered at Kamukunji grounds, the site for the planned rally. The crowds shouted for the release of Matiba and Rubia and flashed out the two-finger salute. Armed police tried to disperse the crowds and chaos erupted. For three days, there were running battles with the police who stormed the poor sections of Nairobi beating up innocent civilians. The unrest spread across the country.⁹⁹

All these, at times overlapping, events elicited resentment from many parts of the country. They made Moi increasingly unpopular and heightened the agitations for reform. The list of persons that were dissatisfied with Moi's record had expanded beyond politicians and by 1989 included NGOs, members of the academy and most importantly, members of faith-based organisations.¹⁰⁰ As shown below, all these incidents attracted the attention of the international community which heightened demands for political reform. Moi bowed to the pressure amended section 2[a] of the Constitution to allow for multi-party politics.¹⁰¹

The transition process at that time did not, however, end up in a democratic constitution.¹⁰² In a 1992 report, compiled just after the liberalisation of politics, the Human Rights Commission observed as follows:

⁹⁸ Fred Oluoch, 'Agitation That Shaped Today's Politics,' 7 October 2013, *Daily Nation*, <<https://mobile.nation.co.ke/lifestyle/Kenya-Multiparty-politics/1950774-2020838-format-xhtml-wbqvy9z/index.html>> accessed 8 November 2020.

⁹⁹ Kenya Human Rights Commission at 142.

¹⁰⁰ Solomon Owuoch, 'Faith-Based Organizations-State Relation and the Democratization Process in Kenya' (2015) Open Access Library Journal, <http://file.scirp.org/pdf/OALibJ_2016071116232775.pdf>; Kiraitu Murungi *The Mud in Politics* (Acacia Stantex Publishers, Nairobi, 2000) 76.

¹⁰¹ Githu Muigai, 'Kenya's Opposition and the Crisis of Governance,' (1993) 21 (1/2) *Journal of Opinion* 26, at 18-29.

¹⁰² See, Stephen Brown, 'Theorising Kenya's Protracted Transition to Democracy' (2004) *Journal of Contemporary African Studies* 325-341. Stephen N. Ndegwa, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya,' (1998) 42 (2) *Africa Today* 193-211; Nasong'o, S W, 'Political Transition Without Transformation: The Dialectic of Liberalization Without Democratization in Kenya and Zambia' (2007) 50 (1) *African Studies Review* 83- 101; Joel D. Barkan, 'Protracted Transitions Among Africa's New Democracies,' (2000) 7 *Democratization* 227-243; Stephen Ndegwa, "'Kenya: Third Time Lucky?'" (2003) 14, 3: *Journal of Democracy*, 145-58; Holmquist, F. and Ford, M. "Kenyan Politics: Toward a Second Transition?" (1998) *Africa Today*, 45, 2:22-58; Rok Ajulu. "Kenya: One Step Forward, Three Steps Back: The Succession Dilemma", (2001) *Review of African Political Economy*, 28,88:197-212.

A year since the elections, these hopes have been dashed ... The KANU regime ... has barely changed the manner in which it has always ruled the country. Despite presence of opposition politicians in parliament, the KANU regime still makes arbitrary decisions of monumental economic and political consequence. It still arrests, jails and harasses its critics; it still pursues its version of ethnic cleansing in parts of the Rift Valley; it still condones banditry in North Eastern Kenya; its high-ranking officials are still involved in massive corruption and pilfering of state funds without sanction (sic).¹⁰³

Between 1992 and 1997, Kenya's real constitution remained authoritarian. There was a renewed clamour for constitutional change and reform as a precursor to the elections of 1997, a clamour that was driven by both domestic and international actors.¹⁰⁴ As these initiatives once again threatened KANU, it resorted to pre-1992 coercive means to thwart the demands. Violence was, however, met with continued disobedience and following the suspension of aid, once again, around July 1997, and the threat of degeneration into a "mass civil disorder", KANU compromised its stance and initiated legislative and constitutional changes.¹⁰⁵ In essence, a group of opposition and KANU MPs established an outfit known as the Inter-Parties Parliamentary Group (IPPG) to negotiate a political settlement in the wake of heightened tensions ahead of the elections that were to follow.¹⁰⁶ Some of the gains of these negotiations included that other political parties were able to get some airtime on state television and certain amendments were also secured to criminalize offences relating to electoral fraud.¹⁰⁷

Around 1997, real constitutional change towards a hybrid constitution had commenced. According to Hornsby, the 1997 elections were the first democratic elections as they held out a prospect for defeat of the incumbent power holders.¹⁰⁸ The democratic space was expanded when compared to what existed around 1992 and an impetus for formal change was set in motion which pervaded the atmosphere for the better part of 1998-2005. In fact, the expanded democratic space did actually provide room for free and fair elections and were it not for opposition disorganisation and the

¹⁰³ Kenya Human Rights Commission, *Independence Without Freedom: The Legitimization of Repressive Laws and Practices in Kenya* in Kivutha Kibwana *Constitutional Law and Politics in Africa* (1997, Claripress Limited) 113.

¹⁰⁴ Hornsby (note 82 above).

¹⁰⁵ Jeffrey S. Steeves, "The Political evolution of Kenya: The 1997 Elections and Succession Politics" (1999) 37 (1) *Commonwealth & Comparative Politics*

¹⁰⁶ Hornsby (note 82 above) See also Frank Holmquist And Ayuka Oendo, 'Kenya: Democracy, Decline, and Despair,' (2001) <http://faculty.wiu.edu/JP-Stierman/History/Kenya_1.pdf> accessed 8 November 2020.

¹⁰⁷ Hornsby (note 82 above) 529 to 604.

¹⁰⁸ *Ibid.*

ethnic factor, a change of leadership could have occurred earlier than 2002.¹⁰⁹ United opposition politicians under the National Rainbow Coalition (NARC) contested against Moi's nominee, Uhuru Kenyatta, when Moi "retired" from politics, and won the 2002 elections.¹¹⁰ Mwai Kibaki then became president.

Since 2003, Freedom House has ranked Kenya as a "partly-free" country meaning under the framework in chapter 3 that it has all along been a "hybrid regime."¹¹¹ One of this study's key informants, Victoria, an academic, observed about this state of affairs as follows:

I think George Orwell's *Animal Farm* largely depicts the fate of democracy in Kenya... Of course, we have to admit that there's indeed some positive change but with the current worrying trend of state organs disregarding court orders, grand level corruption and intimidation of dissenting voices by government actors, democracy is far from reality in Kenya.¹¹²

The impression from the interviews, as well as from the secondary literature, is that the process of democratisation did not lead to the establishment of liberal democracy but rather a hybrid order. This is because, in spite of the 1992 developments, the cabinet, which was drawn from parliament, had limited plurality, as KANU, the ruling party, did not have an elected member of parliament from two major ethnic groups, the Kikuyu and Luo;¹¹³ attacks and restrictions on media persisted;¹¹⁴ and the international community played a lower-profile role, though at times endorsing fraudulent elections.¹¹⁵

In support of the position taken by virtually all participants in the interviews, Freedom House statistics state that Kenya transitioned from "not free" to "partly free" in 2003 and has since then been as such.¹¹⁶ Information from the UK's Economic Intelligence Unit [from 2006-2017] also shows that all through that period, Kenya has

¹⁰⁹ See, D. Foeken and T. Dietz, 'Of Ethnicity, Manipulation and Observation: the 1992 and 1997 Elections in Kenya,' (2001) <<https://openaccess.leidenuniv.nl/handle/1887/4672> > accessed 8 November 2020.

¹¹⁰ Jacob Ngũtich, 'How Moi Made Uhuru and the Power Intrigues that Followed,' 7 February 2020, *The Standard*, <<https://www.standardmedia.co.ke/article/2001359653/how-moi-made-president-uhuru#> > (accessed 8 November 2020).

¹¹¹ Freedom House (note 3 above).

¹¹² Interview with Victoria, Nairobi, 17 April 2019.

¹¹³ Hornsby (note 82 above) 541.

¹¹⁴ Lawyers Committee for Human Rights, *Critique: Review of the U.S. Department of State's Country Reports on Human Rights Practices for 1992*, 205.

¹¹⁵ Hornsby (note 88 above).

¹¹⁶ Freedom House <<https://freedomhouse.org/report/freedom-world/2019/kenya>> (accessed 8 November 2020).

been a “hybrid regime.”¹¹⁷ These two characterisations tally with the Ibrahim Index of African Governance whose assessment of Kenya’s governance reveals that, though Kenya has displayed increasing improvement between 2008 and 2017, its general score has oscillated at a slightly above average scale, between 53.7 percent in 2008 to 59.8 percent based on four broad indicators:¹¹⁸ safety and rule of law; participation and human rights; sustainable economic opportunity and human development. In respect to participation and human rights, it improved in the period under review (2008- 2017) from 51.6 percent to 55.6 percent while in respect to safety and rule of law, it oscillated from 51.8 percent to 55.1 percent.¹¹⁹ From these profiles, it seems safe to deduce that Kenya has been in some state of stagnation to date.¹²⁰

These positions, that Kenya is a hybrid regime, were confirmed by all except one interview participant that participated in this study. A dissenting interviewee, a policeman, believed that since 1992, Kenya has been a liberal democracy because first, it has witnessed three presidents, all of whom came to power through democratic elections, second, it has witnessed legal reforms in the past few years that culminated in the Constitution of Kenya in 2010 and third, the devolved system of government has permitted self-rule.¹²¹ But elections are certainly not the only standard for assessing whether a polity is liberal and democratic, as even vast number of pure authoritarian regimes do also hold elections.

Like Freedom House, most interviewees believed that Kenya was, in practice, a “mixed” society. Olela, for instance, remarked that Kenya was not a liberal or democratic polity because during the period under review (1989- 2017) it “experienced both an ebb of autocracy and a flow of liberal democracy.”¹²² Dr Lydia, an economist working with the government and who sought anonymity, also noted in an interview that “Kenya is a mix of democratic and authoritarian leadership.”¹²³ The interviews conducted in 2019 are a reflection of constitutional developments between 1989 and 2017, and all these point to the existence of some space for exercise of civil

¹¹⁷ Infographics <<https://infographics.economist.com/2017/DemocracyIndex/>> (accessed 8 November 2020).

¹¹⁸ See Kenya’s profile at <<http://iiag.online/>> (accessed 8 November 2020).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Interview with James Ochieng, Nairobi, 26th April 2019.

¹²² Interview with James Olela, Busia, 28 April 2019.

¹²³ Interview with Dr Lydia, Nairobi, 19 September 2019

and political rights, but also hint at state control of electoral processes such that the outcome of all elections, with the exception of 2002, were inappropriately influenced to achieve a particular objective. In respect of liberal attributes, Kenya has since 1989 held periodic elections with the 1992 and 1993 displaying, as observed, high prospects of political leadership turnover through an election.

Indeed, President Moi's 24-year influence was brought to an end courtesy of an election in 2002.¹²⁴ According to the Office of the Registrar of Political Parties, Kenya had 78 political parties as at 2019.¹²⁵ Civil society organisations are also more vibrant and at times operate freely, though in some instances they face real intimidation.¹²⁶ There is an active media in Kenya even though occasionally incidents of attacks upon the media are also witnessed but in isolated rather than systemic mode.¹²⁷ The freedom of speech can be said to exist in Kenya and except for isolated incidents of arrest of politicians, either from the government side or opposition for making inflammatory statements, it is rare to see a person arrested by police for criticising openly either the presidency or government at large.¹²⁸

Yet Kenya's biggest struggles with transition appear to be centered on the conduct of its elections. Kenya has, since 2010, had a very elaborate institutional framework which can allow for fair political competition.¹²⁹ It has a Constitution that entrenches the right to make political choices,¹³⁰ has entrenched the freedom to form or join a political party,¹³¹ and media coverage of the elections is normally permissible though skewed against "smaller" candidates.¹³² Most importantly, three institutions

¹²⁴ Jeffrey Steeves, *Presidential Succession in Kenya: The Transition from Moi to Kibaki* (2006) 44 (2) *Commonwealth & Comparative Politics* 211.

¹²⁵ Registrar of Political Parties http://www.orpp.or.ke/images/POLITICAL_PARTIES_CONTACT_Jan_2019.pdf

¹²⁶ Yves Niyiragira, 'Current Challenges Facing The Civil Society in Kenya,' <https://www.rosalux.de/fileadmin/rls_uploads/pdfs/sonst_publicationen/rls-onl_current-challenges-kenya.pdf> accessed 8 November 2020.

¹²⁷ BBC, Kenya Profile – Media 1 August 2017, <<https://www.bbc.com/news/world-africa-13681344>> accessed 8 November 2020.

¹²⁸ See Patricia Kameri Mbote, *The Operational Environment and Constraints for NGOs*, IELRC 2000-2, <<http://www.ielrc.org/content/w0002.pdf>> accessed 8 November 2020; Stella Cheronu, 'Moses Kuria, Muthama arrested over hate speech,' *Daily Nation*, 11 September 2017 <<https://www.nation.co.ke/news/Moses-Kuria-Muthama-arrested/1056-4091146-u5xvcy/index.html>> accessed 8 November 2020.

¹²⁹ See Constitution of Kenya, Chapter 7.

¹³⁰ Constitution of Kenya, article 38.

¹³¹ *Ibid.*

¹³² Human Rights Watch, *Kenya Elections 2017*, <<https://www.hrw.org/blog-feed/kenya-elections-2017>> accessed 8 November 2020.

have been empowered to ensure the regularity of elections and to address election-related grievances: the Political Parties Tribunal, the Independent Electoral and Boundaries Commission and the Courts.¹³³ These formal rules do not, however, ensure that elections are free and fair and that the person who the majority vote for or wish to vote for actually wins an election.¹³⁴ This is indeed an attribute of an authoritarian regime, in the sense that while there is an even playing field in formal terms, the actual competition is undertaken on an uneven playing field, which gives an advantage mostly to the ruling party.¹³⁵

Kenya fits well into this description. A reflection on the six general elections that have been conducted from 1989- 2019, that is in 1992, 1997, 2002, 2007, 2013 and 2017 all reveal the attributes of an electoral authoritarian regime. In terms of control of the media it is noteworthy that until 1997, the state broadcasting agency, Kenya Broadcasting Corporation (KBC), was controlled by KANU and it was not until the Inter-Parties Parliamentary Group (IPPG) agreements that the Kenya Broadcasting Corporation Act was amended to afford airtime to other political players.¹³⁶ Even so, that amendment was not implemented.¹³⁷ The first private television was established in 1990, the Kenya Television Network (KTN), which was perceived as a partisan television station.¹³⁸ KTN's managing then director was prevented in 1993 from leaving the country in a bid to intimidate him by withdrawing his passport and for some while was claimed to have disappeared.¹³⁹ The place of private media has, however, changed as ownership has now vested in the political class. Most politicians in Kenya are now associated with media houses. In Tome Simiyu's words, "there is no gainsaying that the political class in the country has invested heavily in the media

¹³³ See Constitution of Kenya, Chapter 7 above; see also Part V: Political Parties Act, 2017.

¹³⁴ Duncan Okubasu, 'Lessons for Sub-Saharan Africa from Kenya on Electoral Reforms: The Role and Limitations of the Law,' (2017) 16 (2) *Election Law Journal* 306.

¹³⁵ Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era*, <<http://homes.ieu.edu.tr/~ibagdadi/INT435/Readings/General/Levitsky-Way-Stanford%20-%20Competitive%20Authoritarianism.pdf>> accessed 8 November 2020.

¹³⁶ The Statute Law (Miscellaneous Amendments) Act, 1997.

¹³⁷ Kenya National Assembly Official Record (Hansard) 2 Nov 1993 (Questions by Private Notice: Mr. Kangwana's Whereabouts)

¹³⁸ Hornsby (note 88 above).

¹³⁹ See United States Department of State, 'U.S. Department of State Country Report on Human Rights Practices 1993 - Kenya, 30 January 1994,' <<https://www.refworld.org/docid/3ae6aa5130.html>> accessed 31 May 2019

industry.”¹⁴⁰ The KTN, together with one of Kenya’s mostly widely read print newspapers, The Standard, are owned by the Standard Group Limited, a company in which the Moi family and his close friends have majority shares.¹⁴¹ K24, a widely watched TV station in Kenya, also is owned by a company associated with President Kenyatta’s family.¹⁴² The use of state resources in campaigns is also an easily identifiable phenomenon in every electoral cycle except perhaps in rare cases, such as the 2013 presidential elections, where the sitting president was not seeking re-election and did not actively campaign for any particular candidate. One of the most widely used state resources was the provincial administration.¹⁴³ The provincial administration’s involvement was so pronounced that as an aspect of political reforms, the entire institution was scrapped by the constitution, though it was re-introduced again by President Kibaki.¹⁴⁴ The police and other security forces have been deeply involved in politics and when the International Criminal Court indicted Kenyan leaders for international crimes following the disputed 2007 elections, civil servants were among those implicated: the Inspector General of Police, Mr. Hussein Ali, and the Head of the Civil Service, Mr. Francis Muthaura.¹⁴⁵ A summary of the Reports of two Commissions established to review the 2007 elections – the Kriegler and Waki Commissions – contains the following comments:

The practice of using state resources in partisan campaigns was again witnessed (as in previous elections, in the Moi and post-Moi era, including the 2005 referendum). This included use of government vehicles and aircraft in the campaigns (some disguised with civilian number plates) and use of high-ranking (and some low-ranking) public

¹⁴⁰ Tome Francis Simiyu, ‘Media Ownership and the Coverage of the 2013 General Election in Kenya Democracy at the Crossroads,’ (2014) Vol 8(1) *Global Media Journal African Edition* 114, at 124.

¹⁴¹ Simiyu, T. Francis (2013). Media Ownership and Framing in Kenya: A Study of the ICC Case Against Uhuru Kenyatta. *Open Science Repository Communication and Journalism* available at <<http://www.open-science-repository.com/media-ownership-and-framing-in-kenya-study-of-the-icc-case-against-uhuru-kenyatta.html>> accessed 8 November 2020.

¹⁴² *Ibid*, 125.

¹⁴³ For an understanding of the role of the provincial administration as a colonial take over, see Cherry Gertzel *The provincial administration in Kenya* (1966) *Journal of Commonwealth & Comparative Politics* 201. See also, Obuya Bagaka *Restructuring the Provincial Administration: An Insider’s View*, Society for International Development, available at <http://sidint.net/docs/WP3.pdf>;

¹⁴⁴ Cyrus Ombati ‘Changes in the Provincial Administration,’ 29th January 2013 *Standard Digital*, <<https://www.standardmedia.co.ke/article/2000076095/changes-in-provincial-administration>> accessed 8 November 2020.

¹⁴⁵ BBC, ‘Francis Muthaura: ICC Drops Case Against Kenyan Accused,’ 11 March 2013, <<https://www.bbc.com/news/world-africa-21742410>> accessed 8 November 2020.

servants in the campaigns of the incumbent candidates (and, surprisingly, some opposing candidates).¹⁴⁶

This narrative has not changed, and indeed, one of the issues that framed the political rhetoric in the run-up to the 2017 elections was the use of public facilities and personnel to conduct campaigns. In fact, Cabinet Secretaries' role in campaigns was one of the issues that the Supreme Court was to address in a dispute about the legality of the first presidential election that was referred to it.¹⁴⁷ A hybrid real constitution thus best captures the transitional outcome in the case of Kenya and since this has been the state of affairs since 2003, its constitution can be said to have consolidated. In the section that follows, we examine the presence or absence of conditions of interest in a bid to understand the transitional outcome.

6.5 Conditions of interest

The state of affairs in Kenya is self-evidently the result of interaction between changing formal constitutional norms and the initiatives of various actors acting against the background of enabling or limiting structural conditions. The following section begins to add detail to this very general picture by examining the role of the first of these factors in shaping the transitional outcome.

6.5.1 Actor based conditions

Under this sub-section, we examine change to incumbent power actors, existence of effective democracy demanding groups and candid promotion of democracy by international actors.

6.5.1.1 Change to incumbent power actors

In the case of Kenya, there was no change to the incumbent President in Kenya for ten years following the TWD. Though there has subsequently been a change, this change has occurred under a framework that allows for the continued assimilation of

¹⁴⁶ Kriegler and Waki Reports Summarised Version Revised Edition, (at 22) <https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038> accessed 8 November 2020.

¹⁴⁷ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR. See also Standard Digital Are Cabinet secretaries justified to use public resources to campaign at Jubilee Political rallies? 4th April 2017 <<https://www.standardmedia.co.ke/article/2001234980/are-cabinet-secretaries-justified-to-use-public-resources-to-campaign-at-jubilee-political-rallies>> accessed 8 November 2020.

newcomers under the existing power structure. What can thus be seen through a study of Kenya's political order is that the old guard does not exit the political scene completely and continue to be a fount of informal powers. As a result, though there has been a change of incumbent presidents, in fact, despite democratic elections, Kenya is yet to experience a significant departure from the pre-1989 epoch. There was a belief among the interviewees that what exists in Kenya amounts to a capture of the political system by "some families", a fact that serves as a de facto constitutional norm on its own. Tom, a journalist, claimed:

It is the Moi and the Kenyatta family who run [this] country by default. Those families decide who becomes president. So, what we have is an oligarchy. From Kenyatta to Moi, to Kenyatta to Moi, to Kenyatta. Even in the future trajectory of Kenyan politics, the pattern seems to be repeating itself.¹⁴⁸

As is hinted by this response, there is indeed an apparent circulation of persons drawn from the same political class. Phrases such as "different forest, same monkeys" or the "forest has changed but the monkeys are the same" are indeed a common part of Kenya's political rhetoric, more so after 2010.¹⁴⁹ In a speech at the Moi University–IUPII symposium in 2010, Professor Lumumba characterised Kenya's constitution-making process as having been dominated by a club of individuals who have engaged in "political incest" for forty years.¹⁵⁰ In Lumumba's assessment, "what keeps on changing in Kenya is the forest, but the monkeys are still the same."¹⁵¹ The political parties, he added, that were negotiating the 2010 Constitution, were "born and bred in the KANU school of politics and economics."¹⁵² Juma also uses this euphemism to give credit to a statement made in early 2000 by Kenya's then President, Moi, that KANU would rule Kenya for the next 100 years.¹⁵³ He observed regarding the 2017 elections that:

¹⁴⁸ Interview with Tom Onyango, Nairobi, 26 April 2019.

¹⁴⁹ See, e.g. Christine Mungai, 'Same Forest, Different Monkeys: Why Voters believe all Parties are Alike' 25 February 2017, *The Standard*, <<https://www.standardmedia.co.ke/article/2001230639/same-forest-different-monkeys-why-voters-believe-all-parties-are-alike>>; Nancy Agutu, '10 at 10' rally is about ODM issues, not Jubilee PR stunts – Raila 8 September 2016, *The Star*, available at <<https://www.the-star.co.ke/news/2016-09-08-10-at-10-rally-is-about-odm-issues-not-jubilee-pr-stunts-raila>> accessed 8 November 2020.

¹⁵⁰ PLO Lumumba, 'Speech at Moi University-IUPII International Symposium,' <<https://www.youtube.com/watch?v=rFR3PnIXdM>> accessed 8 November 2020.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Fred Juma, 'Kenya: The Forest Has Changed but the Monkeys are the Same,' (Soko Directory), <<http://sokodirectory.com/2017/03/kenya-forest-changed-monkeys/>> accessed 8 November 2020.

Every election year in Kenya, people barely change but the only things that change are political parties... Look around in the two political divides; NASA and Jubilee and tell me who are in power and who are looking for power. Uhuru Muigai Kenyatta was created by KANU... William Ruto was actually created by Moi himself. Now, look at the vocal opposition. Raila Amolo Odinga was KANU. At one time, he was the pioneer of New KANU. Kalonzo Musyoka was once KANU. Musalia Mudavadi was even a Vice President under KANU. Moses Masika Wetangula was KANU and KANU was him.¹⁵⁴

True to these assertions, persons that have competed for or occupied the highest political offices either served or had strong connections with the pre-1989 single party. They simply come up with new political parties or rebrand existing ones. Kibaki, who served as President from 2003 until 2013 had been Moi's Vice-President from 1978 to 1988, during Kenya's darkest political moments. Kenyatta, who took over from Kibaki in 2013, is the son of Jomo Kenyatta, the first President. In 2002, Moi seeking to extend his rule informally, nominated Uhuru Kenyatta to be his successor as the KANU leader and also presidential candidate.¹⁵⁵ Prior to this, Moi's party had assimilated another opposition party known as the National Development Party (NDP), which at that time was headed by Raila Odinga, converting KANU into "New KANU."¹⁵⁶ Several individuals within new KANU, including Odinga and George Saitoti, had hoped that they would be nominated as Moi's successor and when this did not happen, most joined a newly formed opposition alliance, the National Alliance Party of Kenya (NAK), which became a major political opposition outfit in the run-up to the 2002 general elections as part of the National Rainbow Coalition (NARC).¹⁵⁷ Through this alliance, they won the 2002 General Elections. Yet the fact has been that this political grouping was not completely extricated from the KANU regime and had very deep connections with it or at least KANU's mode of leadership. As observed, Kibaki, the NARC's candidate, had been Moi's Vice President for 10 years during, as mentioned, KANU's most repressive years.¹⁵⁸ He had been a Member of Parliament under KANU from the time of independence and a Minister on several occasions. It was only in 1989 that he had been thrown out as a Vice President and subsequently

¹⁵⁴ *Ibid.*

¹⁵⁵ Jacob Ngũtich, 'How Moi Made Uhuru and the Power Intrigues that Followed,' 7 February 2020, *The Standard*, <<https://www.standardmedia.co.ke/article/2001359653/how-moi-made-president-uhuru#>> accessed 8 November 2020.

¹⁵⁶ Jeffrey Steeves (2006) 'Presidential Succession in Kenya: The transition from Moi to Kibaki, *Commonwealth & Comparative Politics*, 44:2, 211-233

¹⁵⁷ *Ibid*, 219.

¹⁵⁸ David Aduda, 'Mwai Kibaki: One of only two Vice Presidents to Have Risen to Presidency,' 16 March 2020, *The Citizen*

became an opposition figure following liberalisation of politics.¹⁵⁹ There was also a group of several politicians in the 2002 coalition that had previously served in the Moi regime, including George Saitoti who had been Moi's Vice President for around 10 years. Though Raila Odinga had been a victim of the brutalities of the Moi regime, he had already in essence joined KANU by the time Moi was nominating Uhuru as his running mate.¹⁶⁰ This team was not, therefore, completely new and had only a few different entrants. It was unsurprising that in 2007, Kibaki, who had been thought to be a reformist, engaged in one of the most brazen electoral frauds in the post-TWD period in Kenya.¹⁶¹

When Kibaki's term came to an end in 2013, a hotly contested election saw Uhuru Kenyatta ascend to the presidency, deputized by William Ruto. As observed already, Uhuru had been Moi's nominee in the 2002 elections but had himself dissolved his party and supported Mwai Kibaki's 2007 presidential candidature.¹⁶² Ruto, his deputy, had been part of KANU's youth league and did in fact support Uhuru in his 2002 presidential election bid.¹⁶³ Between 2007 and 2013, he had been a minister in the grand coalition Kibaki-Raila government that came into place following the post-election violence. These two sub-subsequently won the 2017 elections, though this time round, they co-opted – as mentioned – Raila Odinga, who had been their political antagonist during the 2017 elections. It is noteworthy in this regard that President Uhuru visited Moi at his home several times, and Nick Salat, KANU's Secretary General's announcement that KANU had joined opposition alliances in 2017 was quickly retracted following President Uhuru's mother, Mama Ngina Kenyatta,

¹⁵⁹ Kamau Ngotho, 'Lessons for Ruto: Three men and how they played their cards,' 2 February 2020 *Daily Nation*, <<https://mobile.nation.co.ke/news/politics/History-lessons-Ruto-can-pick-to-escape-siege/3126390-5440720-format-xhtml-k5s1v6/index.html>>

¹⁶⁰ Jeffrey Steeves, 219.

¹⁶¹ On the 2007 elections see, Axel Harneit-Sievers and Ralph-Michael Peters, 'Kenya's 2007 General Election and Its Aftershocks,' (2008) 43 (1) *Africa Spectrum*, Horn of Africa 133-144; Nic Cheeseman 'The Kenyan Elections of 2007: An Introduction,' (2008) 2:2 *Journal of Eastern African Studies*, 2:2, 166-184.

¹⁶² Voice of Africa, 'Kenyan Opposition Leader to Support Kibaki's Re-election,' 1 November 2009, <<https://www.voanews.com/archive/kenyan-opposition-leader-support-kibakis-re-election>> accessed 8 November 2020.

¹⁶³ Bauttah Omanga, 'How Ruto Rose to be an Influential Personality in Kenya,' 3 December 2012, *The Standard*, <<https://www.standardmedia.co.ke/article/2000071980/how-ruto-rose-to-be-influential-personality-in-kenyan-politics#>> accessed 8 November 2020.

reportedly visiting former President Moi at his Kabarak home.¹⁶⁴ In overall assessment, Kenya has only experienced a partial change to incumbent power holders.

6.5.1.2 Existence of effective democracy demanding groups

One of the questions that interviewees were asked in this study was whether civil society groups, faith-based organisations and other non-governing elites, such as opposition movements, have been meaningfully involved in reform of the constitutional and political system in Kenya from 1989. No respondent offered a negative response to this question. In Nyawa's view, "political rights [in the 2010 Constitution] were as a result of the efforts of the civil societies and the opposition".¹⁶⁵ He added: "It is the civil society [members] like Maina Kiai that have challenged some of the statutory provisions that would have had a negative impact on our political system."¹⁶⁶ In Dr Lydia's view, "civil society organisations are the pillars for the reform process" that have been witnessed in Kenya.¹⁶⁷

Indeed, the existence of democracy-demanding groups, including opposition politicians, is a condition that is present in Kenya's case.¹⁶⁸ These groups were actively involved in the reform processes that led to liberalisation of politics, the making of the 2010 Constitution, and its subsequent "implementation". As observed already, prospects for democratic establishment started to improve around 1982 when a group of individuals tried to form a political party. The 1982 section 2 [a] amendment sought to counter this initiative by declaring Kenya, which had hitherto been a de facto one-party state, a de jure one-party state.¹⁶⁹ At that time also, individuals had already started filing human rights petitions in court against the state, even though courts had shied away from enforcing them.¹⁷⁰ The donor community, for its part, had preferred to work with NGOs instead of the government because of the massive corruption in place

¹⁶⁴ Richard Kamau, 'Kanu to Support Uhuru Kenyatta's Re-election in August, Says Nick Salat,' 24 February 24 February 2017 *Nairobi Wire*, <<http://nairobiwire.com/2017/02/kanu-to-support-uhuru-kenyattas-re-election-in-august-says-nick-salat.html>> accessed 8 November 2020.

¹⁶⁵ Interview with Joshua Nyawa Malinzo, Nairobi, 19 February 2020.

¹⁶⁶ *Ibid.*

¹⁶⁷ Interview with Dr Lydia (n 123 above).

¹⁶⁸ For a nuanced understanding of the role of civil society see, Shadrack Wanjala Nasongo, 'Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition,' in Godwin R Murunga & Shadrack W Nasongo, (eds) Kenya: *The Struggle for Democracy* (Dakar, Codesria, 2007) 19.

¹⁶⁹ See Muigai (note 1 above).

¹⁷⁰ Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 (1) *Human Rights Quarterly* 96-118 at 102.

in the late 1980s.¹⁷¹ This made them become a target for the state but, in response, they shifted their attention, as observed, from social services to political reforms.¹⁷² Following growing antipathy towards the Moi regime, these forces were in principle united in their call for democracy. Though the process of democratisation is associated with internal pressure, the role that international actors play cannot be dismissed.

After the liberalisation of politics in the early 1990s, NGOs and faith-based organisations were among those civil society groups that were dissatisfied with the minimal reforms made and they joined opposition parties in their call for constitutional overhaul.¹⁷³ Political actors, together with civil society organisations, attempted to organise a constitutional conference – and certain civil society organisations circulated some draft constitutions, too.¹⁷⁴ What is known as the 4C's, organized a constitutional conference attended by church-based organisations and political actors from the opposition.¹⁷⁵ Their main agenda, Hornsby notes,¹⁷⁶ was to “curb the powers of the presidency, repeal oppressive laws, resettle clash victims and change the electoral system – all of which would change KANU”.¹⁷⁷ At this time though, the momentum for political reform that had started to build in early 1989 can be said to have substantively dissipated.

Because of the place that democracy-demanding forces claimed, they have often been made party to reform processes even if their positions have been ultimately ignored. In one way or another though, they have shaped the reform trajectory. In 1997, when Moi ultimately bowed to pressure for constitutional reform, he appointed an academic and civil society member, Yash Ghai, to head the Constitution of Kenya Review Commission (CKRC).¹⁷⁸ The piece of legislation that created this initiative, the

¹⁷¹ Juma Anthony Okuku (note 97 above).

¹⁷² *Ibid.*

¹⁷³ Stephen Ndegwa, *Civil Society and Political Change in Africa: The Case of Non-Governmental Organisations in Kenya*, *International Journal of Canadian Studies*, (1994) 35(1-2): 19- 36; Matanga, F. (2000) ‘Civil Society and Politics in Africa: The Case of Kenya’, paper presented at Fourth International Conference of ISTR, Dublin, Ireland; Okuku, J. A. ‘Civil Society and the Democratisation Process in Kenya and Uganda: A Comparative Analysis of the Contribution of the Church and NGOs’, (2003) 30(1), *South African Journal of Political Studies*, 51-63.

¹⁷⁴ See, Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo Sareat, Nairobi, 1999).

¹⁷⁵ See Jacob M. Mati, ‘Antinomies in the Struggle for the Transformation of the Kenyan Constitution (1990–2010) (2013) 31 *Journal of Contemporary African Studies* 235-254

¹⁷⁶ Hornsby, note 88 at 597.

¹⁷⁷ *Ibid.*

¹⁷⁸ Jill Cottrell & Yash Ghai, *Constitution Making and Democratization in Kenya (2000–2005)* (2007) *Democratisation*, 14:1, 1 at 5.

Constitution of Kenya Review Act 1998, provided that membership of the Commission would include persons appointed by an Inter-Parliamentary Committee, faith-based organisations, including nominees from the Muslim Council and Kenya Episcopal Conference, and, most importantly, “four persons nominated by civil society”¹⁷⁹ Professor Ghai was not sworn in alongside other commissioners for the reason that:

he was trying to get agreement to merge the civil society body – the People’s Commission (under the auspices of the Ufungamano Initiative, bringing together religious groups with other sectors of civil society) into the CKRC. Agreement to the merger of the People’s Commission with the official body was achieved in May 2001.¹⁸⁰

Though this initiative did not end up with a new constitution for Kenya, following the dissolution of Parliament by Moi, and in spite of the revival of the constitution-making process under a huge 629 membership, dubbed “the Bomas” process it did influence the content of the 2010 Constitution.¹⁸¹ Rev. Timothy Njoya, a clergyman who had been a victim of police brutalities in the early 1990s, and other activists, filed petitions in court challenging the constitutionality of the *Constitution of Kenya Review Act*.¹⁸² The court agreed with them and held in essence that Parliament did not have constituent power, so that it could revise the entire Constitution.¹⁸³ This is in part what activated the fresh constitutional reform process initiated by the government that resulted in the draft constitution of 2005.¹⁸⁴ This draft had been prepared in one of the most exclusionary processes under the Attorney General, Amos Wako, and when it was submitted to a referendum and rallied against by opposition and civil society organisations, it was rejected.¹⁸⁵

¹⁷⁹ Constitution of Kenya Review Act, 1997, section 3.

¹⁸⁰ Katiba Institute, About CKRC Process, <<http://www.katibainstitute.org/Archives/index.php/ckrc-process/about-the-ckrc-process>> date?

¹⁸¹ See e.g Lisa Fuchs, ‘On the Political Integration of Minority Communities: The Ogiek of Eastern Mau Forest in the 2013 Elections,’ in Fouere, Marie-Aude, Mwangi, Susan et al (eds) *Kenya’s Past as Prologue: Voters, Violence and the 2013 General Election* (waweza Communications, Nairobi, 2014) 81.

¹⁸² *Timothy Njoya v CKRC and National Constitutional Conference* (2004); Laurence Juma and Chuks Okpaluba, ‘Judicial Intervention in Kenya’s Constitutional Review Process’ (2012) 11 *Washington University Global Studies Law Review* 287.

¹⁸³ Njoya case, *Ibid*.

¹⁸⁴ For a review of the Wako Draft, see Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen and Kamotho Waiganjo, *Kenya Constitutional Documents: A Comparative Analysis*, Bergen: Chr. Michelsen Institute, 2006. CMI Report 2006: 16. See also, Ghai, Yash Pal (2005). ‘The Wako Draft Lost Course on Devolution’. *Sunday Nation*, 6 November 2005.

¹⁸⁵ Berd Anders Andreassen Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution* CMI Working PAPER WO (2016).

Following the 2008 disputed elections and the formation of the “Grand Coalition Government” a wide range of stakeholders, including NGOs and faith-based organisations, got substantively involved in the constitution-making process that resulted in the 2010 document. The present constitution cannot thus be said to be a product of exclusionary constitution-making processes akin to what has been said about other SSA countries after the TWD.¹⁸⁶ At the time the Constitution was being made and promulgated, a coalition government had just been formed in the aftermath of the post-election violence, consisting of all three major political parties of the time.¹⁸⁷ The first party was the Orange Democratic Movement (ODM), led by Odinga, who felt that he had actually won the 2007 elections but who had been robbed of his victory by the then incumbent, Kibaki.¹⁸⁸ There was also the Party of National Unity (PNU), which had sponsored President Kibaki.¹⁸⁹ The other participant in the elections was Kalonzo Musyoka, who came third, with his party, the Orange Democratic Movement-Kenya (ODM-K), and who had accepted the vice presidency just after conceding Mwai Kibaki’s disputed victory.¹⁹⁰ Civil society and more so faith-based organisations intervened in humanitarian support as well as in calling for restoration of the social and political order following serious disruptions.¹⁹¹ When the process of constitutional review started as part of the Kofi Annan-led negotiations, they had developed into a constituency incapable of being ignored.

After the promulgation of the 2010 Constitution, civil society organisations remained involved in constitutional enforcement. Some of the more direct roles that activists and civil society organisations have played include protests and issuance of

¹⁸⁶ Muna Ndulo, "Constitution-Making in Africa: Assessing Both the Process and the Content" (2001). Cornell Law Faculty Publications. 57; *James Thuo Gathii*, Popular Authorship and *Constitution Making: Comparing and Constitutions: Patterns of African Constitutions in the Making* (Nov. 27, 1998).

¹⁸⁷ See Jimmy Kisobo, 'Impact of Coalition Government on Development of Post-conflict Kenya,' (Omniscriptum GmbH & Company Kg, 2015).

¹⁸⁸ Charles Hornsby, *Kenya: A History Since Independence* (Tauris & Co Ltd, 2012).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ See, Sara Jerving 'NGOs work to de-escalate and respond to Kenya election clashes,' 26 October 2017, <<https://www.devex.com/news/ngos-work-to-de-escalate-and-respond-to-kenya-election-clashes-91396>> accessed 9 November 2020 ; Susan M. Kilonzo, 'Silent Religiosity in a Snivelling Nation: The Role of Religious Institutions in Promoting Post-conflict Reconciliation in Kenya,' (2009) *Africa Media Review*, Volume 17, Numbers 1&2, 95–107.

press statements,¹⁹² and, most prominently, the initiation of judicial review proceedings. In this regard, NGOs have, for instance, been party to all presidential elections cases.¹⁹³ Also, some of the most important cases that have been filed and in which the courts have held against government have been at the instance of civil society organisations or individuals undertaking public interest litigation. Okiya Omtata, an activist, has, for instance, become renowned for his “defence” of the Constitution having sought and obtained several injunctions against the government for constitutional breaches.¹⁹⁴ This, one could say, is because, first, locus standi provisions were relaxed in the 2010 Constitution and, secondly, because the first Chief Justice under the 2010 Constitution, Willy Mutunga, had been a member of civil society and an academic who had been a victim of Moi-era brutalities. Whenever in this regard civil society organisations have faced trials, such as de-registration, courts have often readily intervened to restore their registration or allowed them to operate.¹⁹⁵ In some instances, civil society organisations have been admitted as *amicus curiae*.¹⁹⁶ In overall assessment, existence of effective democracy demanding groups is a condition present in Kenya.

¹⁹² See e.g. Civicus, Kenya: Civil Society Condemns Attempted Raid and Deregistration of Human Rights Organisations 18 August 2017, <<https://www.civicus.org/index.php/media-resources/media-releases/2918-kenya-civil-society-condemns-attempted-raid-and-deregistration-of-human-rights-organisations>> accessed 9 November 2020; Defender Defenders, Kenya: Civil society condemns attempted raid and deregistration of human rights organisations 18 August 2017, <<https://defenddefenders.org/kenya-civil-society-condemns-attempted-raid-and-deregistration-of-human-rights-organisations/>> accessed 9 November 2020.

¹⁹³ For instance, (Petition No. 4 of 2013), Sponsored by AFRICOG which was consolidated with Raila Odinga Petition.

¹⁹⁴ See, Elvis Ondieki, ‘Public litigation: Where would we be without Okiya Omtata?’ 18 March 2010, *Daily Nation* <<https://www.nation.co.ke/news/Where-would-we-be-without-Okiya-Omtatah-/1056-4270618-s3nv0nz/index.html>> accessed 9 November 2020. Some of the important petitions commenced by Civil Society organisations or where they have been involved in one way or another, include, Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR; In the matter of the principle gender representation in the National Assembly and the Senate [2012] eKLR (The Advisory Opinion No. 2 of 2012).

¹⁹⁵ See e.g. Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR (where a court issues an order declaring the deregistration of the Kenya Human Rights as well as freezing of its accounts Commission as unconstitutional, null and void) Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others [2017] eKLR; International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013;

¹⁹⁶ See e.g. in EG & 7 others v Attorney General; DKM & 9 others (Interested Parties) Katiba Institute was an *Amicus curiae*. In Nahashon Omwoha Osiako & 66 Others v Attorney General, [2017] eKLR the Kenya Section Of International Commission of Jurists was an amicus; In Celestine John Aoko & others v Shem Owino Muga & 7 others 2019, the Kenya National Commission on Human Rights was admitted as amicus.

6.5.1.3 Candid promotion of democracy by international actors

International actors have had an interest in Kenya's political and constitutional processes but have played quite a limited and at times ambivalent role. It is noteworthy, though, that the very process of opening up of the legal and political space in Kenya was a result of the structural adjustments programs and the political conditionalities on aid that had been imposed on Kenya, among other African countries. The partial opening up of the democratic space in Kenya is in fact thought to have been donor-induced or facilitated.¹⁹⁷ According to Hornsby, "there was little evidence – apart from its dependence on foreign aid – that political change was directly a product of domestic economic crisis."¹⁹⁸ While donors contributed to reform, the change registered in 1992 was not so profound as to destabilize the authoritarian norms that had been generated over the years.

It is argued that one of the reasons why the Moi regime was not particularly vulnerable to demands for democratisation was the divided support towards the Moi regime. In particular, factions existed even within even a single base while in other instances, certain countries simply contradicted others. A case in point for the latter issue is that there were different positions within the US about support for the Moi regime. While the US Ambassador at the time, Mr. Smith Hempstone, had profiled Moi as a dictator and had taken it upon himself to censure him, the Bush administration itself supported Moi.¹⁹⁹ The US Congress, for its part, supported the Ambassador.²⁰⁰ Congress first stopped the release of a \$5 million disbursement of military assistance and additional aid of \$8m because of the state of political affairs, presumably at Mr. Hempstone's suggestion.²⁰¹ Later, it passed a law that imposed restrictions on President George Bush's proposed budget of USD 15,000,000.²⁰² The restrictions were that the Bush administration was to certify that Kenya had complied with a multitude of conditions, which included that Kenya should have:

¹⁹⁷ See, Philip G Roessler, "Donor Induced Democratisation and the Privatisation of State Violence in Kenya and Rwanda (2005) 37 (2) Comparative Politics 207.

¹⁹⁸ Hornsby (note 82 above).

¹⁹⁹ Kamau Ngotho, US envoys: The bulldozers and doormats Daily Nation, 31 March 2019.

²⁰⁰ Stephen Brown, From Demiurge to Midwife: Changing Donor Roles in Kenya's Democratisation Process in Godwin R. Murunga and Shadrack Wanjala Nasong'o: Kenya The Struggle for Democracy.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

taken steps to charge and try or release all prisoners detained for political reasons; ceased any physical abuse or mistreatment of prisoners; restored the independence of the judiciary; and restored freedom of expression.²⁰³

The Bush Administration did not ensure that all these conditions were met, but some of the required reforms were nonetheless effected, especially regarding increased judicial independence and the release of political prisoners.²⁰⁴ It bypassed conditions by Congress and disbursed a sum of \$5m to Kenya.²⁰⁵ The US had given “geo-strategic interests” priority over democracy, simply because Kenya had allowed the US to use its airspace and the Port of Mombasa for the US’s pursuit of Saddam Hussein.²⁰⁶ Later, though, the Bush administration was embarrassed following the arrest of the publisher of a local periodical, *Nairobi Law Monthly*, Gitobu Imanyara. From that time on, the Bush administration became more lukewarm in its support of the Moi regime.²⁰⁷ It is only after this incident that there was a common voice from the US and it became explicit in its condemnation of human rights abuses in Kenya.²⁰⁸

Britain also played an ambivalent role in supporting democracy in Kenya that influenced the approach of other international actors. As early as 1982, when a failed coup was staged against the Moi regime, Margaret Thatcher commented that “Britain was watching”, thereby sending a message that its military stationed in Kenya was not to be completely ignored.²⁰⁹ In acting thus, Britain’s stance on the Moi was more accommodating than the one that other western countries had taken. This, it can be argued, persuaded other European countries to be more cautious in their condemnation of repression and maladministration in Kenya at first. In fact, Kenya was emboldened to sever its diplomatic ties with Norway as result of the position it had taken on Moi’s human rights credentials.²¹⁰ The UK had been a great advocate for Kenya at the World Bank and is claimed to have been supporting funding proposals

²⁰³ Human Rights Watch World Report 1992: Events of 1991 at <https://www.hrw.org/reports/1992/WR92/AFW-03.htm>

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Michael Mubea Kamau, ‘Kenya And Britain Diplomatic Relations,’ 1963 TO 2017, M.A Thesis, Kenyatta University, 2018 16.

²⁰⁷ Stephen Brown, ‘From Demiurge to Midwife: Changing Donor Roles in Kenya’s Democratisation Process,’ in Godwin R. Murunga and Shadrack Wanjala Nasong’o, *Kenya The Struggle for Democracy* (Zed Books, 2007).

²⁰⁸ Jane Perlez, ‘Aid for Kenya cut as Donors Cite Corruption,’ *The New York Times*, October 21, 1991.

²⁰⁹ Michael Mubea Kamau (note 206 above) 17.

²¹⁰ Neil Fleming, ‘Kenya Breaks Diplomatic Relations with Norway,’ 22 October 1990 UPI. <<https://www.upi.com/Archives/1990/10/22/Kenya-breaks-diplomatic-relations-with-Norway/7457656568000/>> accessed 8 November, 2020.

that were not even appropriate for Kenya.²¹¹ Through its Foreign Secretary, Douglas Hurd, it had announced that aid in Kenya would continue flowing as usual, at a time just after Denmark had announced that it would withdraw aid to Kenya.²¹² Moi was reportedly cheerful about the UK's position and went on to thank Margaret Thatcher for the faith she had shown in his regime.²¹³ It was not until Thatcher was ousted in 1990 that the UK began to comment on Moi's human rights record.²¹⁴

When the UK's position started to change and repression persisted, other Scandinavian countries followed suit with renewed audacity. By that time, some countries, such as Denmark, had already cut aid while others were still providing assistance. Following the arrest of opposition leaders who had called on donors to cut aid over their meeting of 16 November 1991, written and oral protests were registered by the major donors and they were joined by other countries like Australia, Finland and the US.²¹⁵ Britain's Minister for Overseas Development, Lynda Chalker, warned that donors would be "tough" on Kenya during a consultative meeting held in Paris in 1991.²¹⁶ At the time of the meeting, the World Bank and IMF announced that "levels of aid for Kenya depend on clear progress in implementing economic and social reform."²¹⁷ Britain subsequently froze aid to the tune of \$350 million out of \$1 billion. It also clarified that it was not going to send any foreign aid to Kenya for the six months to follow.²¹⁸ The US also slashed its aid from a pledged \$47 million to \$28 million.²¹⁹ The Paris meeting took place just after the murder of Robert Ouko, the Foreign Minister, and the unconvincing explanation given by the Moi government to the donor community about the circumstances of his death.²²⁰ Moi's government reacted to the outcome of the meeting by making an announcement that two of Kenya's top government officials, one of whom was Moi's close friend, Nicholas Biwott, were under questioning in relation to the murder of Ouko.²²¹ This came too late, however, as decisions about the withholding and cutting of foreign aid had already been

²¹¹ Stephen Weber, 'European Union Conditionality, in Politics and Institutions in an Integrated Europe,' in Barry Eichengreen, Jeffrey Frieden, Jürgen v. Hagen 210.

²¹² Nairobi Law Monthly.

²¹³ Brown, (note 207 above).

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ Human Rights Watch World Report 1992: Events of 1991 at <https://www.hrw.org/reports/1992/WR92/AFW-03.htm>

²¹⁸ *Ibid.*

²¹⁹ Brown, note 207 above.

²²⁰ *Ibid.*

²²¹ *Ibid.*

made.²²² Moi took less than two weeks to react to these developments and allowed the introduction of multi-party democracy through the repeal of section 2[a]. Stephen Brown recounts that:

On 3 December 1991, after long asserting that it would never do so, Moi announced that the government would allow opposition parties to register. Within weeks, the government repealed the constitutional article enshrining the Kenya African National Union (KANU) as the sole political party.²²³

The donor community was not, however, interested in deeper reform of the legal and political order, particularly given its earlier contradictory positions. When, for instance, security of tenure for judges was restored after it had been removed in 1988, the US was satisfied, notwithstanding that, in the intervening period, Moi had already effected the changes to the judiciary he needed.²²⁴ For these reasons, Kibwana and Mutunga observe that “foreign interests in Kenya simply wanted political competition in a superficial way.”²²⁵ Armed with these changes, Kenya became eligible for more donor funding, but mere formal commitment to democratic norms did not translate into deeper democracy on the ground. After the 1992 elections, following the few reforms that came by way of liberalisation of politics, the international community was unable to exert any more pressure on the Moi regime. At this point in time, the state was not vulnerable to external demands because the economic situation had already taken a different turn. Though the Structural Adjustment Programs had other far-reaching negative implications, they also contributed to pushing Kenya towards self-reliance through liberalisation of its domestic economy.²²⁶ This meant that the opportunity for exerting deeper reforms was lost and the international society could not play as facilitative a role as the one that it might have played at the dawn of the TWD.

In the years that followed, especially after the end of the Moi era, the international community has continued to be interested in political and constitutional developments in Kenya but once again, its involvement has been perverse considering that for virtually all the elections that have taken place, its primary interest has been

²²² Thomas E. Hitchings, Facts on File Yearbook 1991, 925.

²²³ Stephen Brown (note 207 above).

²²⁴ *Ibid.*

²²⁵ Willy Mutunga and Kivutha Kibwana (on file with author).

²²⁶ See Joseph K Rono, ‘The impact of the Structural Adjustment Programmes on Kenyan Society (2002) 17 (1) *Journal of Social Development in Africa* 81; Jacob Chege, Dianah Ngui, and Peter Kimuyu, (2016) ‘Scoping paper on Kenyan Manufacturing (2016) 7.

political tranquillity, even if that is to be achieved through acceptance of the results of a flawed election. As Jasper Veen put the point in relation to the 1992 elections:

the international community frightened by the instability caused by the “ethnic clashes” preferred stability over democratic reforms and more or less resumed business as usual.²²⁷

The 2007 elections, for their part, which raptured the political order, are claimed to have been stolen “with US connivance”.²²⁸ Stephen Brown has explained the impact of donor behaviour on Kenya’s electoral process as follows:

Donors as a whole demonstrated a distinct lack of vision and understanding regarding what was required for a democratic transition in Kenya. They overly emphasised elections (and election day), at the expense of campaign conditions and the other components of democracy. In both 1992 and 1997 donors strongly supported minimal reforms to the constitution before the elections which had little effect on the fairness of the elections, but permitted the polls to proceed in spite of KANU's tremendously unfair advantage.²²⁹

The 2017 Presidential elections that were annulled by the Supreme Court, for instance, revealed the disingenuous concern of international actors for Kenya’s electoral process. The African Union, the European Union, the Commonwealth Nations, and the US-based Carter Center all participated as observers in the 2017 elections and endorsed the results.²³⁰ The European Union had sent a delegation of election observers who concluded that the 2017 Presidential election had been conducted in a fair and free manner.²³¹ Marietje Schaake, the head of the EU Mission, remarked in a press conference that the EU had not witnessed any signs of “centralized or localized manipulation”.²³² Former US Secretary of State, John Kerry, had also stated that the elections were free, and credibly fair and that they were managed very well.²³³ Notwithstanding their bold statements about how free the elections were, the said

²²⁷ Jasper Veen (note 90 above) at 33.

²²⁸ Ken Flottman, ‘The Debacle of 2007: How Kenyan Politics Was Frozen and an Election Stolen with US Connivance,’ 8 June 2017, *The Elephant*, <<https://www.theelephant.info/features/2017/06/08/the-debacle-of-2007-how-kenyan-politics-was-frozen-and-an-election-stolen-with-us-connivance/>> accessed 8 November 2020.
²²⁹ Stephen Brown, at 738.

²³⁰ Lily Kuo, Abdi Latif Dahir, ‘Foreign Election Observers Endorsed a Deeply Flawed Election in Kenya,’ 6 September 2017, *Quartz Africa*, <<https://qz.com/africa/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/>> accessed 8 November 2020.

²³¹ *Ibid.*

²³² Mercy Wairimu, ‘Kenya Election was Fair, no Sign of Manipulation - EAC, EU Observers,’ *The Star*, 10th August 2017, <<https://www.the-star.co.ke/news/2017-08-10-kenya-election-was-fair-no-sign-of-manipulation-eac-eu-observers/>> accessed 8 November 2020

²³³ Lily Kuo, Abdi Latif Dahir (note 230 above).

elections were declared null and void by the Supreme Court.²³⁴ Therefore, one can argue that these international actors were not sincerely concerned with the quality of elections.

It is noteworthy though that the influence of international actors can be said to have reduced over the years because of Kenya's apparent economic affluence and its adoption of trade-driven relations, especially with China.²³⁵ While Kenya still receives other forms of social services support from western countries, its relative economic stability when contrasted with its neighbours makes it less susceptible to external pressure for change of its political practices. The increased presence of China as a development "partner" to Kenya raises concerns about the prospects of the international community ever again exerting any influence over its democratisation process. As at 2017, Kenya was the third most indebted country to China in Africa, just behind Ethiopia and Angola.²³⁶ China's foreign policy has not favoured interference in domestic matters. As Taylor puts it:

Having seen that African nations had rallied around China in its time of need, Beijing began to adopt a posture that was designed to raise its prestige amongst the Third World and, at the same time, maintain its non-interference agenda. The democratisation process that swept Africa in the 1980s allowed China the opportunity to pursue just this. Fundamental to China's approach was the assertion that what Africa needed was "understanding rather than interfering in their internal affairs".²³⁷

China has not, for its part, commented on Kenya's elections, though it is apparent that it will support the de facto ruling regime at any point in time. This has made it a more attractive "partner" than western countries, which imposed terms and conditions on aid. The effect of this newfound relationship is that the influence of Western liberal democracies has dwindled.²³⁸

²³⁴ See, Presidential Petition 1 of 2017, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission* & 2 others [2017] eKLR.

²³⁵ Michael Mubea Kamau, note 207 above, at 18.

²³⁶ Capital News, 'Kenya Holds Third Highest Chinese Debt,' 20 September 2018. <<https://www.capitalfm.co.ke/business/2018/09/kenya-holds-third-highest-chinese-debt-in-africa/>> accessed 8 November 2020.

²³⁷ Ian Taylor, 1998. 'China's foreign policy towards Africa in the 1990s', (1998) 36,3 *Journal of Modern African Studies*, 443-60.

²³⁸ See, Wachira Maina, 'How China's Grand Entry into Africa has Weakened Democracy, *Daily Nation*, <<https://www.nation.co.ke/oped/opinion/China-grand-entry-Africa-democracy-weakened/440808-4329540-m308d1z/index.html>> accessed 8 November 2020.

6.5.2 Influence of structural conditions

Underlying contributions by various actors to the democratisation process are structural factors, without which the various actor-based contributions would, perhaps, yield different outcomes. As Jasper Veen puts it:

The transition in Kenya cannot be credibly attributed to actors' contingent choices solely as structural factors played their part as well. A decade of economic crisis, low levels of growth coupled with a rapidly expanding population, and difficult structural adjustment programmes weakened the ability of the Moi regime to fund his patronage networks on which its support base depended.²³⁹

Kenya's post-2000 relative economic affluence and the geo-political interests that other countries have in Kenya, on the one hand, and the neo-patrimonial nature of politics, as well as ethnic cleavages, on the other, can be said to have shaped, not only the transitional outcome, but also its pace. Regarding economic factors, it is undeniable that the crisis of the late 1980s made Kenya vulnerable to international actors' call for democratisation, particularly after the departure of Margaret Thatcher as UK Prime Minister.²⁴⁰ Kenya, just like Cameroon, had been profiled as the "shining star" of Africa, but its economic situation became grim in the late 1980s, too.²⁴¹ The deteriorating economic situation was linked to massive corruption, evidenced by the fact that, as mentioned, the donor community had preferred at a certain point to dispense aid directly through NGOs.²⁴² Indeed, some of the most disturbing stories about corruption in Kenya arose during that period. The Goldenberg Scandal, for example, the biggest known corruption saga in Kenya, was conceived and partly executed during that time.²⁴³ There is also a report that Kenya bought jet fighters from a French firm rather than a British one for double the price that the British firm had quoted simply because the British firm had refused to give kickbacks to persons who were negotiating the deal.²⁴⁴ Massive corruption was being reported at a time when the donor community, particularly the World Bank, had conceived the problems of

²³⁹ Jasper Veen (note 90 above) at 31.

²⁴⁰ Brown above.

²⁴¹ Nantang Jua, Cameroon: Jump-starting an economic crisis Africa Insight, Volume 21, Issue 3, Jan 1991, p. 162 – 170.

²⁴² Juma Anthony Okuku (note 97 above).

²⁴³ See, Peter Warutere, 'The Goldenberg Conspiracy' The game of paper, gold, money and power ISS Paper 117 September 2005.

²⁴⁴ Bertha Z Osei-Hwedie and Kwaku Osei-Hwedie The Political Economic and Cultural Bases for Corruption in Africa in Hope, Kempe Ronald, Sr, K. Hope, B. Chikulo, 'Corruption and Development in Africa: Lessons from Country Case Studies (Macmillan Press Limited, GB, 2000) 25.

Africa as being connected to bad governance and had started imposing Structural Adjustment Programs as well as political conditionalities on foreign aid.²⁴⁵ The economic hardships of that time gave democracy-demanding forces the springboard with which to address political issues, and the crisis became the exogenous force behind the transition. This crisis exposed Kenya to the demands of the donor community, facilitating the transition.

Kenya's economic situation has, however, improved from a GDP of USD 8.3 billion in 1989 to USD 74.9 Billion in 2019. In consequence, Kenya's national budget does not rely as heavily on donor funding as had been the case at the dawn of the TWD.²⁴⁶ This has had a profound impact on the interventions of international actors genuinely concerned about Kenya's domestic situation over the years, particularly after Moi. Kenya's reduced exposure to external pressure became manifest in 2013, when Uhuru Kenyatta and Willian Ruto, who had been indicted by the ICC, were cleared to run for the Presidential election.²⁴⁷ Prior to the elections, the US government, through its Assistant Secretary of State, had warned that it would maintain essential contact and cautioned the Kenyan electorate that "choices had consequences".²⁴⁸ When the two were elected, several countries expressed their dissatisfaction with the state of affairs, creating an impression that they would strain relations. Botswana even issued a statement stating that Kenya's President Uhuru should not set foot in Botswana if he was not going to co-operate with the ICC.²⁴⁹ The statement was nonetheless withdrawn and the rhetoric propagated by even the most powerful nations, like the US, dissipated over time.²⁵⁰ This is attributed partly to Kenya's relative economic affluence and also because of a second related structural condition, its regional geopolitical influence and the geo-strategic interests that influential countries and the UN have had in Kenya.

²⁴⁵ See Samwel Decalo, 'The Process, Prospects and Constraints of Democratization in Africa' (1992) 91 (362) *African Affairs*, 7–35.

²⁴⁶ See World Bank <<https://data.worldbank.org/country/kenya>> accessed 9 November 2020.

²⁴⁷ Simiyu, T. Francis

²⁴⁸ Gabe Joselow, 'US Official Says Kenya's Elections Have 'Consequences' Voice of Africa 7 February 2013, <<https://www.voanews.com/africa/us-official-says-kenyas-elections-have-consequences>> accessed 9 November 2020.

²⁴⁹ Bame Piet, 'Skelemani warns Kenyatta on ICC,' Mmengi Online, 12 March 2013, at <<https://www.mmegi.bw/index.php?sid=1&aid=1734&dir=2013/March/Tuesday12#comments>> accessed 9 November 2020.

²⁵⁰ BBC News, 'Botswana Apologises to Kenya over Kenyatta ICC Warning, 14 March 2013, <<https://www.bbc.com/news/world-africa-21784867>> accessed 9 November 2020; Stephen Brown & Rosalind Raddatz Dire Consequences or Empty Threats? Western pressure for peace, justice and democracy in Kenya, Vol. 91, No. 362 *Journal of Eastern African Studies*, 8:1, 43-62.

Before being overtaken by Ethiopia, Kenya had been the main transit hub for, and the economic powerhouse of, Eastern Africa.²⁵¹ It is also the site of the United Nations' only headquarters in Africa, hosting the UNEP.²⁵² Its Port of Mombasa is one of East and Central Africa's gateways to Asia and of great importance to landlocked countries such as Uganda, Rwanda and South Sudan.²⁵³ It is also the second largest refugee-hosting country in Africa of people displaced from the Great Lakes Region, and especially from Somalia, following the breakdown of its legal order.²⁵⁴ Both the United States and the United Kingdom have economic as well as military interests in Kenya,²⁵⁵ with Britain having one of its training units hosting thousands of soldiers in Kenya over the years.²⁵⁶ Its importance in the region makes Kenya's political cohesion and continuity a main interest of both the African Union as well as the international community at large. While most African countries are plagued with civil strife and wars, Kenya received a lot of attention following the 2008 post-election violence.²⁵⁷ The AU, with UN support, helped to broker a deal between the two political sides under the leadership of former UN Secretary General, Koffi Anan, which resulted in a coalition government.²⁵⁸ The impact that this geopolitical influence has on Kenya's democratisation process is that it moderates external support for democracy. Rather than withdrawing support for ruling regimes, and conscious of the impact that such a move can have on pro-democracy groups, who may in consequence resort to violent disruptions of the political order, the western countries adopts mostly a strategy of supporting democratic institutions, like the electoral body and the courts. In short, the

²⁵¹ Christina Okello, 'Post-Crisis Kenya Seeks to Affirm its Status as East Africa's Powerhouse,' 14 March 2018 RFI, <<http://www.rfi.fr/en/20180313-spot-afr-13-03-18-post-crisis-Kenya-seeks-affirm-status-east-africa-powerhouse>> accessed 9 November 2020; Bob Koigi, Ethiopia outpaces Kenya as East Africa's economic powerhouse, 31 May 2017, Africa Data available at <<https://africabusinesscommunities.com/africadata/ethiopia-outpaces-kenya-as-east-africas-economic-powerhouse/>> accessed 9 November 2020; See World Bank News, Regional Centre for Aviation Excellence Is Key to Kenya's Rise as Air Transit Hub 25 November 2019 <<https://www.worldbank.org/en/news/feature/2019/11/25/regional-center-for-aviation-excellence-is-key-to-kenyas-rise-as-air-transit-hub>> accessed 9 November 2020.

²⁵² See UNEP, About UN Environment Programme, <<https://www.unenvironment.org/about-un-environment/why-does-un-environment-matter>> accessed 9 November 2020.

²⁵³ Otavio Veras, 'Mombasa and Dar es Salaam, Gateways to East Africa,' Africa Business Insight, 1 December 2016, <<https://www.howwemadeitinafrica.com/mombasa-dar-es-salaam-gateways-east-africa/56866/>> accessed 9 November 2020.

²⁵⁴ UNHCR- Kenya, Refugees, <https://www.unhcr.org/ke/who-we-help/refugees>

²⁵⁵ See, Michael Mubea Kamau n 207 above. See also, US Department of State, US Relations with Kenya, <<https://www.state.gov/u-s-relations-with-kenya/>> accessed 9 November 2020.

²⁵⁶ Ministry of Defence 'The British Army in Africa', <<https://www.army.mod.uk/deployments/africa/>> accessed 9 November 2020

²⁵⁷ See also David Onyango, 'Why World's Attention is Focused on Kenya, (2008) *East African Standard*, 17 February

²⁵⁸ See M Juma above; Mwangi, M. 2008. *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*. Nairobi: Institute of Diplomacy and International Studies.

imposition of political conditionalities or censure is less likely because of the interests that countries like the UK and US have in Kenya.

The other structural factors that are interlinked and which have shaped the transitional outcome are ethnic cleavages as well as neopatrimonialism. These have connections with land and natural resources, and as Kagwanja puts it, “the land issue constitutes the major structural factor underlying ethnically driven electoral and political violence in Kenya.”²⁵⁹ These two are a fount of informal powers and politics and find strong expression in formal institutions and politics.²⁶⁰ Their terms are, first, that communities view closeness to power as a precondition for societal development while individuals also see the opportunity to work for the government as a platform for personal progress. Political elites, for their part, capitalize on this understanding and exploit it.²⁶¹ The influence of these structural conditions is so overwhelming that corruption is a particularly common phenomenon in Kenya. As Stephen Brown put it in an interview for this study, the terms of power acquisition in Kenya are that for one to get into political office, he or she must rely on informal networks, which include ethnic identity, with the understanding that, should you get into office, you must empower, if not protect, those who assisted you. ²⁶²As Kubai also put it in the interviews, Kenya’s “politics is based on tribal affiliations. As such politics shift depending on who is seeking what position.”²⁶³

²⁵⁹ Peter Kagwanja & Roger Southall (2009) Introduction: Kenya – A Democracy in Retreat? 27:3, *Journal of Contemporary African Studies*, 259-277; See also, Rutten, M., and S, Owuor. 2009. Weapons of mass destruction: Land ethnicity and the 2007 elections in Kenya (2009) 27 *Journal of Contemporary African Studies* 305-24

²⁶⁰ See Yash Ghai, Ethnicity and the Kenyan System of Governance, Katiba Institute (23 June 2016) <<http://www.katibainstitute.org/ethnicity-and-the-kenyan-system-of-governance-yash-pal-ghai/>> accessed 9 November 2020; Luke M Obala and Michael Mattingly, ‘Ethnicity, Corruption and Violence in Urban Land Conflict in Kenya, (2014) 51 (13) *Urban Studies* 2735-2751; Marcel Rutten & Sam Owuor, ‘Weapons of Mass Destruction: Land, Ethnicity and the 2007 elections in Kenya, (2008) 27:3 *Journal of Contemporary African Studies*, 305-324; Wamwere, K. *Towards Genocide in Kenya: The Curse of Negative Ethnicity*, (Mvule Africa, Nairobi, 2008); Mueller, S. 2008. The political economy of Kenya’s crisis. *Journal of Eastern African Studies* 2, no. 2: 185-210; Muigai, G. 1995. Ethnicity and the renewal of competitive politics in Kenya. In *Ethnic conflict and democratization in Africa*, ed. H. Glickman, 161- 96. Atlanta: African Studies Association; Oucho, J. 2002. *Undercurrents of Ethnic Conflict in Kenya*. Leiden: Brill; Karuti Kanyinga ‘The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya, (2009) 27:3, *Journal of Contemporary African Studies*, 325-344; Gettleman, J. Disputed vote plunges Kenya into bloodshed. *New York Times*, 31 December 2007.

²⁶¹ Jacqueline M Klopp, Ethnic Land Clashes and Winning Elections: The Case of Kenya’s Electoral Despotism (2001) 35 (3) *Canadian Journal of African Studies*, 473.

²⁶² Interview with Stephen Brown, Amsterdam, the Netherlands 28 May 2019.

²⁶³ Interview with C Kubai, Nairobi, 8 September 2017

Ethnic mobilisation of politics has been prominent after liberalisation of politics in the early 1990s. Ethnicity had played a role in fuelling resentment towards the Moi government in the 1980s following the foiled 1982 coup, because Moi reorganized the military by having people at the top drawn from his ethnic community.²⁶⁴ This led to disenchantment, especially from larger tribes, given that his was the fourth largest. Moi's objection to multi-party politics was that it was going to divide the country along ethnic lines. Indeed, other than electoral fraud and disenfranchisement of communities through denial of identity cards and hence voting rights, ethnic cleavages played a significant role in the 1992 elections. Opposition parties that sprung out of the democratisation process associated with the TWD had ethnic-based support depending where their leader came from. As a result, the ruling party, KANU, did not have any seat from the Central Province, home to the Kikuyu ethnic community.²⁶⁵ This means that unless Moi nominated people from the community to be members of parliament, none would be part of the government in spite of the fact that it was the largest ethnic group. Hornsby recounts that because of this, Moi's government had little plurality following the 1992 elections.²⁶⁶ This pattern largely continued even after the Moi era, especially after the new Constitution.²⁶⁷ The contest in the 2002 elections, where ethnic politics were overshadowed, was between Kibaki and Kenyatta, both of whom are from the Kikuyu community.²⁶⁸ The 2007, 2013 and 2017 elections, where persons from different ethnic communities faced off against each other, were hotly contested, with voting being essentially along ethnic lines.²⁶⁹ The post-election violence experienced in 2008, in this regard, was ethnic-founded violence between groups that supported Kibaki as against those that supported Raila.²⁷⁰ This trend continued in both 2013 and 2017. In both elections the winning parties, the Jubilee Alliance Party (JAP)

²⁶⁴ See Generally, Charles Hornsby, *Kenya: A History Since Independence* (Tauris & Co Ltd, 2012).
²⁶⁵ James D. Long and Clark C. Gibson, 'Evaluating the Roles of Ethnicity and Performance in African Elections: Evidence from an Exit Poll in Kenya,' (2015) 68 (4) *Political Research Quarterly* 830.
²⁶⁶ Hornsby, note 188 above.
²⁶⁷ National Cohesion and Integration Commission, 'Towards National Cohesion and Unity in Kenya,' Ethnic Diversity and Audit of the Civil Service Report 2016.
²⁶⁸ Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch, 'The political economy of Kenya: Community, Clientelism, and Class,' in Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch (eds) *The Oxford Handbook of Kenyan Politics* (OUP, 2020).
²⁶⁹ *Ibid.*
²⁷⁰ *Ibid.*

as well as Jubilee, were largely Kikuyu-Kalenjin parties and were supported by these two large communities in the main.²⁷¹

A factor closely related to the ethnic mobilisation of politics is the exploitation of client-patron networks. Outside of politics, there are high levels of corruption within government bureaucracy, even in the so-called “independent offices”.²⁷² In spite of legally protected security, institutions in both the pre- and post-TWD have proven to be easy prey for capture by power seekers. Take for instance the institution of judicial review. In 2016, the Supreme Court was shrouded in controversy and did not even operate – not just because of judicial controversy over the retirement of judges who had attained the mandatory retirement age, but because one of the justices, Tunoi, had been implicated in allegations of bribery.²⁷³ In particular, the judge was claimed to have receiving a bribe of \$200,000 to influence a decision of the Court over the election of the Governor of Nairobi and his deputy, an election that had been disallowed by the High Court but overturned by the Court of Appeal.²⁷⁴ The Supreme Court reversed the decision, upholding the election of the governor in 2014.²⁷⁵ About a year later, a private individual filed an affidavit with the Judicial Service Commission explaining how he had been used as the conduit for the bribe.²⁷⁶ The JSC found Justice Tunoi culpable and recommended to the President that a Tribunal be formed to investigate his conduct.²⁷⁷ Before the Tribunal could complete the hearing of the dispute, however, the Supreme Court allowed an application in another case whose effect determined that Justice Tunoi was not a judge anymore, having attained the age 70, despite having been appointed under the old Constitution which had capped the retirement age of judges at 75.²⁷⁸ Reports such as the one implicating Justice Tunoi are not isolated. In 2013, the Judicial Service Commission sacked the Chief Registrar of the

²⁷¹ *Ibid.*

²⁷² Generally, see, Danie Branch Nic Cheeseman, and Leigh Gardner, eds. *Our Turn to Eat: Politics in Kenya Since 1950* (Lit. Verlag, Berlin, 2011).

²⁷³ Olive Burrows, ‘Judiciary on Trial: Tunoi Saga Deals Courts a Blow,’ 5 February 2017; *Capital New*; <<https://www.capitalfm.co.ke/news/2016/02/judiciary-on-trial-tunoi-saga-deals-courts-a-blow/>> accessed 9 November 2020.

²⁷⁴ *Ibid.*

²⁷⁵ Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR

²⁷⁶ Olive Burrows, ‘How Kidero Bought a Judge: The Whistleblower’s Claim,’ 27 January 2016, *Capital News*, <<https://www.capitalfm.co.ke/news/2016/01/115817/>> accessed 9 November 2020.

²⁷⁷ Peter Leftie, ‘Uhuru Kenyatta Appoints Tribunal to Probe Justice Tunoi,’ *Daily Nation*, 23 February 2017, <<http://www.nation.co.ke/news/Tunoi-suspended-pending-tribunal-probe/1056-3089422-qsax3hz/index.html>> accessed 9 November 2020.

²⁷⁸ Lady Justice Kalpana H. Rawal & 2 others v Judicial Service Commission & 6 others [2016] eKLR

Judiciary, Gladys Shollei, over allegations of “incompetence, misbehaviour, [and] violation of the prescribed code of conduct for judicial officers”.²⁷⁹ According to the then Chief Justice, Willy Mutunga, “Shollei had admitted to 33 allegations in which Sh1.7 billion taxpayer funds had been lost or were at risk”.²⁸⁰ Some of those that have come to public attention include allegations about Justice Mutava, who was found to be culpable by a tribunal formed by the President to investigate his conduct.²⁸¹ In 2017 too, a clerk and secretary of a judge at the Judicial Review Division of the High Court, Justice Aburili, was investigated for receiving a Kshs. 2 million bribe at the High Court in Nairobi.²⁸² Similar examples can be found in other institutions. This implies that many independent institutions have been captured by powerful commercial and political interests, making them ineffective.

Some of the innovations in the 2010 Constitution include that it introduced a Chapter addressing “Leadership and Integrity”.²⁸³ Also, there exist several provisions dealing with ethnic diversity, such as one which demands that political parties must not be founded on an ethnic basis.²⁸⁴ Political elites who exploit ethnic cleavages for political mileage strive for formal compliance by ensuring that a few individuals are listed in the party from most parts of the country. In reality though, the party remains ethnic-based.²⁸⁵ As Jeffrey Steeves put it:

We have then three pillars of Kenyan politics, political leadership based on ethnic representation and reward, an emphasis on accumulation and distribution of valued resources, and unbounded politics whereby leaders and their associates view political parties and alignments as passing instruments in the struggle for power and influence. To capture the most coveted prize – the presidency – requires crafting a coalition of ethnic leaders who use their community's support to lever positions of power and influence within the ruling group.²⁸⁶

²⁷⁹ See, *Gladys Boss Shollei v Judicial Service Commission & Another* [2014] eKLR

²⁸⁰ Nation Reporter, ‘JSC Sacks Chief Registrar Gladys Shollei 18 October 2013,’ <<http://www.nation.co.ke/news/politics/1064-2038326-woee1o/index.html>> (accessed 9 November 2020).

²⁸¹ Ghosts of Goldenberg: Tribunal recommends sacking of judge Joseph Mutava, available at <<https://www.youtube.com/watch?v=DZIMLqwo21A>> (accessed 9 November 2020).

²⁸² Dominic Wabala, EACC probes Sh2 million High Court bribery bid 9 January 2017, <https://www.the-star.co.ke/news/2017/01/09/eacc-probes-sh2-million-high-court-bribery-bid_c1484041> (accessed 9 November 2020).

²⁸³ Constitution of Kenya, Chapter Six.

²⁸⁴ *Ibid*, article 91 (2) (a).

²⁸⁵ See Cheeseman et al (n 268 above); Jill Cottrell Ghai and Yash Pal Ghai, ‘Constitution has failed to produce true political parties, so will BBI,’ *The Star*, 13 March 2020.

²⁸⁶ J Steeves ‘Presidential succession in Kenya: The Transition from Moi to Kibaki’ (2006) 44 (2) *Commonwealth & Comparative Politics* 211 at 215-216.

While one would therefore expect societies with relatively better economic circumstances like Kenya to do better than less developed countries in their efforts at pursuit of democracy in Kenya, chronic neopatrimonialism has negated this advantage. The next segment examines the design-based conditions.

6.5.3 Design based factors

Under this sub-section, two conditions of interest are considered that is change to formal powers and existence of effective judicial review.

6.5.3.1 Change to formal powers

In the early 1990s, the main formal constitutional change that was made to Kenya's Constitution was the repeal of section 2 [a]. Another was the restoration of the security of judicial tenure.²⁸⁷ The legal arrangements that had been in place at the inception of the TWD largely remained intact. A 1992 Essay by the Kenya Human Rights Commission noted generally as follows about change to legal apparatus and its implication on real constitutional change:

The reason for continuing status quo are simple: when the Country reverted to a multi-party system of government in 1992, the only laws and structures changed to reflect the new political realities were those dealing with the electoral system – and these only to express the fact that the country now permitted multi parties. Consequently, the country still operates under the same warped legal and administrative structures created in the colonial era. These structures favour an unaccountable and powerful executive which is necessary to maintain one-person dictatorship (sic).²⁸⁸

After 1992, the only other significant developments were the adoption of the so-called Inter-Parties Parliamentary Group (IPPGM) in 1997, an arrangement whose main import was that political parties would participate in the empanelment of the electoral body.²⁸⁹ For about 20 years, nothing substantial changed about this arrangement despite more than one attempt at enacting a new constitution: the 1997 Constitution of Kenya Review (CKRC) process that turned into the so-called 2003 “Bomas” and the 2005 Wako Draft Processes.²⁹⁰

²⁸⁷ Mutua (note 170 above). Constitution of Kenya Amendment Act No. 1 of 1990.

²⁸⁸ Kenya Human Rights Commission, above.

²⁸⁹ Hornsby note 188 above at 529- 604. See also Frank Holmquist And Ayuka Oendo, Kenya: Democracy, Decline, and Despair (2001) <http://faculty.wiu.edu/JP-Stierman/History/Kenya_1.pdf> accessed 9 November 2020.

²⁹⁰ For an analysis of the constitution making process in Kenya, see Richard Stacey, Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process (2011), Vol. 9 No. 3–4, *International Journal of Constitutional Law* 587–614

The claim made here is not that it was necessary for Kenya to enact a new constitution if its transition process was to be complete. Instead, it is that the institutional arrangements in place could not act as the breeding ground for genuine democratic norms to diffuse into the constitutional order. It is no wonder that after 1992, civil society organisations as well as opposition parties continued to clamour for greater reforms, which would provide a formal basis for dispersion of power from the Presidency, and at least change the patterns of power acquisition and use.²⁹¹ The authoritarian norms and practices, that had been generated and enforced over the years and which could not sit well with the arrangements in the Independence Constitution, necessitating their amendment, still found a haven in the existing institutional arrangements.

The eventual enactment of a new, normatively attractive constitution in Kenya in 2010 did not, contrary to expectations,²⁹² complete the transitional process. As already mentioned, two elections conducted after the new constitution's promulgation have displayed attributes of an electoral authoritarian regime and cannot be adjudged as free and fair.²⁹³ Indeed, the use of violence, particularly during elections in opposition regions continues, just like in the pre-2010 era.²⁹⁴ At best, the 2010 Constitution, though having come in late and even if not optimally enforced, has so far acted as a hedge against deeper regression and has also provided a framework for gradual change of the hybrid real constitution in the absence of conditions that can trigger a more rapid evolution of the constitutional order. It can be claimed, consequently, that the formal constitution has assisted in consolidating the hybrid legal order by preventing a relapse into full-blown authoritarian rule. This is particularly true considering again that it is Moi's 2002 nominee, Uhuru Kenyatta, who won both the 2013 and 2017 elections, and who had in fact been indicted by the International

²⁹¹ See, Mutunga (note 4 above).

²⁹² See, Joel Barkan, and Makau Mutua 'Turning the Corner in Kenya: A New Constitution for Nairobi,' *Foreign Affairs*, August 10, 2010 ("Ratification of the new constitution also returns Kenya to the path of democratization and economic growth.")

²⁹³ Aziz Rana, 'Kenya's New Electoral Authoritarianism,' *Boston Review*, <<http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism>> accessed 9 November 2020.

²⁹⁴ See Paul Okongo, 'Elections And Violence: The Kenyan Case' 9 November 2017, *The Elephant*, <<https://www.theelephant.info/reflections/2017/11/09/elections-and-violence-the-kenyan-case/>> accessed 9 November 2020. See *The Elephant*, <https://www.theelephant.info/reflections/2017/11/09/elections-and-violence-the-kenyan-case/> accessed 9 November 2020.

Criminal Court for perpetrating politically motivated crimes during the 2007/2008 post-election violence.²⁹⁵

In the interviews, it became apparent that, were it not for the 2010 Constitution, the country could have regressed to an authoritarian constitution. Interviewees cited the presence of a progressive Bill of Rights,²⁹⁶ the introduction of a devolved system of government,²⁹⁷ the proclamation of national values,²⁹⁸ the setting of standards on leadership and integrity,²⁹⁹ inclusivity, the establishment of independent institutions,³⁰⁰ the creation of affirmative action mechanisms and an equalisation fund, the accommodation of the aspirations of “all Kenyans” and the devolution of power as attributes that make the Constitution of Kenya a “good constitution”.³⁰¹ The first role that the institutional arrangements and norms under the 2010 Constitution have played is that they have given the judiciary sufficient legal security to protect democracy-supporting rights, as the following section shows.³⁰² The success or failure of this process of judicial empowerment is discussed in greater detail in a section that follows. Second, these new arrangements have provided a platform for pro-democracy groups to demand democratic rule, either through protests or the pursuit of judicial redress, as discussed below, too. In other words, the legal apparatus has been supportive of democracy-demanding groups. A particularly important design aspect is the formal rules of change which were reworked thoroughly in the 2010 Constitution and have successfully blocked all attempts at formal constitutional change.³⁰³ While formal change may be desirable, the fact that Kenya’s authoritarian constitution was consolidated through opportunistic amendments make the fact that the 2010 Constitution has not been subjected to an amendment thus far a positive spectacle. Thus, its hybrid status, it is argued, is in part sustained by the fact that the formal constitution cannot be easily amended to destroy the institutional framework that gives democracy-protecting institutions as well as democracy-demanding groups the means

²⁹⁵ Ismael Akwei, ‘Meet the Eight Candidates for Kenya’s 2017 Presidential Elections,’ *Africa News*, 2 August 2017, available at <<https://www.africanews.com/2017/08/02/meet-the-eight-candidates-for-kenya-s-2017-presidential-elections/>> accessed 9 November 2020.

²⁹⁶ Interview with Joshua Wabwire, Nairobi, 26 August 2019.

²⁹⁷ *Ibid.*

²⁹⁸ Interview with Olela (note 122 above)

²⁹⁹ Interview with Victoria (note 112 above)

³⁰⁰ Interview with Olela, note 122 above.

³⁰¹ Interview with Vincent Juma above, Nairobi, 21 August 2019.

³⁰² James Gathii, ‘The Contested Empowerment of Kenya’s Judiciary, 2010–2015: A Historical Institutional Analysis (Sharia Publishing Nairobi, 2016); Migai note 1 above, Sihanya, note 15 above.

³⁰³ Chapter 16, Constitution of Kenya.

of monitoring breaches. In conclusion, though formal constitutional norms have been changed in Kenya, it has not helped to push Kenya to a democratic constitution but has provided an environment that militates against regression.

6.5.3.2 Existence of effective judicial review

Prior to 2010, and especially during the Moi era, the institution of judicial review was completely ineffective.³⁰⁴ Judges were appointed by the President and their independence had been severely compromised following a constitutional amendment that temporarily removed their security of tenure in 1988.³⁰⁵ Kenyan courts had in fact initially refused to enforce the Bill of Rights, citing the absence of rules of procedure!³⁰⁶ Whenever an election petition was lodged to challenge the presidential election, it would consequently almost without exception be struck out on technical grounds. In 1991, for instance, one of the contestants in the election, Kenneth Matiba, had been physically incapacitated as a result of state torture.³⁰⁷ He gave his wife a power of attorney to sign the petition on his behalf, but the judge struck out the petition on the basis that it had not been signed by the petitioner personally.³⁰⁸ In 1997 too, Kibaki, who was second to the incumbent president Moi, also presented a petition to court to challenge Moi's victory but the court struck it out on the basis that he had not served it on the Respondent, Moi, personally.³⁰⁹ Kibaki appealed against that decision to the Court of Appeal, but the Court of Appeal returned a similar verdict.³¹⁰

It is this inclination of courts to tactically rule in favour of incumbents that, it is claimed, dissuaded opposition factions in 2007 General Elections from petitioning courts and instead to called for mass protests.³¹¹ The Chief Justice had already sworn in the incumbent Kibaki in an evening private ceremony, in spite of the vast grievances that had been formulated about the elections.³¹² A Commission of Inquiry established under the leadership of Justice Kriegler to review the 2007 elections concluded that

³⁰⁴ See Mutua (note 170 above).

³⁰⁵ *Ibid.* See also, Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya Under Daniel Arap Moi,' 1978- 2001 (2001) 5 (1) *African Quarterly Studies* 1, at 4.

³⁰⁶ See also, United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C. 12/1993/6, 1993.

³⁰⁷ *Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others* Civil Application NAI 241 (1993) [Election Petition 27 of 1993]

³⁰⁸ *Ibid.*

³⁰⁹ Election Petition No. 1 of 1999, *Mwai Kibaki v Daniel Moi*.

³¹⁰ Civil Appeal No. 172 Consolidated with 173 of 1999 *Mwai Kibaki vs Daniel Toroitich Arap Moi* [1999] eKLR

³¹¹ James D. Long, Karuti Kanyinga, Karen E. Ferree, Clark Gibson, 'Choosing Peace over Democracy,' (2013) 24 (3) *Journal of Democracy* 140, at 150.

³¹² Gilbert M Khadiagala, 'Forty Days and Nights of Peacemaking in Kenya,' (2008) 7 (2) *Journal of African Elections*, at 7.

there was an “absence of an effective dispute resolution mechanism”.³¹³ In the end, the dispute over the 2007 elections was resolved through a political settlement, rather than judicial intervention, at the behest of mediation talks led by Kofi Annan following a serious disruption of the legal and political order.³¹⁴

The 2010 Constitution significantly empowered courts and entrenches their independence in a bid to restore the confidence of courts as arbiters of political contests.³¹⁵ The new provisions depart from the previous arrangements in many respects.³¹⁶ An interviewee who wished to be identified as KO, took the view that “[t]he judiciary was a big beneficiary of the new Constitution...” and that “...this [was] a huge change from the old era, when the chief justice reportedly maintained in his office a red phone with a direct line to state house...”³¹⁷ Judicial independence is a key concern of the 2010 Constitution, in the sense that judges are not appointed or removed by the President. Their recruitment is rather undertaken by the Judicial Service Commission, also established by the Constitution and whose membership includes judges themselves and representatives of the private bar.³¹⁸ The role of the President is limited to appointing a person whose name is forwarded to him after a competitive hiring process and a public vetting exercise.³¹⁹ All judicial officers enjoy security of tenure in the sense that, unless they resign or die, they can only leave office after attainment of 70 years or if a tribunal is formed to investigate their conduct and culpability established.³²⁰

Interviewees held conflicting views about whether courts in Kenya are bold enough to enforce liberal and democratic values. Juma, for instance, said in an interview after the invalidation of the 8 August 2017 Presidential Election, that “acquisition of power was through any means that revealed a numerical outcome as

³¹³ Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, at 141. See the Report <https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf > accessed 9 November 2020.

³¹⁴ See, Monica K. Juma, ‘African Mediation of the Kenyan Post-2007 Election Crisis,’ (2009) 27 (3) *Journal of Contemporary African Studies* 407.

³¹⁵ See James Gathii, ‘The Contested Empowerment of Kenya’s Judiciary, 2010–2015: A Historical Institutional Analysis (Sharia Publishing Nairobi, 2016).

³¹⁶ *Ibid.*

³¹⁷ Interview with KO, Nairobi, 16 September 2017.

³¹⁸ See Articles 171-173, Constitution of Kenya.

³¹⁹ See, Judicial Service Act, 2011.

³²⁰ Articles 167-168, Constitution of Kenya.

opposed to constitutional requirement.”³²¹ Jackson, a judge interviewee, also cited annulment of the August 2017 election as evidence that judges were bold enough.³²² Reference was also made by Grace, an opposition politician, to annulment of parliamentary seats as evidence that judges were bold.³²³ For others though, judges are simply timid. Malinzo Nyawa, for instance, stated that in 2013, “the Supreme Court delivered the worst judgment in a post-2010 constitutional dispensation. Firstly, it relied on procedural technicalities to deny the petitioners the right to file further documents. Secondly, it purposely adopted a very high test in determining election petitions.” He added, too, that though the court displayed boldness when it annulled the first 2017 presidential election, it “was met with glaring irregularities but still upheld the election.” In his words, “whether they had started being timorous souls, I cannot tell.”³²⁴ Dr Lydia, for her part explained that “Kenyan courts have increasingly gone back to the bygone days in bed with the executive and only few judges like Justice Odunga are bold to enforce the constitution.”³²⁵ In spite of the sentiments espousing scepticism towards courts effectiveness, the institution of judicial review can still be said to be effective in post-2010 era when contrasted with the pre-2010 era.

As pointed out in Chapter 4, courts can participate in changing the real constitution through review of executive practices, democratic processes, legislation that serves constitutional functions and also through informal constitutional change. The one area where there has been some noticeable success in the post-2010 epoch is in review of legislation. Some of the provisions that have been reviewed and struck down were enacted during earlier, darker moments in Kenya’s history, while others date from the new era and were meant to implement the Constitution. In the year 2014, for instance, one of the greatest controversies in Kenya’s Parliament concerned a bill proposed by the government to amend laws in order to address terrorism³²⁶ This bill would give the state enormous powers and it was thought that it would provide a basis for authoritarian state activities.³²⁷ The final debating of the bill took place in an emotive session in which there were scenes of fighting and pouring of water by

³²¹ Interview with Interview with D Juma, Nairobi, 22 September 2017.

³²² Interview with Joshua Nyawa Malinzo, Nairobi, 19 February 2020.

³²³ Interview with Grace (Presudoname), 22 September 2017.

³²⁴ Interview with Malinzo Nyawa (note 322 above)

³²⁵ *Ibid.*

³²⁶ Security Laws (Amendment) Act, No 19 of 2014

³²⁷ Article 19, ‘Kenya: Concerns with Security Laws (Amendment) Bill,’ <[https://www.article19.org/resources.php/resource/37800/en/kenya:-concerns-with-security-laws-\(amendment\)-bill](https://www.article19.org/resources.php/resource/37800/en/kenya:-concerns-with-security-laws-(amendment)-bill)> accessed 9 November.

Members of Parliament.³²⁸ The bill was eventually passed by dint of the ruling party's majority in Parliament. In response, opposition parties sponsored a judicial review application challenging the law: *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another*.³²⁹ A bench of five High Court judges declared several portions of the legislation to be unconstitutional for, among other things, "violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution", "freedom of the media", "the right of an accused person", "the right to be released on bond or bail on reasonable conditions", "the right of an accused person to remain silent during proceedings", and "the principle of non-refoulement as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution."³³⁰ If the changes that the legislation proposed had been allowed to be part of the legal order, they would have eroded Kenya's democratic progress substantially.

Decisions with the same impact or potential as the *Cord Case* have been legion since 2010. In 2015, the High Court declared a law that provided for funds to be administered by members of the legislature, the Constituency Development (CDF) Act, unconstitutional.³³¹ Administration of the CDF by members of parliament had been introduced in 2003. Even though it had had a great impact in addressing marginalisation, it contravened the principle of separation of powers.³³² In actual practice, members of parliament who had absolute control over the fund largely abdicated their legislative functions and used the fund to reward persons who had supported them.³³³ Through a decision of the court, the CDF was restructured. In another case decided in 2015, the High Court determined that a section of a law that criminalized HIV transmission, section 24 of the HIV and AIDS Prevention and Control Act was unconstitutional.³³⁴ A year later, in 2016, the High Court found that a law that

³²⁸ See, Business Daily, 'Chaos as Kenyan MPs Pass Contested Security Laws,' 19 December 2017 available at <<http://www.businessdailyafrica.com/Chaos-as-MPs-pass-contested-security-laws/-/539546/2561728/-/2nintxz/-/index.html>> accessed 9 November 2020.

³²⁹ [2015] eKLR.

³³⁰ *Ibid.*

³³¹ Nairobi High Court Petition No. 71 of 2013, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

³³² Alphonse Shiundu, 'CDF shocker as 137 MPs,' spending plans rejected <<https://www.standardmedia.co.ke/article/2000139011/cdf-shocker-as-137-mps-spending-plans-rejected>> accessed 9 November 2020.

³³³ *Ibid.*

³³⁴ *Aids Law Project v Attorney General & 3 others* [2015] eKLR

criminalized the sending of text messages was unconstitutional.³³⁵ Another important judicial review decision was handed down in 2017 when the High Court found that the offence of criminal defamation, which was contained in a colonial law (the Penal Code), was unconstitutional.³³⁶

Despite the role that judicial review has played in protecting democratic norms, a number of laws that support authoritarian practices nonetheless remain on the statute books even during the post-2010 era. These include, first, the *Public Order Act*.³³⁷ This law, enacted during colonial times, seeks to “make provision for the maintenance of public order, and for purposes connected therewith” and has been invoked recurrently by authorities to justify banning assemblies and protests, especially of a political nature.³³⁸ The second is the *Chief’s Act*, enacted in 1937, whose provisions make it a “duty of every chief or assistant chief to maintain order in the area in respect of which he is appointed.”³³⁹ Third is the *Preservation of Public Security Act*.³⁴⁰ Also enacted during the colonial period, this law empowers the President, “if it appears to” him “that it is necessary for the preservation of public security to do so”, to “declare that the provisions of this Part of this Act ... come into operation in Kenya or in any part thereof.”³⁴¹ The reason for the continued existence of these laws is partly that courts do not normally move on their own to review legislation and, in an adversarial legal system like Kenya’s, the framing of pleadings and the quality of advocacy has a decisive impact. In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others*,³⁴² for instance, the Supreme Court declined to strike down a provision of a law on the basis that:

The petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare Section 23 to be unconstitutional. [332] The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the Court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, we cannot afford to lock our eyes to the disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause. [333] In the

³³⁵ *Geoffrey Andare v Attorney General & others*, Nairobi, High Court Petition 149 of 2015 [2016] eKLR

³³⁶ *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

³³⁷ Chapter 56, Laws of Kenya.

³³⁸ *Ibid*, Long Title.

³³⁹ Chapter 128, Laws of Kenya. S. 6.

³⁴⁰ Chapter 57, Laws of Kenya.

³⁴¹ *Ibid*, at Section 3.

³⁴² [2017] eKLR.

circumstances, we are unable to find that Section 23 is unconstitutional. Let the matter be addressed in the right proceedings in the right circumstances.³⁴³

It is noteworthy to observe though that Kenyan courts sometimes, albeit justifiably, show diffidence towards “high-stakes” politics and “controversial” matters. Justifiably because being young courts they could strive for public support by siding with dominant public opinion. The main matters in question are the death penalty, abortion and minority rights. Several cases have, for instance been filed challenging the death penalty or some of its aspects.³⁴⁴ Court of Appeal simply ruled that, “[s]hould Kenyans decide that it is time to remove the death sentence from [their] statute books, then they shall do so through their representatives in Parliament.”³⁴⁵ In another death penalty case, the Supreme Court found that, while the death penalty was not unconstitutional, its imposition as a mandatory sentence for capital offences interfered with judicial discretion.³⁴⁶ In all these cases, courts appear to be public-opinion sensitive even where the constitutional text allows them to act as required.

Adopting this restrained and sensitive approach, Kenyan courts have at times not performed well when confronted with “mega politics”.³⁴⁷ Nevertheless, this should not be taken to mean that judicial review is ineffective in Kenya even on matters considered to be “high stakes politics.” In 2013, the Supreme Court, confronted with a presidential petition, dismissed it, citing want of evidence, yet noting that, though some irregularities had been disclosed, an election that had been conducted “substantially” in accordance with the law could not be annulled unless the irregularities interfered with the final outcome.³⁴⁸ contrary in fact to international observers position about the elections, in the 2017, a presidential election petition was filed under a virtually similar set circumstances and the Supreme Court annulled the election, arguing on this occasion that irregularities need not interfere with the outcome of an election for it to be declared invalid.³⁴⁹ Granted the history judges dismissing presidential elections

³⁴³ *Ibid.*

³⁴⁴ E.g. *Godfrey Ngunjiri Mutiso V Republic* [2010] eKLR.

³⁴⁵ *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR

³⁴⁶ *Francis Karioko Muruatetu & another v Republic* [2017] eKLR

³⁴⁷ Duncan Okubasu and Josephat Kilonzo, Judicialisation of Mega Politics in Kenya: Contributor to Democratization or Mere recipe for Institutional Backlash? in James Ngondi (ed) *Reflections on the 2017 Elections in Kenya* (Nairobi: ICJ, Kenya Chapter, 2018)

³⁴⁸ Petitions No. 3, 4 and 5 of 2013; *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR.

³⁴⁹ See Petition No. 1 of 2017, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

citing technical reasons, the singular fact that the Supreme Court could annul a presidential is evidence of some effectiveness of judicial review even in mega politics.

6.6 Concluding observations

Despite the liberalisation of politics in the early 1990s, Kenya remained a de facto authoritarian constitutional regime though it was gradually experiencing real constitutional change towards a hybrid constitution. In 2002, after a change to the incumbent political power holder when Moi's nominee was ousted, real constitutional change occurred and Kenya transitioned from an authoritarian to a hybrid constitution. Since then and to date, the real constitution has neither regressed into an authoritarian one nor has it become democratic. While, therefore, the environment is relatively free when compared with the pre-1989 epoch, transition to a democratic constitution is a yet-to-be-realised outcome if the endurance of its post 2002 hybrid constitution is anything to go by is anything to go by. In 2010, a new, normatively attractive Constitution was promulgated. The introduction of this Constitution did not, however, complete Kenya's transitional process as it, and the institutions it fashioned, such as judicial review, have simply hedged against regression. As such, they have contributed to the consolidation of Kenya's hybrid constitutional regime.

There are a number of explanations for the partial transition to, and endurance of, Kenya's hybrid constitution. While incumbent political power holders have changed, the legal order is yet to profit from their departure because the political order has been closed to a few individuals or families that were either the beneficiaries of, or have deep connections to, Kenya's authoritarian past. This has arguably facilitated a continuum of patronage networks and informal powers. Second, while pro-democracy groups have over the years been involved in the reform process, their effectiveness has been undermined by co-optation. International actors, for their part, played a significant role in the early 1990s in facilitating change from a one-party state, but over the years, their strategic interests in Kenya have inhibited their support for democracy-demanding groups. These interests, combined with Kenya's relative economic affluence and strategic international relations, mean that only endogenous forces can be relied upon to foster real constitutional change. Because of other structural conditions, however, including neopatrimonialism and ethnic cleavages, it is unlikely that Kenya will rapidly transition to liberal democracy in the absence of a serious economic or political crisis. A gradual change to the real constitution in this direction

is nonetheless expected at the behest of democracy-demanding groups with the support of judicial review pursued under a normatively attractive formal constitution enacted in 2010.

CHAPTER SEVEN: BENIN'S TRANSITION TO AND FROM A DEMOCRATIC REAL CONSTITUTION

7.1 Introduction

Discounting the post 2019 period, Benin has since the early 1990s been described as a “a model of successful democratic transition” in Africa.¹ Despite the fact that Benin’s democracy has not been “consolidated”² or, rather, that starting around 2017, it fell victim to global authoritarian diffusion, dubbed democratic “regression” or “decay”, it stands to be counted as one of the few African political orders whose de facto constitutions became democratic after the TWD.³ Though Benin’s Freedom House ratings fell from a “free” to “partly-free” country in 2020, it has all along been ranked as a “free” country.⁴ It is, indeed, the African country that “inaugurated the...national conference movement in February 1990” as a model for political and constitutional transformation.⁵ The peculiarity of Benin – just like South Africa – when contrasted with other countries that can also be claimed to have democratic constitutions, such as Botswana and Mauritius, is that Benin was a full-blown authoritarian state at the inception of the TWD.⁶ The second peculiarity of Benin, to which its inability to “consolidate” or depart from “nominal” democracy is linked, is that it has been one of Africa’s economically least-developed countries. Given the relationship that has been

¹ Laloupo Francis ‘La Conference nationale du Benin: un concept nouveau de changement de regime politique,’ (1993) Anne Africaine 1992-1993; see also Anna Rotman, ‘Benin’s Constitutional Court: An Institutional Model for Guaranteeing Human Rights’ (2004) 17 *Harv Hum Rts J* 281, who describes it as ‘bright spot in West Africa’; Thomas Bierschenk, described it as “a model democracy in the African context” in Thomas Bierschenk, ‘The Local Appropriation of Democracy : An Analysis of the Municipal Elections in Parakou, Republic of Benin 2002 -03,’ (2006) 44, 4 *J. of Modern African Studies*, (2006), 543–571; Richard Ванџас, ‘Briefing: Benin: Challenges for Democracy,’ (2014) 113 (424) *African Affairs*, 449–459, who describes it as a “model”.

² See Rachel M. Gisselquist, ‘Democratic Transitions and Democratic Survival,’ (2008) 15 (4) *Democratisation*, Benin, 789.

³ See, Benin’s regression in Dirk Kohnert, Preuss Hans-Joachim, ‘Benin’s Stealthy Democracide: How Africa’s Model Democracy Kills Itself Bit by Bit,’ (2019) *ZBW – Leibniz Information Centre for Economics*; Kiel, Hamburg, <<https://www.econstor.eu/handle/10419/205259>> accessed 11 November 2020.

⁴ See Freedom House, ‘Freedom in the World- Benin,’

<<https://freedomhouse.org/country/benin/freedom-world/2019>> accessed November 2020.

⁵ John Heinlbrunn, ‘Social Origins of National Conferences in Benin and Togo,’ (1993) 31 (2) *The Journal of Modern African Studies* 277, at 278. See also, Samuel Decalo, ‘Benin: First of the New Democracies,’ in John F Clark, *Political Reform in Francophone Africa* (Taylor and Francis, 2018).

⁶ Chris Allen, ‘Restructuring an Authoritarian State: ‘Democratic Renewal in Benin,’ (1992) 19 (54) *Review of African Political Economy*, 42.

claimed to exist between wealth and democracy, one would not expect it to have had a stable real democratic constitution over the years.⁷

Based on personal interviews conducted and information obtained from secondary sources, this study has established that in Benin's post-1990 era, after the National Conference ("NC") that ushered in a democratic dispensation, phenomena associated with democratic constitutionalism, such as leadership turnover at the instance of elections and protection of political rights, remain largely evident. Benin is certainly not a constitutional "paradise" given that the mentioned problems that now bedevil mature democracies – the so-called democratic rot or regression⁸ -- also threaten it, particularly in President Talon's era that started in 2016.⁹ Nevertheless, Benin successfully transitioned and has been, for a long time, a stable democracy.¹⁰ The main argument made in this chapter is that the Mathieu Kérékou regime, which was in power at the inception of the TWD, became so vulnerable to endogenous forces within the polity such that it lost significant control, not only over the reform scheme, but also of Benin's immediate post-NC constitutional development. Riding on French support, democracy-demanding groups established a strong system of judicial review that has over the years fostered constitutional consolidation. These groups deliberately strengthened democratic institutions such that, when Kérékou came back into power

⁷ See e.g. Abbas Pourgerami, 'The Political Economy of Development: An Empirical Examination of the Wealth Theory of Democracy,' (1991) *Journal of Theoretical Politics* 26.

⁸ See, Tom Gerald Daly, 'Democratic Decay in 'Keystone' Democracies: The Real Threat to Global Constitutionalism?' (2017) *Int'l J. Const. L. Blog* (May 10, 2017), <<http://www.i-connectblog.com/2017/05/democratic-decay-in-keystone-democracies-the-real-threat-to-global-constitutionalism-i-connect-column/>> accessed 11 November 2020; Scott Mainwaring and Anibal Pérez-Licón, 'Democratic Breakdown and Survival' (2013) 24(2) *Journal of Democracy* 123, 132–134; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, 9; Aziz Z. Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy,' (2018) 65 *UCLA Law Review*; András L. Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*, (Routledge, 2017); Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018); David Waldner and Ellen Lust, 'Unwelcome Change: Coming to Terms with Democratic Backsliding' (forthcoming 2018) 21 *Annual Review of Political Science*; Amichai Magen, 'The Democratic Entitlement in an Era of Democratic Recession' (2015) 4(2) *Cambridge Journal of International and Comparative Law* 368 and Valeriya Mechkova, Anna Lührmann, and Staffan I. Lindberg, 'How Much Democratic Backsliding?' (2017) 28(4) *Journal of Democracy* 162-169; Zachary Elkins, 'Is the Sky Falling? Constitutional Crises in Historical Perspective' in Mark Graber, Sandy Levinson, and Mark Tushnet (eds) *Constitutional Democracy in Crisis*, (Oxford University Press, 2018).

⁹ Ife Paul Atihou, 'Declining Democratic Processes in Benin Republic: Implication for African Security' (2018) 15 (3) *African Renaissance* 29.

¹⁰ Bertelsmann Stiftung, BTI 2020 Country Report — Benin. Göttersloh: Bertelsmann Stiftung, 2020, <https://www.bti-project.org/content/en/downloads/reports/country_report_2020_BEN.pdf> accessed 11 November 2020.

in 1996, the *de facto* authoritarian norms of the pre-1989 era were for the most part not re-established. The transition was not, however, without any underlying structural foundations, the most important one being the 1980s economic crisis occasioned by the collapse in oil prices in Nigeria, the closure of that country's borders with Benin and the cumulative effect of the nationalisation of domestic and foreign companies in the 1970s. Benin's formal constitution is not however as normatively attractive as Kenya's and its regression to a hybrid regime is attribute to this fact as well as the real or perceived capture of the Constitutional Court in President Talon's era.

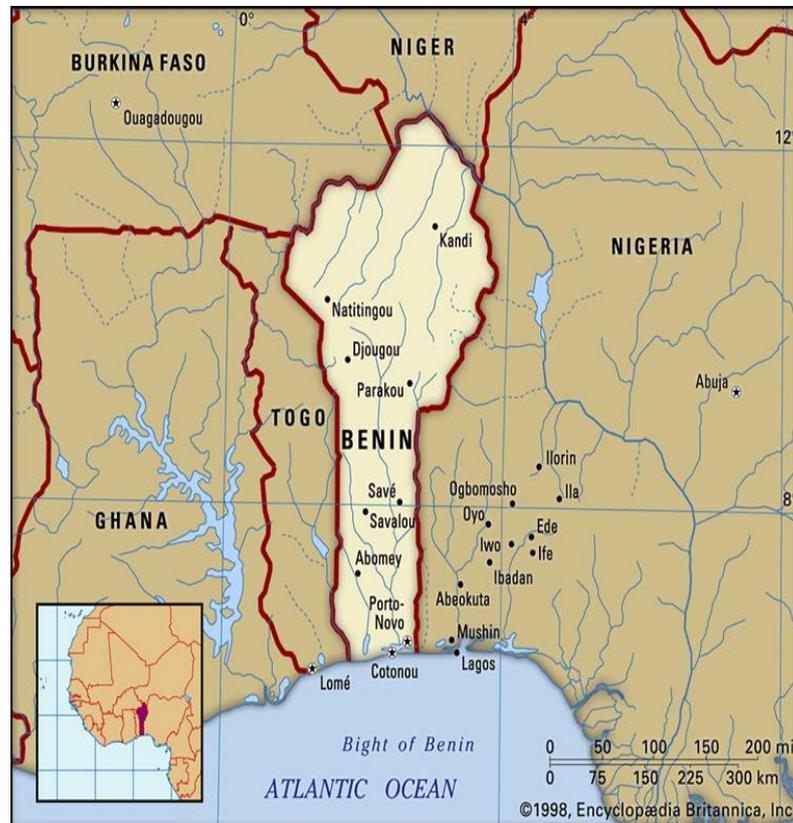
This argument is expounded as follows. First, Benin's social, political and institutional context is described. In so doing, the section identifies institutions operating in the political order that enforce both the real constitution. Second, a historical expedition into Benin's pre-1989 past is undertaken to understand Benin's constitutional conditions prior to its encounter with the TWD. This is followed by a section that takes a look at the transitional process and outcome. After that is a section that takes a closer look at the conditions of interest, particularly the role played by various actors: incumbent power holders, democracy-demanding groups and international actors. Further, the structural conditions that either facilitated or hindered the transition and subsequent consolidation process are discussed. As has already been hinted, the 1990 constitution and judicial review played a great role in democratic consolidation at least until around 2017. The penultimate sections examine the role that formal change and powers as well as judicial review have played, especially in facilitating real constitutional change towards and away from a democratic constitution. In so doing, the conditions behind Benin's successful real constitutional change are identified. The last section summarises the Chapter and makes some concluding remarks.

7.2 Social, political and institutional context

A French colony known before 1975 as "Dahomey"¹¹ and located in west Africa, Benin is one of the smallest countries on the continent with a population of 11.5

¹¹ Mathurin C. Hounnikpo and Samuel Decalo, *Historical Dictionary of Benin*, (Scarecrow Press, 2012) at 129.

million people.¹² It borders Nigeria to the east, Togo to the west and Burkina Faso and Niger to the north.¹³



Map of Benin

Source: Encyclopedia Britannica¹⁴

Like most African countries, it is a multi-cultural and multi-religious society. It has over 42 different ethnic groups which include immigrants from Togo, Nigeria and Mali. The largest ethnic group is the Fon/Dahomey, which represents about 39% of the population.¹⁵ The other large tribes are the Yoruba, Adja and Baruba, which constitute 18.5%, 15% and 8% of the population respectively.¹⁶ Other smaller ones include the

¹² World Bank, 'Benin Overview,' <<https://www.worldbank.org/en/country/benin>> accessed 11 November 2020.

¹³ John S. Hughes and R. H. Hughes, 'A Directory of African Wetlands, Benin' (1992), *ICUN, The World Conservation Union*, 301.

¹⁴ Encyclopædia Britannica, 'Benin,' <<https://www.britannica.com/place/Benin>> accessed 11 November 2020

¹⁵ Sawe, Benjamin Elisha, 'Major Ethnic Groups of Benin,' *WorldAtlas*, Apr. 25, 2017, <worldatlas.com/articles/major-ethnic-groups-of-benin.html> accessed 11 November 2020.

¹⁶ *Ibid.*

Fula and Dendi.¹⁷ The majority of the population are Christians though the number of Muslims has been on the rise lately.¹⁸ There are also African traditional beliefs in Benin.¹⁹ Religious and ethnic cleavages play a less prominent role in Benin than in some other African countries, but are nevertheless present.²⁰ The return of Benin's pre-TWD leader, Mathieu Kérékou, for instance, is claimed to have had "significant religious dimensions".²¹ Also, religious leaders, and more so Christians, are generally part of the political elite and have over the years played a significant role in politics in Benin.²² Recently, with the increasing number of Muslims in Benin, it is thought that there is potential for religious-based tensions.²³ However, that is yet to manifest itself prominently.

Benin also has a south-north divide which has had some implications for the political landscape. Economically, the northern part is not on a par with the southern, the conditions in the north being worse.²⁴ The riotous pre-1972 constitutional tragedies were associated with this divide to the extent that military factions from either the north or south often toppled each other, depending on who was in power and who they supported.²⁵ After 1972, the influence of this divide was largely suppressed following a military takeover by Kérékou.²⁶ Through the introduction and institutionalisation of Marxist-Leninism, or at least its Benin version, Kérékou managed to weaken the military dimension of the north-south dynamics.²⁷ In present-day Benin, discounting President Talon's reign, which started in 2016, the divide within the south – especially

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See, Camilla Strandsbjerg, Kérékou, 'God and the Ancestors: Religion and the Conception of Political Power in Benin' (2000) 99 (396) *African Affairs*; Denise Brügand, 'Muslim Reformists and the State in Benin,' in B. F. Soares and Reni Otayek (eds) *Islam and Muslim Politics in Africa* (Palgrave Macmillan US, 2007) 121.

²¹ *Ibid.*

²² Peter Knoope and Gregory Chauzal, 'Beneath the Apparent State of Affairs: Stability in Ghana and Benin The Potential for Radicalisation and Political Violence in West Africa,' (2016), *Clingendael Report*, (Netherlands Institute of International Relations January 2016), <<https://www.clingendael.org/sites/default/files/pdfs/Ghana%20Benin%20-%20January%202016.pdf>> accessed 11 November 2020.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Dov Ronen, 'Political Dynamics in Benin,' (Center for International Affairs Harvard University April 1984) 6. Skurnik W.A.E. 'The Military and Politics: Dahomey and Upper Volta,' in Claude E. Welch, (ed.) *Soldier and State in Africa*, (Northwestern University Press, 1970).

²⁶ John Tyler Dickovick, 'Legacies of Leftism: Ideology, Ethnicity and Democracy in Benin, Ghana and Mali (2008) 6 (6) *Third World Quarterly*, 1119, 1123- 1124.

²⁷ Kristen A. Harkness, 'When Soldiers Rebel: Ethnic Armies and Political Instability in Africa,' (Cambridge University Press, 2018) 190.

between Abomey, Porto-Novo and Mono -- often created some form of equilibrium, with the northern part welding political power, while the southern part held the economic power.²⁸ This, it has been argued, has fostered some sense of “national unity”.²⁹

Politically, Benin is a multi-party democracy, a status it has enjoyed since 1990.³⁰ Unlike most African countries, it does not have a dominant political party.³¹ Political alliances are nevertheless cherished, and most political parties form alliances, especially in run-off elections. Some of the parties with membership in parliament include the Amana Alliance (*Alliance Amana*), the Republican Bloc (*Bloc républicain*), the Presidential Movement (*Mouvance Présidentielle*); the Cowry Forces for an Emerging Benin (*Forces Cauris pour un Bénin émergent*); the Union Makes the Nation (*L'Union fait la Nation*) and the Alliance for a Democratic Dynamic (*Alliance pour une Dynamique Démocratique*).³² Intriguingly though, most presidential candidates in Benin prefer to contest as independent candidates, not under the sponsorship of a political party.³³ However, the presidents more often than not have known affiliations to political parties even if those parties do not sponsor their presidential bids. The parties that, for instance, won the communal and parliamentary elections, the Progressive Union and the Republican Bloc, have been described as “Talon’s parties”.³⁴

Benin’s governance is organized under the 1990 Constitution. It is a presidential system whose president is the both head of Government and “Chief of State”.³⁵ The President appoints members of government, who are his ministers, “after an advisory

²⁸ Clingendael Report, 21.

²⁹ *Ibid.*

³⁰ Graeme R. Newman, *Crime and Punishment Around the World [4 volumes]*, (ABC-CLIO, Benin 2010) at. 7

³¹ Rachel Gisselquist, ‘Benin: A Pulverized Party System in Transition,’ in Doorenspleet R., Nijzink L. (eds) *Party Systems and Democracy in Africa*, (Palgrave Macmillan, London 2014), at 129.

³² See African Elections Database, <<http://africanelections.tripod.com/bj.html>> accessed 11 November 2020.

³³ Issaka K Souarï, ‘The 2011 Presidential Election in Benin: Explaining the Success of One of Two Firsts,’ (2011) 10 *Journal of African Election* 74.

³⁴ Geraldine Boechat, ‘Patrice Talon’s parties took 77% of The Seats in the Communal Elections in Benin,’ 21 May 2020 *Medià Africa*; <https://medafricatimes.com/19975-patrice-talons-parties-took-77-of-the-seats-in-the-communal-elections-in-benin.html> accessed 11 November 2020; Samuel Woodhams, ‘A Democratic Champion Goes Down In West Africa,’ 13 May 2019, *Vanguard*, <<http://www.vanguardafrica.com/africawatch/2019/5/9/a-democratic-champion-goes-down-in-west-africa>> accessed 11 November 2020.

³⁵ Constitution of Benin, articles 41, 54.

opinion of the National Assembly.”³⁶ Though the Constitution does not create an office of the Prime Minister, Presidents in Benin have over the years created the position and appointed someone or at times abolished it.³⁷ Under the 1990 Constitution, the President is elected for a maximum of two terms of 5 years each.³⁸ The political system has also embraced representative democracy with a unicameral legislature made up of “deputies”.³⁹ The deputies are elected by way of direct suffrage for a term of 4 years and are eligible for re-election.⁴⁰ Other than political branches, Benin has a judicial system and “councils”, both of which are independent offices from the executive. Its legal system is part of the civil law tradition, with a judiciary headed by a Supreme Court.⁴¹ Other important bodies in the constitutional order include the Constitutional Council, the Economic and Social Council and the High Authority of Audio Visuals and Communications.⁴² Administratively, Benin is divided into twelve “departments”, which are in turn sub-divided into seventy-seven communes.⁴³

7.3 Pre-1980 constitutional conditions

Benin’s pre-1989 colonial history is not very different from many other African countries in the sense that its real constitution was overwhelmingly authoritarian. It gained its independence from France in 1960 after a French takeover of the Kingdom of Dahomey around 1894 that lasted for about 60 years.⁴⁴ Like many other African countries, colonial rule was resisted in Dahomey and though decolonisation is generally attributed to external factors, some anti-colonial resistance groups take credit

³⁶ *Ibid.*

³⁷ See e.g. Joe Bavier, ‘Benin President Scraps PM’s Post in New Government,’ 12 August 2013, *Reuters*, <<https://www.reuters.com/article/us-benin-government/benin-president-scraps-pms-post-in-new-government-idUSBRE97B0GO20130812>> accessed 11 November 2020.

³⁸ Constitution of Benin, article 42.

³⁹ Karim Okanla, ‘Democracy in West Africa’ *D + C Newsletter*, 3 July 2019 <<https://www.dandc.eu/en/article/troublesome-trend-recent-elections-senegal-benin-and-nigeria-have-revealed-serious-problems>> accessed 11 November 2020; Constitution of Benin, article 78.

⁴⁰ *Ibid.*, article 79.

⁴¹ Constitution of Benin, 131 and title VI generally.

⁴² See Constitution of Benin, Titles VII and VIII; Statioids, Departments of Benin, <<http://www.statoids.com/ubj.html>> accessed 11 November 2020.

⁴³ Caldeira, E., Foucault, M. & Rota-Graziosi, G. ‘Decentralisation in Africa and the Nature of Local Governments’ Competition: Evidence from Benin,’ (2015) 22 *Int Tax & Public Finance* 1048, at 1057.

⁴⁴ Charles Shryer and Nkasa Yelengi, ‘The Roles of the Military in the History of Benin (Dahomey): 1870-Present (2003) *University of Wisconsin-Superior McNair Scholars Journal* 81, <<https://minds.wisconsin.edu/bitstream/handle/1793/75818/The%20Roles%20of%20the%20Military%20in%20the%20History%20of%20Benin%20%28Dahomey%29%201870-Present%20by%20Charles%20Shryer.pdf?sequence=13&isAllowed=y>> accessed 11 November 2020.

for the peaceful transfer of power to the indigenous inhabitants.⁴⁵ Because of Dahomey's participation in the French National Assembly, multi-party democracy is an idea that had already been experienced by the time that Benin attained its independence from the French in 1960.⁴⁶ Following the departure of the French, however, a period of constitutional suspensions, political rule outside or even without a formal constitution, dramatic military takeovers and unmitigated violation of rights ensued.⁴⁷ At a certain point, Benin was referred to as "the sick child of Africa".⁴⁸ The most serious constitutional disruptions occurred between 1962 and 1972. From 1963 to the start of Kérékou's term, no less than ten constitutions were inaugurated and there were more than five successful coups.⁴⁹ Formal constitutions in these successive military regimes did not matter and amendment was not an option as groups never come to power through democratic elections in the first place. Most regimes from 1963 until 1972 remained substantively non-civilian.

Before 1972, there were three major political parties that were ethnically and regionally mobilized, and which pursued patronage politics.⁵⁰ Sections of the army were recruited into these parties on the basis of ethnic affiliations – a phenomenon that made the army very partisan and political.⁵¹ Takeover of the state by military fractions was so profound that the 1972 coup itself was regarded as attempting to transform both the army and the political system.⁵² The period from 1963 through to 1972 is one in which military arrangements constituted the de facto constitution.⁵³ Most presidents were either members of the armed forces or civilians nominated by the armed forces

⁴⁵ Patrick Manning Slavery, *Colonialism and Economic Growth in Dahomey, 1640-1960* (Cambridge University Press, 1982) 261.

⁴⁶ See, Martin Staniland, 'The Three-Party System in Dahomey: I, 1946-56,' (1973) 14 (2) *The Journal of African History* 291.

⁴⁷ Maurice Ahanhanzo-Glidi, 'Naissance d'un Etat: l'évolution politique et constitutionnelle du Dahomey, de la colonisation a nos jours (LGDJ 1969); Lyon Bio Bigou, 'La contribution du pouvoir législatif a la vie politique du Bénin de 1965 a 1979' in CAPAN L'histoire du pouvoir législatif des indépendances a nos jours (Actes du colloque parlementaire du cinquantenaire Porto-Novo 2011) 8.

⁴⁸ Horace Signonna Adjolohoun, 'Benin,' <http://www.icla.up.ac.za/images/country_reports/benin_country_report.pdf> accessed 11 November 2020.

⁴⁹ *Ibid.*

⁵⁰ Martin Staniland, 'The Three-Party System in Dahomey: II, 1956–1957,' (1973) 14 (3) *The Journal of African History* 491.

⁵¹ Chris Allen (note 6 above).

⁵² *Ibid.*

⁵³ Generally, see, Samuel Decalo 'The Politics of Instability in Dahomey,' (1968) 7 (2) *Geneve-Afrique/Geneva-Africa* 5.

themselves.⁵⁴ In this set-up, democracy was often used to try to make a military government “look civilian” and this appears to have been the limited ambition of the few elections that took place in that epoch. In some instances, the military would paradoxically intervene to declare an electoral outcome null and void, as happened in the election of 1968.⁵⁵ In other cases, the military would remove a leader who was approved in a civilian election merely on the basis that the elected leader was thought to be impervious to control from the military.⁵⁶

Formal constitutional turnover depended on the leadership in place. As Adjolohoun puts it, “the period from 1960 to 1972 was one of political instability and successive regime changes”.⁵⁷ As the leadership changed, either the formal constitution was suspended or substituted.⁵⁸ Legal and political instability were thus the norm before 1972. Between 1963 and 1979, Benin’s formal constitution was suspended three times, in 1963, 1965 and 1972.⁵⁹ The suspension in 1972 lasted, according to Melkinsburg, for 7 years, implying that for all that period, the country was ruled without any written constitution. Substitutions occurred in 1964, 1968 and 1970.⁶⁰ After reinstatement of the Constitution in 1979, some form of formal stability was achieved as it remained unchanged except for one amendment in 1984.⁶¹ The 1963 constitution was suspended in 1963 after President Herbert Maga was overthrown following riots in the southern part of the country by Colonel Christophe Soglo, who intervened to prevent what he thought was a looming civil war.⁶² The reasons that were given by Songlo for his intervention had nothing, nevertheless, to do with civil war as they were stated as being:

⁵⁴ Samuel Decalo, ‘Regionalism, Politics, and the Military in Dahomey,’ (1973) 7 (3) *The Journal of Developing Areas* 479.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Signonna Horace Adjolohoun, ‘Centralized Model of Constitutional Adjudication: The Constitutional Court of Benin,’ in Charles Fombad (eds) *Constitutional Adjudication in Africa* (Oxford University Press, 2017).

⁵⁸ See P. F. Goudeau, *African Politics* (Martinus Nijhoff Publishers bv, The Hague 1981).

⁵⁹ See, Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions*, (Cambridge University Press, New York, 2009).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Simon Akindes, ‘Civil-Military Relations in Benin: Out of the Barracks and Back- Now What?’ In Martins Rupiya *et al*, *The New African Civil-Military Relations* (APPRI. Pretoria, 2015) 44.

Luxuriant lifestyle of the rulers, abusive increase of the number of ministerial posts, unsatisfied social demands, unkept promises, the rise of the cost of living, anti-democratic measures that martyred the people and reduced them to nothing.⁶³

It was not until 1964 that a new constitution was established in a bid to make the government civilian, but that, too, was suspended in 1965.⁶⁴ The year 1965 is itself considered as one of the most momentous following an attempt at prosecuting the deposed President Maga.⁶⁵ The rift that ensued following this initiative forced the heads of government, Apithy and Ahomadedge, out of power in favour of the head of state – Colonel Soglo – following his suspension of the government and the Constitution.⁶⁶ This state of affairs changed in 1967, when a new military team overthrew Soglo under the leadership of Maurice Kouandete.⁶⁷ This team had taken advantage of civilian unrest occasioned by a ban on trade union activities.⁶⁸ Following this takeover, Kouandete formed a government that was mainly dominated by the military but which was headed by a civilian, Emile Zinsou.⁶⁹ Previously, Zinsou had been defeated in an election by one Basis Adjou, but the election was declared null and void.⁷⁰ The army had, however, decided that that Adjou would not form a government as he had been perceived to be part of the old regime.⁷¹ Zinsou was not in favour of the idea of leading a government that had been formed by the military and led the country into a plebiscite to decide whether civilians approved his rule.⁷² Following a more than 55% win, he refused to be controlled by the military. Zinsou also tried to establish his own single, state political party.⁷³ His reign came to a dramatic end in 1969, after one and a half years in power, when he was deposed by the then commander in chief of the army, Colonel Kouandete.⁷⁴

⁶³ Carlson Anyangwe 'Revolutionary Overthrow of Constitutional Orders in Africa,' (Bamenda, Langaa Research and Publishing, 2012) 135.

⁶⁴ Zachary Elkins et al, note 59 above (Lifespan of National Constitutions).

⁶⁵ Morrison, Donald G., Robert C. Mitchell, and John N. Paden, *Black Africa: A Comparative Handbook*, (Springer, 1989) 371.

⁶⁶ *Ibid.*

⁶⁷ Harris M. Lentz, *Heads of States and Governments Since 1945* (Routledge; 1st edition, 1996) at 88.

⁶⁸ 61.

⁶⁹ Chuka Onwumechili and David Carle, *African Democratisation and Military Coups* (Greenwood Publishing Group, 1998).

⁷⁰ *Ibid.*, at 43.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Noel Dossou-Yovo, 'The Experience of Benin,' (1999) 16 (3) *International Journal of World Peace* 61.

⁷⁴ *Ibid.*, 61-62.

The years between 1969 and 1972 were quite eventful, too. Following the deposition of Zinsou, a military directorate took over the leadership of the country and organized a presidential election in March 1970.⁷⁵ There was a looming civil war when counting of the results revealed almost equal support for the three main candidates – Ahomadegbe, Maga and Apithy – and the directorate intervened by cancelling the exercise and asking the candidates, along with Zinsou, to resolve what they considered a crisis.⁷⁶ In the end, a presidential council was established with each of the candidates serving as president for two years in rotation.⁷⁷ The term of this triumvirate, however, came to an end in 1972, when Mathieu Kérékou deposed the leadership and took over the government, placing the three co-presidents under arrest.⁷⁸

Kérékou became leader of Dahomey in 1972, ascending to power not through a democratic election but through military intervention.⁷⁹ A military national council was established with 12 members from the main regions. At this time, national security was managed by both the army and the gendarmerie.⁸⁰ Kérékou reorganized the administration and merged the two.⁸¹ He also announced the adoption of Marxism-Leninism as the official national ideology.⁸² The model that was adopted by Kérékou was, however, “nominally Afro-Marxist in orientation” as “the regime shared little in common with the Soviet-inspired, Soviet-financed escapades in Angola, Ethiopia and Mozambique.”⁸³ This Marxist-Leninist rhetoric is said to have helped Kérékou deal with ethnic divisions through mobilisation of the country’s most influential actors, including students.⁸⁴ It was also important in re-organizing the state that had initially been managed by the military along ethnic lines.⁸⁵ Through this, he thus managed to control ethnic-led military takeovers. Accordingly, though patron-client relationships

⁷⁵ *Ibid* at 62.

⁷⁶ *Ibid.*

⁷⁷ Generally see, Samuel Decalo, ‘The Morphology of Radical Military Rule in Africa,’ (1985) 1 (3-4) *Journal of Communist Studies*, 122

⁷⁸ Samuel Decalo, ‘People’s Republic of Benin,’ in B. Szajkowski (ed.), *Marxist Government* (Springer, 1981) 87-115.

⁷⁹ *Ibid.*

⁸⁰ See Decalo, *Ibid*; Bernard Vlakpa, ‘Political History of Benin,’ (Undated), <<http://knowledgeiskeytosuccess.over-blog.com/pages/The-political-history-of-benin-4685987.html>> accessed 11 November 2020.

⁸¹ *Ibid.*

⁸² John Tyler Dickovick, ‘Legacies of Leftism: Ideology, Ethnicity and Democracy in Benin, Ghana and Mali (2008) 29 (6) *Third World Quarterly* 1123.

⁸³ *Ibid.*

⁸⁴ *Ibid*, 1124.

⁸⁵ *Ibid.*

flourished in Benin, these were not pursued along ethnic lines.⁸⁶ Having changed the country's name, Kɔ̀rɔ̀kou established a political party through which he ruled until the late 1980s. As Siege explained in detail:

PRPB was created on 30 November 1975, after Dahomey had opted for socialism. [Thus] one year later the party that was to carry this socialism was created which was the PRPB. When this party was created, the country changed its name at the same time. Dahomey became Benin, which is why the name of the party is PRPB (Party of the People's Revolution of Benin). The new party became the state party, which subsequently directed all the political activities of the country.⁸⁷

Commitment to PRPB ideology had far-reaching implications for how the state would be run and thus for Benin's political economy. In spite of its form, this ideology justified nationalisation of many private companies and institutions, inclusive of banks and insurance companies.⁸⁸ At first, these initiatives had huge support because they led to some increase in public jobs as well as in salaries.⁸⁹ Because foreign companies were not left out either, the implementation of this ideology put Dahomey, as it was then called, into a strained relationship with them, more so France.⁹⁰ Later, general support towards it also dwindled as Kɔ̀rɔ̀kou allocated the positions in the nationalized agencies to his political cronies and supporters.⁹¹

The human rights record of pre-1989 Benin was as poor as most other African countries.⁹² As already noted, the main way through which power was acquired was by military takeover rather than through elections. Violence having been the means by which political power was acquired, it was also the means by which the government of the day and political order was maintained. It was not after Kɔ̀rɔ̀kou's ascension to power by that "elections" became the means by which political power was claimed to be legitimate. The position expressed here is not that Kɔ̀rɔ̀kou remained in power as a result of democratic elections. It is just that, from 1963, when Benin gained her independence, no political leadership could claim to have gained power on account of elections. As already hinted, the period before Kɔ̀rɔ̀kou was characterized by

⁸⁶ *Ibid*, 1125.

⁸⁷ Interview with Serge, 28 February 2020, Calavi-Abomey. Translated by Ezechias Djima.

⁸⁸ John Heilbrunn, 'Social Origins of National Conferences in Benin and Togo,' (1993) 31 (2) *The Journal of Modern African Studies* 277.

⁸⁹ Stuart Butler, *Benin: The Bradt Travel Guide* (The Globe Pequot Press Inc, 2006) 19.

⁹⁰ United States Department of the Army, *Africa, Problems & Prospects: A Bibliographic Survey* (Army Headquarters, 1977) 277.

⁹¹ Heilbrunn, note 88 above, at 282.

⁹² University of Minnesota Human Rights Library, 'The Status of Human Rights Organizations in Sub-Saharan Africa,' <<http://hrlibrary.umn.edu/africa/benin.htm>> accessed 11 November 2020.

predictable assassinations, detentions and other forms of gross curtailment of civil and political rights as leadership turnover occurred at the instance of military and counter military action.⁹³

The situation became worse after Kérékou took over. A commentary on human rights in Benin remarks that “human rights were violated on a daily basis. There was no freedom of expression or of the press, and extra-judicial killings and detentions were commonplace”.⁹⁴ Most of the political players in the pre-Kérékou regime were exiled.⁹⁵ The *Parti de la Revolution Populaire du Benin* (PRPB) remained the only party.⁹⁶ Even the trade unions were subsumed into PRPB following the incorporation of all trade unions by the *Union Nationale des Syndicats des Travailleurs du Benin* (UNSTB) and the interests of workers could only be articulated by the ruling party’s central committee.⁹⁷ From that time until the dawn of the TWD, freedom of the press was curtailed and it was not until 1988 that it was restored.⁹⁸ Also, it had become clear that the holding political views that were contrary to those of Kérékou would not be tolerated. In 1979, it had been decided that Kérékou would be the sole candidate for elections for the PRPB and, indeed, he was unanimously elected president in all the elections that followed until the inception of the TWD.⁹⁹ Though elections were conducted in 1979 for the National Revolutionary Assembly, “they were highly controlled, with government selected candidates”.¹⁰⁰ In all that period, it was illegal to form a political party in Benin and there were no prospects of leadership change through an election even within PRPB. Kérékou’s regime “routinely abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground”.¹⁰¹ Recounting several incidents, such as the murder of Kérékou’s Minister of the Interior, Michel Aekpe, Kassa Mompo – the Secretary

⁹³ See Ronald Adlovi, ‘Benin’ in Heyns Christoph, (eds) *Human Rights Law in Africa* (Issue 1, Volume 4, 2004) <<https://brill.com/view/journals/hrao/hrao-overview.xml>> accessed 11 November 2020.

⁹⁴ *Ibid.*

⁹⁵ See return of many from exile mentioned in United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1998 - Benin*, 26 February 1999, <https://www.refworld.org/docid/3ae6aa5cc.html> accessed 29 November 2019.

⁹⁶ Tom Langsford (eds) *Political Handbook of the World 2012* (Sage Publications, 2012) 139.

⁹⁷ Heilbrunn, (note 88 above) at 284.

⁹⁸ *Ibid* at 285.

⁹⁹ David Lea, Annamarie Rowe (eds.) *A Political Chronology for Africa* (Europa Publications Limited, London 2001,) 33.

¹⁰⁰ Gisselquist, note 2, at 795. Darin Christensen and David D. Laitin, *African States Since Independence* (Yale University Press, 2019) 64.

¹⁰¹ Signonna Horace Adjolohoun, note 56, at 51.

General of the Workers Union – reviewed Kɔ̀rɔ̀kou’s rule in an interview for this study as follows:

Kɔ̀rɔ̀kou dissolved all democratic organisations, he created the state party PRPB (Party of the Popular Revolution of Benin) of which he was the leader. It was a single party. He framed the basic organisations of this party and from there, he reigned. He was an autocrat and created an autocratic dictatorship until 1989.¹⁰²

7.4 Transitional outcome

Benin’s real constitution assumed a different shape in the late 1980s in the wake of the TWD. The ideology under which PBRP had practised Marxist-Leninism had already suffered from a loss of international legitimacy at the end of the Cold War. The build-up to the transition started around 1980 when Benin slowly slid into a deep economic crisis. Between 1987 and 1989, Benin experienced “endemic” strikes and riots by workers and students.¹⁰³ As discussed in section 6.5, this crisis, coupled with demands from the international community that African countries progress towards the accommodation of pluralism, offered democracy-demanding groups a platform to push for deeper changes. Even before the NC that culminated in the 1990 Constitution, the political order was loosened and freedoms that had hitherto been muzzled, such as speech and association, could be exercised.¹⁰⁴

The political and economic crisis, unfortunately, for Kɔ̀rɔ̀kou, had deepened and could not be addressed by simple acts like the liberalisation of politics. This crisis, “hastened consensus about the necessity of restructuring the economy”.¹⁰⁵ The grievances of the students and the teachers were so pronounced that minimal change was unacceptable to the protestors.¹⁰⁶ In any event, the grievances had assumed political dimensions in the late 1980s.¹⁰⁷ Students were at the forefront and played a

¹⁰² Interview with Kassa Momo, Benin workers union confederation headquarters, Cotonou, 5th March 2020. (Translated by Ezechias Djima).

¹⁰³ Michael Bratton and Nicolas van de Walle, ‘Popular Protest and Political Reform in Africa,’ (1992) 24 (4) *Comparative Politics* 422.

¹⁰⁴ Daniel Lambach, Markus Bayer, Felix S. Bethke *et al*, *Nonviolent Resistance and Democratic Consolidation* (Palgrave Macmillan, 2020) 66.

¹⁰⁵ Heinlbrunn (note 88 above) at 279.

¹⁰⁶ Bierschenk (note 1 above) at 340; Michael Bratton and Nicolas van de Walle, *Popular Protest and Political Reform in Africa* (note 103 above.)

¹⁰⁷ Bierschenk (note 1 above)

significant role in giving a political dimension to the economic crisis.¹⁰⁸ When the Structural Adjustment Programs were introduced, the students opposed them because they obliterated the scholarships that had previously been given and also the guarantee of employment after university.¹⁰⁹ Initially, Κιρῆκου had also consolidated the student union into a state-run organisation such that, in addition to protesting and demanding autonomous associations, they joined other democracy-demanding groups calling for the dissolution of PRPB, a new constitution and a liberal society.¹¹⁰

The pressure mounted and, when coupled with French support, Κιρῆκου had to legalize the opposition and organize a constitutional delegates' conference to amend the formal constitution, one of the demands of the protests.¹¹¹ The authoritarian Beninese state had begun to collapse. Siege, a professor of history who participated in an interview for this study, summarized the events of that period as follows:

On 6 December 1989 there was a joint meeting of the National Executive Council (the government of the time), the Central Committee of the PRPB and all the state structures. On 7 December 1989, a report was made of this meeting. From this report, it emerged that a conference should be convened in the first quarter of 1990, the name of this conference was not known, but it was necessary to convene a conference anyway. The decision of this historic conference was made on 6 December 1989 and the next day it was announced.¹¹²

Following a preparatory meeting, a Committee was set up to oversee the negotiations. According to Siege:

This committee was headed by Mr. Robert Dossou, who was a minister at the time. He later also became President of the Constitutional Court. The Robert Dossou team worked until 19 February 1990, when the activities of the conference began. From 19 to 20 February 1990 a bureau was set up to run the conference. The office was composed of Salomon Biakou and a student named Herve Akakpo. On 20 February 1989 in the afternoon, the President of the Conference was elected to lead its activities. The bureau was composed of 13 members (sic).¹¹³

The outcome of the committee was a delegates' conference that brought together human rights groups, universities, women, religious leaders, and military and

¹⁰⁸ Markus Bayer, 'The Democratizing Effect of Non-violent Resistance,' (2018) <<https://css.ethz.ch/en/services/digital-library/articles/article.html/b85b5ea9-dc3c-47aa-ae8b-aa93c8849112>> accessed 11 November 2020.

¹⁰⁹ Heinlbrunn (note 88 above) at 292.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* See also, Φῤῥῆδῆρῖϋϋϋ ϋϋϋϋ ϋϋϋϋ, 'Constitution de la Rῥpublique du Βῥnin, La Constitution de tous les records en Afrique (Editions CACI 2010).

¹¹² Interview with Serge (note 87 above).

¹¹³ *Ibid.*

opposition leaders, to whose efforts the Constitution of 1990 is credited.¹¹⁴ At the end of the NC, and despite resistance, Kɔ̀rɔ̀kou succumbed to demands for an election after the constitutional change process. Kɔ̀rɔ̀kou had initially indicated that he was not going to contest but nevertheless announced his candidature on the last day.¹¹⁵ Twelve candidates participated in the election. Soglo, Kɔ̀rɔ̀kou's main competitor, was party to the reform but had also said that he did not intend to contest.¹¹⁶ He nonetheless contested and defeated Kɔ̀rɔ̀kou in a run-off as neither of them had met the minimum vote threshold to be president.¹¹⁷ Gisselquist provides a context for these elections in the following way:

Although successful in electing a new government, the 1991 elections were by no means smooth... Between the first and second rounds of the polls, there were several incidents of election related violence. During the second round, Kɔ̀rɔ̀kou supporters reportedly attacked Soglo supporters in the northern town of Parakou, leaving two dead. In addition, Soglo [had] a mysterious illness during the campaign, which some of his camp attributed to poisoning or 'witchcraft.' Finally, after announcement of the results, Kɔ̀rɔ̀kou did not concede until March 30, when he was granted immunity for crimes committed during his tenure in office.¹¹⁸

From 1990, when political competition was restored, incumbents or persons that they support have relinquished power peacefully, and there has been compliance with term limits in Benin.¹¹⁹ The military, for its part, "has apparently developed a more republican spirit and stays out of politics".¹²⁰ There has also never been a constitutional suspension let alone an unconstitutional change of government.¹²¹ Benin has hosted free and fair elections, features of a democratic real constitution. As mentioned in the introductory parts, Freedom House has ranked Benin as "free" until 2019 when, as mentioned, it backslid. From the 2020 BTI report, Benin remains a stable democratic country, and "free and fair elections have been the norm in Benin since 1990",¹²² a position that was also taken by most interview participants.

¹¹⁴ *Ibid.*

¹¹⁵ Bruce Baker, 'The Class of 1990: How Have the Autocratic Leaders of Sub-Saharan Africa Fared under Democratisation?' (1998) 19 (1) *Democratization* 115, at 117.

¹¹⁶ Gisselquist, note 2, at 798.

¹¹⁷ Samuel Decalo and M Hounnikpo, *Historical Dictionary of Benin*, (Scarecrow Press, 2013) 367.

¹¹⁸ *Ibid.*

¹¹⁹ Vera Songwe, 'Benin's Landmark Elections: An Experiment in Political Transitions,' Brookings, (2016) <<https://www.brookings.edu/blog/africa-in-focus/2016/03/22/benins-landmark-elections-an-experiment-in-political-transitions/>> accessed 23 November 2019.

¹²⁰ BTI report, note 10 above, at 29.

¹²¹ Elkins et al, 'Constitutional Timelines, Sub-Saharan Africa,' <<https://comparativeconstitutionsproject.org/chronology/>> accessed 11 November 2020.

¹²² Bertelsmann Stiftung, BTI 2018, Country Report- Benin, note 10, at 8.

According to Maxime, for instance, “civil rights are respected” in Benin and it remains a democratic country. Maxime added:

“[s]ince the conference of the "Forces vives de la Nation", Benin has experienced a great renewal, and its constitution, which had lasted more than 30 years, has provided for modalities that highlight [features of] a good democracy. Elections in Benin meet the standards of democracy. In addition, we have a Constitutional Court that guarantees civil and political rights.”¹²³

Samwel too, like Maxime, explained that from “1990 to date, the Beninese constitution has always guaranteed and protected civil and political rights. A good number of political parties go to elections whether presidential, municipal and communal, or legislative. All that is required to be a candidate is for everyone to meet the conditions.”¹²⁴ An anonymous interviewee also confirmed that:

Benin is one of the most stable countries in terms of democracy in Africa. As proof, after the national conference of 1990, elections have followed one another in peace and stability. This tranquillity is relative, since an election always generates unhappiness and frustration, which triggers violence. Thus, like an election anywhere in the world, disputes arise, but Benin has always been able to [ensure] that rights of all participating parties [are] respected. Benin is a model where free and fair elections are held.¹²⁵

True to the claims of interview participants, and as already hinted, elections have been free in Benin, and incumbents have lost. Kɔ̀rɔ̀kou, who had become an opposition figure, won the 1996 elections.¹²⁶ Although he had won fewer votes than the incumbent Soglo in the first round, he received the support of both the third and fourth-placed opposition candidates and, as a result, he won the election.¹²⁷ He also won the 2001 election, though that election was marred by fraud claims, and some candidates withdrew.¹²⁸ In particular, Soglo refused to stand for the second round,

¹²³ Interview with Maxime, Calavi Abomey.

¹²⁴ Interview with Samwel, Abomey Calavi.

¹²⁵ Interview with Juliet (Pseudo name), Cotonou, Benin.

¹²⁶ Issaka K Souarɔ̀, ‘The 2011 Presidential Election in Benin: Explaining the Success of One of Two Firsts,’ 10 (2) *Journal of African Elections*, 76 <<https://www.eisa.org.za/pdf/JAE10.2Square.pdf>> accessed 11 November 2020.

¹²⁷ Reuters, ‘Marxist Leads In Benin Vote For President,’ 20 March 1996, <<https://www.nytimes.com/1996/03/20/world/marxist-leads-in-benin-vote-for-president.html>> accessed 11 November 2020.

¹²⁸ Issaka K Souarɔ̀, (note 126 above).

citing electoral fraud, as did Houmbedji.¹²⁹ Kérékou thus won with 84.1%, a result that was still considered as credible by the international community.¹³⁰ Kérékou announced that he was not going to change the Constitution and run for a third term under the new dispensation.¹³¹ Houmbedji had actually been Kérékou's preferred candidate for election who had, at one point, been exiled.¹³² He was defeated by Yayi Boni.¹³³ Boni left office in 2016 after serving for two terms. His Prime Minister, Lionel Zinsou, contested the 2016 elections but lost to an independent, Patrice Talon. Talon had lost to Zinsou in the first round of elections.¹³⁴ In the case of the 2016 elections, several aspirant candidates submitted their papers to the electoral body, the Autonomous National Electoral Commission, and about 33 contested.¹³⁵

The situation is not very different with Benin's Parliamentary elections, particularly before 2019. In contrast with other African countries, there is no dominant party in Parliament. In 2019, however, some parties were barred from participating in the parliamentary elections following a rejection of their applications and the Progressive Union, whose leader is Brunno Amoussou, garnered about 56.2 % of the seats while the Republican Bloc, headed by Jean-Michel Abimbola, garnered about 43.8% of the seats.¹³⁶ These parties are, however, claimed to be associated with President Talon. In the 2015 elections, a different political outfit, FCBE–Amana Alliance, whose Presidential candidate lost to President Talon in 2016, had the largest number of seats, 33.¹³⁷ This is also largely the case for local elections, even if they

¹²⁹ *Ibid.*

¹³⁰ Gisselquist, note 2, at 799.

¹³¹ Nico Colombant, Benin's Kérékou 'Promises to Step Down 27 October 2009,' *Voice of Africa News*, <<https://www.voanews.com/archive/benins-Kérékou-promises-step-down>> accessed 11 November 2020.

¹³² Allen (note 6 above), at 48.

¹³³ Barry Turner, *The Statesman's Yearbook 2008: The Politics, Cultures and Economies of the World* (Palgrave Macmillan, 2017).

¹³⁴ See Vera Songwe, 'Benin's Landmark Elections: An Experiment in Political Transitions, Brookings,' (2016) <<https://www.brookings.edu/blog/africa-in-focus/2016/03/22/benins-landmark-elections-an-experiment-in-political-transitions/>> accessed 23 November 2019.

¹³⁵ Allegresse Sasse, 'Benin Votes in Presidential Election as Incumbent Steps Down,' *Reuters*, 6 March 2016, <<https://www.reuters.com/article/us-benin-election/benin-votes-in-presidential-election-as-incumbent-steps-down-idUSKCN0W8066>> accessed 23 November 2019.

¹³⁶ See Election Guide, Benin, Republic of Benin, 28 April 2019, <<http://www.electionguide.org/elections/id/3215/>> accessed 23 November 2019.

¹³⁷ Election Watch, (2015) 26 (3) *Journal of Democracy* 176.

have previously been subject to postponements.¹³⁸ Gisselquest makes the following remarks about the quality of these elections:

December 2002 then brought the country's first democratic local elections for mayors and municipal councils as part of the decentralisation program. Notably, these elections allowed former president Soglo to assume a new role in politics as the mayor of Cotonou... The opposition also won in Benin's capital Porto Novo.¹³⁹

Political rights have also been largely respected. As mentioned, Freedom House had until 2019 profiled Benin as "free", at that time with a rating higher than South Africa.¹⁴⁰ While most participants expressed discomfort with President Talon's reign, their unanimous response was that Benin has generally been a free and democratic country over the years. Badet noted in this regard that:

Benin, with all that is said, is in a democratic space where people are able to say what they want. If we have to take stock over the past 30 years or so, Benin is in a democratic system, even though there are always some exceptional situations.¹⁴¹

The protection of civil and political rights in Benin is way better than in other African countries, especially her neighbours. According to Freedom House's 2017 report:

Benin remains among the most stable democracies in sub-Saharan Africa, having witnessed multiple free and fair elections and peaceful transfers of power since its transition to democracy in 1991.¹⁴²

As at 2019, Benin had an average score of 79% and is considered to be a "free" country.¹⁴³ Political Rights and Civil Liberties indices placed Benin at 2 out of 7, with a score of 1 being most free and a score of 7 being least free.¹⁴⁴ The status, "free" is one

¹³⁸ See, IFES, 'Strengthening the Local Electoral Process December 2002 Local Elections IFES Final Report,' (2002) <<https://www.ifes.org/publications/strengthening-local-electoral-process-december-2002-local-elections-ifes-final-report>> accessed 11 November 2020; See also, Institute for Security Studies, Report on Peace and Security in the ECOWAS area Benin Elections: The Awaiting Game, <https://www.files.ethz.ch/isn/187631/ECOWAS_11_Benin.pdf> accessed 23 November 2019.

¹³⁹ Gisselquest, note 2, at 799.

¹⁴⁰ Benin had 82 % against South Africa's 75 %. See Freedom House (Benin above) as well as Freedom House, South Africa, 2017 <<https://freedomhouse.org/country/south-africa/freedom-net/2017>> accessed 23 November 2019.

¹⁴¹ Interview with Gilles Badet, Cotonou, 9 March 2020.

¹⁴² Freedom House, 'Freedom in the World 2019 - Benin,' 5 August 2016, <<https://freedomhouse.org/report/freedom-world/2019/benin.html>> accessed 10 December 2019.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

which Benin has enjoyed since 1991.¹⁴⁵ These statistics are corroborated by the BTI report as follows:

Freedom of expression is constitutionally guaranteed and numerous political parties and non-governmental associations act without interventions from the authorities (except for basic registration requirements). There are no reports of denial to create an association and the political arena is more occupied by civil society than it is by political parties. Trade unions are particularly vocal when it comes to representing the interest of the relatively small formal labor force... Major clashes between associations and the police are occasionally reported but, all in all, association and assembly rights are rarely restricted.¹⁴⁶

According to the Ibrahim African Governance Index, Benin, which is profiled as “Bouncing Back” in 2019, had an overall governance ranking of 13 out of 54 Countries.¹⁴⁷ The profile “bouncing back” implies that, though there has been a decline or no change over the last ten years, it is showing signs of progress. On average, it is a country that has had an above-average score in the continent, mostly hovering around the 60% mark since 2008.¹⁴⁸ Benin’s score card of participation and human rights puts it at position 6 out of 5 with an average score of 71.5% with its trend for the period 2008 until 2018 profiled as “increasing improvement”.¹⁴⁹ In terms of safety and the rule of law, it is placed at position 15 out of 54 with a score of 63.5%.¹⁵⁰ The rule of law and safety yardstick does show, however, a deterioration.¹⁵¹ Under the Rule of Law Index, Benin scores highly on indicators such as lawful transition of power, non-discrimination, freedom of religion and association as well as absence of civil conflicts.¹⁵²

There is therefore greater correspondence between the de jure and de facto constitution in Benin than in most parts of the region. Though the formal constitution has limitations, such as vesting enormous powers in the President, it is better than what the Kérékou regime used in the pre-1989 era.¹⁵³ Allen reviews it as follows:

The new constitution enshrines liberal democratic values and prescribes a representative and accountable system. The rule of law and respect for human rights

¹⁴⁵ See the various profiles over the years.

¹⁴⁶ BTI (note 10 above) at 9.

¹⁴⁷ Ibrahim Index of African Governance (IIAG), <<http://iiag.online/>> accessed 10 December 2019.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Signonna Horace Adjolohoun, note 56, at 51.

have been restored. While the presidency controls a considerable degree of power it and the cabinet are ultimately responsible to the assembly...¹⁵⁴

Separation of powers, the BTI Report remarks, “is not only constitutionally mandated but also implemented on the ground.”¹⁵⁵ Commenting on the 2016 presidential elections, BTI’s 2018 report also stated:

the 2016 presidential election has reaffirmed the stability of democracy in Benin. Following the election, the Former President Boni Yayi, left office, respecting the two-term limit set by the constitution. Independent candidate Patrice Talon was elected president with the support of a large opposition alliance in the second round of elections. The election process in contrast with Yayi’s re-election in 2011, did not produce any major issues of contention.¹⁵⁶

BTI makes a raft of other assessments that show that the situation in Benin is way more favourable compared to many other places on the continent.¹⁵⁷ In terms of state formation, the report remarks that the “state’s monopoly on use of force is established nationwide”.¹⁵⁸ This means that, unlike in other countries, where militia groups have taken hostage of parts of the country, Benin’s defence and police forces are in control of the entire country.

This is not, however, to suggest that matters are all rosy in Benin. Françoise Agui-Daho Ejuviste believes that “the sword of Damocles is hanging over Benin”.¹⁵⁹ As a respondent from the Communist Party of Benin also noted, with resentment:

Since 2016, violations of freedoms have worsened with the advent of Talon's power. In Benin today, we see opponents imprisoned, exiled or prosecuted by the courts. Democracy no longer exists in Benin. It is the will of the head of state, the only thing that counts. He imprisons whoever he wants and all institutions are subject to him.¹⁶⁰

True to the reservations of interview participants, as well as Freedom House’s recalibration of Benin’s ratings, problems that bedevil mature democracies also afflict Benin’s democracy, especially since 2018, after the end-of-term of members of parliament, known as “deputies” that Talon found when he won the 2016 elections. The 2019 Parliamentary elections have been described in this regard as elections with

¹⁵⁴ Allen (note 6 above) at 56.

¹⁵⁵ Bertelsmann Stiftung, ‘BTI 2018, Country Report- Benin, Gutersloh, <https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Chad.pdf> accessed 11 November 2020.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, at 7.

¹⁵⁹ Interview with Françoise Agui-Daho Ejuviste, Cotonou, Benin.

¹⁶⁰ Interview with John (Presudoname) Cotonou.

“no-opposition”.¹⁶¹ This was after the two parties affiliated to President Talon participated in the election to the exclusion of other parties.¹⁶² This led to protests in which previous political figures participated and, like in other African countries, the use of force was reported in suppression of the protests.¹⁶³ The exclusion of other parties is a major setback to democracy in Benin considering that Benin is host to over 150 political parties.¹⁶⁴ Tactics such as questionable barring candidates on account of lack of tax clearance came in handy to stifle democracy.¹⁶⁵ It was unsurprising, thus, when an interview participant stated that “Benin today belongs to the hybrid category. Even if it was once considered the laboratory of democracy, the 2019 legislative elections affected its democracy.”¹⁶⁶ In overall assessment, Benin experienced real constitutional change and its constitution became democratic in the early 1990s. Its constitution consolidated over the years until around 2017, following a takeover by President Talon when it experienced real constitutional change and its constitution has since been a hybrid one.

7.5 Conditions of Interest

There is no single cause to which real constitutional change in Benin can be attributed.¹⁶⁷ As Dickovic cautions, the existing explanations for Benin’s transition have serious limitations to the extent that they “focus on proximal causes – the role of civil society actors at the moment of transitions – and do not emphasize distant causes”.¹⁶⁸ Benin’s democratic trajectory, starting in the 1980s is treated as “transitions by

¹⁶¹ BBC News, ‘Benin Holds Vote With No Opposition Candidates,’ 28 April 2019, <<https://www.bbc.com/news/world-africa-48084124>> accessed 11 November 2020.

¹⁶² *Ibid.*

¹⁶³ Tyson Roberts, ‘Why Did Many Voters Boycott Benin’s April 28 Elections?’ 10 May 2019, <<https://www.washingtonpost.com/politics/2019/05/10/why-did-many-voters-boycott-benins-april-elections/>> accessed 11 November 2020.

¹⁶⁴ See Le Point, Benin - Legislative ‘The Head of State will come out necessarily weakened,’ 30 April 2019 <https://www.lepoint.fr/afrique/benin-legislatives-le-chef-de-l-etat-en-ressortira-forcement-affaibli-26-04-2019-2309701_3826.php> accessed 11 November 2020.

¹⁶⁵ Africa News, ‘Beninese Opposition Demands New Electoral Code,’ 19 February 2019 <<https://www.africanews.com/2019/02/19/beninese-opposition-demands-new-electoral-code/>> accessed 11 November 2020.

¹⁶⁶ *Ibid.*

¹⁶⁷ See Gisselquest who remarks as follows: an economic crisis; the weakness and vulnerability of the incumbent (Kɔ̀rɔ̀kou regime); support for democratic transitions and consolidation by international actors; the diversity and strength of domestic non-governmental groups and elites; domestic leadership; and the particular institutions under which politics have operated since 1990. Note 2 at 809.

¹⁶⁸ Dickovic, note 82 above at 1129.

collapse”.¹⁶⁹ This is nevertheless a limited way of seeing the change that occurred in Benin. As the sections that follow show, there are both actor-based contributions to, as well as structural foundations for, the transition. After the transition, it is contended, formal change and the institution of judicial review, which played no role in the transitional process, has protected Benin’s constitutional order from some of the pathologies of democracy.

7.5.1 Actor-based explanations

There are three actors of interest: incumbent power holders, democracy-demanding groups and international actors, each of which is discussed separately.

7.5.1.1 Change to incumbent power holders

One of the questions that interview participants were asked in this study was whether there has been a change of incumbent power holders after the TWD. In the case of Benin, all participants answered in the affirmative, though qualifying in some cases that the old politicians are still influential.¹⁷⁰ Boko Hyacinthe, commenting about the general circulation of political actors in Benin, remarked:

Change of incumbent political actors is a reality here. During our constitutional conference, our president was Mathieu Kérékou. He was an army general but since they did not want to remove the entire government, Soglo was appointed as Prime Minister to manage the country. After about a year, the country went for elections and he was elected President. Five years later, there was another election and Kérékou became president again. Then came Yayi Boni and later Talon in 2016.¹⁷¹

Juliet also put it that:

[t]here has been a change in the sense that from 1990, date of the national conference, Benin has, to date, had four (04) presidential elections with various actors as winners. Benin having chosen the democratic model; the elected political actors freely form and organize state policy.¹⁷²

Indeed, Benin is one of the few countries in Africa that has witnessed a change of incumbent power holders since the TWD. Though the formal removal of Kérékou came about following the election of 1991, he – and his party, PRBP – had been

¹⁶⁹ See Stephan Haggard & Robert Kaufman, *The Political Economy of Democratic Transitions*, (Princeton University Press, 1997).

¹⁷⁰ For instance, Djima Yanique (“the former political decision makers are not yet ready to give way to the younger generation that is increasingly interested in politics”)

¹⁷¹ Interview with Boko K. Hyacinthe, Calavi-Abomey, 28 February 2020.

¹⁷² Interview with Juliet above.

dislodged from real power earlier than that. At the time that the National Conference was being held, PRBP had in fact already been dissolved and even when Kérékou competed in the 1991 elections he did so as an independent candidate. Because of the harsh economic situation, it had become apparent to the Kérékou regime's support base that the regime faced segregation from transitional activities.¹⁷³ This, together with the fear that political leaders could face prosecution, persuaded Kérékou to lift the ban on opposition parties and also on several individuals, including former presidents, who, together with their parties, became an important constituency during the reforms.¹⁷⁴ When the assembly was constituted, the first issue for consideration was the assembly's sovereignty itself. Kérékou is said to have claimed that what was at play was more of civilian *coup d'état* and he agreed to relinquish power to the assembly.¹⁷⁵ In Allan's assessment, this was due to Kérékou's "anxiety for his personal survival as opposed to that of his regime".¹⁷⁶ In spite of his involvement, the assembly promised to pardon him and not to expose him to prosecution. In this pardon lies his willingness to cede power to Nicéphore Soglo after he lost to him in 1991, in the elections that followed the conclusion of the National Conference.

Since the inception of the TWD, there has been, not only a change of incumbent power holders, but also a tendency for people not previously in or close to power to be elected. In the words of Adida and Bouko, Benin has a "thirst for political outsiders" whose election "help[s] to nurture healthy political competition."¹⁷⁷ Nicéphore Soglo, to whom Kérékou lost, was a former IMF and World Bank official, who had been nominated by the assembly to be Prime Minister.¹⁷⁸ Adida and Bouko described Soglo as "a man who was born in the neighbouring Togo, educated in France and spent most of the Kérékou military years outside Benin, working with the International Monetary Fund and the World Bank." Hyacinthe also remarked in this regard:

Most of these presidents do not come in with political parties. During the 1996 elections where Kérékou lost to Soglo, he came in as an independent candidate. It

¹⁷³ Heilbrunn (note 88 above) at 279.

¹⁷⁴ *Ibid.*

¹⁷⁵ Gisselquist, note 2, at 796- 797.

¹⁷⁶ Allen, note 6, at 54.

¹⁷⁷ Claire Adida and Adam Chabi Bouko, 'Benin has a new president: Patrice Talon, An Ironic Outsider Politician,' 13 April 2016 <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/13/benin-has-a-new-president-patrice-talon-an-ironic-outsider-politician/>> accessed 11 November 2020.

¹⁷⁸ Claire Adida and Adam Chabi Bouko

is only after he was in office that he formed a political party. Yayi Boni too had no party. This is because people in Benin punish politicians during elections such that when you come with a party you are likely to be punished particularly if the party does something bad. They then prefer independent candidates because they feel that they are outsiders.¹⁷⁹

Patterns of informal politics and their networks, one can argue, were fragmented as a result of disruptions in the early 1990s. Kérékou only came back into power in 1996 after he defeated Soglo in a run-off.¹⁸⁰ It is said that, even though Kérékou had retired from active politics, he came back for two reasons. First, Soglo had, in a meeting involving West African states, humiliated and condemned him over his past reign. This was found to be particularly politically contentious because Kérékou had already been pardoned of the things he had done, which explains why he was able to hand over power.¹⁸¹ Second, some of Kérékou's close allies still in government were unhappy with the way Soglo was ruling. The levels of corruption were low and those who could benefit from corruption were few.¹⁸² They are thought to have incited Kérékou to run again.¹⁸³ By the time Kérékou was coming back to power, though, the reforms had taken such a deep dimension that it was virtually impossible for him to reverse the gains that had been realized during the TWD. Further, he also had to work with other persons that had joined the state, such as judges, who were picked from the pro-democracy movement of the late 1990s. This made it difficult for him to redirect the course of real constitutional change back towards authoritarianism, as had been the case in many African countries.

As observed, Kérékou's term ended in 2006, because of the constitutional restriction in place and perhaps because of his age, too. He announced in a meeting in 2005 with primary and secondary school teachers that he was not going to amend the Constitution and run for another term because "if you don't leave power, power will leave you."¹⁸⁴ Yayi Boni, an independent candidate, won that year's election,

¹⁷⁹ Interview with Boko K. Hyacinthe (above).

¹⁸⁰ Lucy Creevey, Paul Ngomo and Richard Vengroff, 'Party Politics And Different Paths To Democratic Transitions: A Comparison of Benin and Senegal,' (2005) 11 (4) *Party Politics* 478.

¹⁸¹ Heinlbrunn, note 88, at 285; Jennifer C. Seely 'The Legacies of transitional governments: Post-transition dynamics in Benin and Togo,' (2005) 12 (3) *Democratization* 360, at 370.

¹⁸² Interview with Hyacinthe.

¹⁸³ *Ibid.*

¹⁸⁴ The New Humanitarian, 'Kérékou Says Will Retire Next Year, Will Not Change Constitution to Stay in Power,' 12 July 2005 <<https://www.thenewhumanitarian.org/report/55408/benin-Kérékou-says-will-retire-next-year-will-not-change-constitution-stay-power>> accessed 11 November 2020.

defeating Kérékou's one-time Prime Minister, Adrien Houngbédji.¹⁸⁵ Houngbédji was a more seasoned politician, it can be contended, as he had been the President of the National Assembly between 1999 and 2003. Boni subsequently won the 2011 election and in total ruled for 10 years, from 2006 until 2016, when Patrice Talon took over. Boni, "unlike his political rivals at the time" had "no prior political experience, an asset on which he capitalized: He ran as an independent, his campaign based on change."¹⁸⁶ At the end of Boni's term, he supported the candidature of his Prime Minister, Lionel Zinsou, who lost to Talon.¹⁸⁷ These circulations have occurred, as observed, without a dominant party.

In Benin, save for a few exceptions, people that were actively engaged in the pre-1989 regime do not repackage themselves with new political parties for the sake of taking over power. Most politicians in Benin seem to politically disentangle themselves, not only from the Kérékou regime but, at the time of their taking over office, from any political party. Though some of the members of the PRBP diffused into the new political order, they did not occasion a substantive reversal either. When asked where the members of PRBP went, Siege remarked in the interview for this study that:

They are all there; many are even in positions of responsibility in the country. When we take for example the case of Ousmane Batoko, the President of the Supreme Court, he is one of the members of the PRPB. There are very many of them who still animate the political life of the country. They were part of the PRPB but today they are still active in Benin's politics.¹⁸⁸

Whether the prospects of leadership change through an election will dwindle in Benin in the post-2017 era is yet, however, to be established in light of the flawed parliamentary elections. What can be observed in Benin, though, is that there has been, since the TWD, a change of incumbent power holders, with Soglo, for example, serving for only one term.

¹⁸⁵ Issaka K Souaré, note 33 above, 76- 79.

¹⁸⁶ LLC Books, *Members of the National Assembly of Benin: Adrien Houngbédji, Bruno Amoussou, Mathurin Nago, Kamarou Fassassi, Théophile Nata* (LLC Books, 2010).

¹⁸⁷ Tyson Roberts, 'Here's why Benin's Election Was a Step Forward for African Democratic Consolidation. And Why it Wasn't,' *Washington Post*, 22 March 2016, <<https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/22/heres-why-benins-election-was-a-step-forward-for-african-democratic-consolidation-and-why-it-wasnt/>> accessed 11 November 2020.

¹⁸⁸ Interview with Serge, 28 February 2020, Calavi-Abomey, Translated by Ezechias Djima.

7.5.1.2 Existence of effective democracy demanding groups

Interview participants observed that democracy-demanding forces were a synergy between former and aspiring political elites as well as both civil society and faith-based organisations. These coalesced into a largely united force for constitutional change. The political dimensions to this force are credited to the Communist Party of Benin, which ultimately did not take part in the transitional process. As Samwel put it, “the created opposition movements, civil society, faith-based organisations, etc... were significantly involved in the change of Benin's political and constitutional system.”¹⁸⁹

In the Beninese context, pro-democracy groups were not just members of civil society, the academy or opposition parties. They comprised workers, who included civil servants, as well as university students. While each of these groups had their own agenda, for instance students seeking their scholarships and post-university job assurances and civil servants their unpaid salaries, all were united in seeking regime change. Under the influence of the Communist Party of Benin’s agenda, these groups came to have a common purpose, the ouster of Kérékou. In Serge’s recollection:

It was the Communist Party of Dahomey that led the fight against the Kérékou regime. It compromised nothing!¹⁹⁰

This party, then a mere movement, was operating covertly in Benin with headquarters in other parts of the world, such as Paris and Lagos. It also had strong alliances with China and Albania.¹⁹¹ It recruited many civil servants, students and intellectuals.¹⁹² The party was interested in the ouster of Kérékou and did not participate in the NC, which it considered a “bourgeois charade”.¹⁹³ This could actually be true given Mompo’s admission that France captured the constitutional moments in Benin and preserved Kérékou. The non-participation of the CPB mean that other voices, especially faith-based organisations, took charge of the reforms, particularly when ‘the initiative moved from the streets to the conference hall.’¹⁹⁴

¹⁸⁹ Interview with Samwel, above.

¹⁹⁰ Interview with Serge, 28 February 2020, Calavi-Abomey, Translated by Ezechias Djima.

¹⁹¹ Allen, note 6, at 46.

¹⁹² *Ibid.*

¹⁹³ Seely (note 181 above) at 363.

¹⁹⁴ *Ibid.*

Кїрїkou “surrendered power to the *Haut Conseil de la Republique* (HCR)” under the leadership of Bishop Isodore de Souza.¹⁹⁵ This agency, over which Кїрїkou did not have control, served as the legislature and undertook the drafting exercise.¹⁹⁶ It is this HCR that was primarily responsible for the management of the conference that resulted in Benin’s present-day Constitution. It was also responsible for the elections of March 1991 that saw the overthrow of Кїрїkou and an end to his two decades’ reign.¹⁹⁷ The HCR forced Кїрїkou to relinquish control over the military to Soglo Nicephore, who was also designated by the conference as the interim Prime Minister.¹⁹⁸ HCR was composed of former presidents and other delegates to the constitutional conference. This body also played the role of the legislative body for a year after the NC.¹⁹⁹

Except for the Communist Party of Benin, the assembly was composed of all-important stakeholders. When Кїрїkou asked eight ministers under Dossou to establish an assembly, the terms were that it was “for all the living forces of the nation, whatever their political sensibilities”.²⁰⁰ The NC had 488 representatives in the following forms:

106, going to “political tendencies”; 86 to peasants and artisans representing districts; 70 to development associations; 39 to unions; 31 to “personalities”; 30 to state institutions (National Assembly etc. 22 to administrative cadres; 18 to religious representatives; 17 to armed forces; 15 to diplomats; 13 to professional associations; 12 to the National University of Benin; 11 to Beninese Diaspora; 8 to economic actors...; six to women organisations and four to NGOs.²⁰¹

At the inception of the TWD, several civil society organisations emerged and have since remained largely in operation. The government in Benin has remained under the constant watch of civil society organisations and, in both the Кїрїkou and Boni era, they have lobbied or countered executive influence in many ways. Siege gave as an example that:

In 2006, when Кїрїkou came back to power and finished his mandate, he did not want to leave. He wanted to revise the constitution to run again but civil society stood up against him. It was in fact at that time when NGO "l'Elan" of Reky Madougou came out with the slogan "Don't touch my constitution". Also, during Boni’s era, civil society

¹⁹⁵ *Ibid.*

¹⁹⁶ Seely (note 181 above) at 362.

¹⁹⁷ *Ibid.*

¹⁹⁸ Pierre Englebort, *Recent History in Africa South of the Sahara* (Europa Publications, 2004) 67.

¹⁹⁹ Allen, note 6, at 48.

²⁰⁰ See Letter from Colonel Vincent Guezodje to President Кїрїkou, of 23rd November 1989, reprinted in Gbado, 79-80.

²⁰¹ Gisselquist, note 2, at 796. See also Seely note 181 (above at 362).

easily picked up undemocratic practices and created the “Red Wednesday”. One of the leaders of this Red Wednesday is Joseph Djogbenou, the current President of the Constitutional Court.²⁰²

Badet also said about the present-day involvement of non-political actors as follows:

Trade unions, NGOs and the Catholic religion in particular are involved in political affairs. The Catholics are always issuing pastoral letters, and Bishops are always issuing letters to citizens. They also offer themselves as mediations during crises and civil society at large has also done the same over the years. Until today there have been fronts for organisation of free elections, fronts for the fight against the revision of the Constitution etc... the trade unions are strongly involved in this, not only to defend the workers’ community, but also to protect democratic freedoms.²⁰³

In the recent past though, more so during Talon’s era, democracy-demanding groups’ space has shrunk. This is because of what respondents felt was general repression by President Talon’s government. In the assessment of Hyacinthe:

Civil society organisations have been many and active too. However, during President Talon’s time, they have become more careful in their censorship of the government, especially of the President.²⁰⁴

The role that democracy-demanding groups have played in the recent past was thus qualified by most interview participants. Aguia-Daho thought that civil society organisations have been “side-lined” and some are “aboard” the system in power.²⁰⁵ Mompo, for his part, believed that involvement of civil society “from the start to date” has had an underlying selfish agenda. He noted:

[These people] pretend and chat around human rights... but in reality, they do not really defend people ... There are those who use unionism to enrich themselves, that is to say during the democratic renewal, there were liberal unions that pretend to defend workers, but in reality, put themselves in power.²⁰⁶

Mompo is not in the minority. His sentiments were echoed by a respondent based at the Communist Party of Benin, who stated:

Civil society and organisations, opposition movements animate political life according to their interests. There are some who do it and to secure themselves a path to the top to start doing the same. From 1989 to today, only the Communist Party of Benin (PCB) has not changed its position, it is the only opposition party that takes into account the defence of the peoples of our country.²⁰⁷

²⁰² Interview with Serge, 28 February 2020, Calavi-Abomey. Translated by Ezechias Djima.

²⁰³ Interview with Gilles Badet (note 141 above).

²⁰⁴ Interview with Boko K. Hyacinthe (above)

²⁰⁵ Interview with Françoise Aguia-Daho йjuviste, above.

²⁰⁶ Interview with Kassa Mompo (note 102 above).

²⁰⁷ Interview with John (above).

Jonathan, another respondent, also emphasized, that “today, there is no doubt that these organisations only think about their own interests. They are ready to turn a blind eye to the excesses of the central government as soon as they have had their share of the cake.”²⁰⁸ Last, but not least, Djima Yanique said:

Before 2016, civil society, faith-based organisations and other non-governmental elites were truly involved in the reforms of the political system, they attended the roundtables. After 2016, the reforms undertaken by President Talon’s regime did not allow the opposition to really exist.²⁰⁹

7.5.1.3 Candid promotion of democracy by international actors

The role that external actors played, especially France and the Bretton Woods Institutions, in Benin’s democratic transition cannot be gainsaid.²¹⁰ As already pointed out, nationalisation of foreign-owned companies caused Kérékou’s regime to fall into disfavour with the French.²¹¹ France became a key destination for asylum seekers. France is even claimed to have been involved in the attempted ouster of Kérékou.²¹² The Benin-France relationship, just like Benin’s relationship with the US, remained strained for a while.²¹³ It was not until 1983 that a French president visited Benin.²¹⁴ As noted, Benin had adopted Marxist-Leninism and, after the relationship between France and Benin had been re-established, the French ambassador reportedly visited Benin several times seeking to convince Kérékou to abandon his “socialist policies...”²¹⁵ With the relationship having been re-established to some extent, France began to have an influence over Benin’s affairs. Socialism, for its part, as the ideology under which the PBRP was formally run, “lost international legitimacy” in the late 1980s, too.²¹⁶

In general, and as pointed out in previous chapters, the World Bank and the IMF not only imposed structural adjustment programs but also political conditionalities to aid. At around that time, Gazibo argues, two vocabularies became very common

²⁰⁸ Interview with Jonathan, Porto Novo, 5 March 2020.

²⁰⁹ Interview with DJIMA Yanique, Cotonou, 6 March 2020.

²¹⁰ Mamaudou Gazibo, ‘Foreign Aid and Democratisation: Benin and Niger Compared,’ (2005) 48 (3) *African Studies Review*, 67 at 68.

²¹¹ Heilbrunn, note 88, at 282.

²¹² Howard French, ‘The Mercenary Position,’ (1997) 73 *Transition*, 110 at 115.

²¹³ See Allen, note 6 above. See also, United States, Bureau Notes, Benin (1989) at 3.

²¹⁴ Michel Martin, ‘The Rise and “Thermidorianization” of Radical Praetorianism in Benin,’ in John Markakis, Michael Waller, *Military Marxist Regimes in Africa* (Routledge, Taylor and Francis, 2013) 73.

²¹⁵ Allen, note 6 at 54.

²¹⁶ See Seely, note 181 at 362.

among donors, one being “good governance” and the second being “political conditionality.”²¹⁷ Benin’s economic crisis had degenerated to chronic levels by 1987, a fact that made it almost entirely reliant on aid.²¹⁸ As early as 1987, and as the crisis worsened, Benin started to yield to the terms of the international community. In 1987, Benin sought and was granted a “stabilisation loan” but with conditions associated with structural adjustment programs.²¹⁹ This included the privatisation of public enterprises.²²⁰ These Structural Adjustment Programs triggered a “great reduction in social services in general”.²²¹ This then became one of the unintended consequences of the international actors’ initiatives as it generated huge public displeasure with the ruling regime. The Kérékou regime had started making concessions to the donor community and indeed the separation of UNSTB, the workers’ union, from PRPB is said to have been as a result of IMF conditions and negotiations with Kérékou.²²²

Though Kérékou had technically addressed some demands from the Bretton Woods Institutions, democracy-demanding groups were dissatisfied with bare “liberalisation” of politics and wanted deeper change. France intervened through its French Ambassador by suggesting a national conference.²²³ France did not just initiate the idea of a national conference. It also negotiated, it is claimed, for Kérékou’s amnesty, a fact that Momo remembered regretfully, during this study’s interview, as follows:

France gave him immunity, which allowed him to return to power five years later and to serve ten years. Kérékou did almost 27 years in power. He had his minister killed... he eliminated workers' uprisings, repressed people more so trade unionists, and killed or imprisoned people in camps such as Canan, Parakou, Segbana, Bembekkkk and Kandi... France intervened to help, so that the revolution would not go all the way. [It] made a plan, a conspiracy from Paris [and] Versailles to organize the national conference. France then organized the national conference to put [in power] those who could help them to maintain control over the system.²²⁴

Momo’s sentiments about the role of France were echoed by Siege, for whom:

²¹⁷ Mamaudou Gazibo, note 210, at 77.

²¹⁸ R. Omotayo Olaniyan, *Foreign Aid, Self-Reliance, and Economic Development in West Africa* (Westport, Greenwood Publishing Group Inc., 1996) at 70.

²¹⁹ Heilbrunn, note 88, at 281

²²⁰ Heilbrunn, note 88; Mamaudou Gazibo, note 210 at 75.

²²¹ Mamaudou Gazibo (above) at 75.

²²² Heilbrunn, note 88, at 284.

²²³ Jean-Francois Medard, ‘France and Sub-Saharan Africa: A Privileged Relationship, in Ulf Engel, Gorm Rye Olsen (eds) *Africa and the North: Between Globalization and Marginalization* (Routledge, 2005), at 37.

²²⁴ Interview with Kassa Momo (note 102 above).

There was some kind of agreement between the President of the Conference (Isidore De-Souza) and the French ambassador. In 1989 their relations had become very close as well as with Kérékou. In 1989, there was a bicentenary celebration of the French revolution. On that occasion, there was a great rapprochement between the French ambassador to Benin and President Kérékou. The French ambassador gave several publicized conferences, in which he said that it was important that human rights be liberated. He also, it seems, transmitted a document to Kérékou's Director of Cabinet at the time, Mr. Pierre Otcho, which asked Kérékou to organize a conference to try to resolve then deep crisis.²²⁵

Following the NC, which is claimed to have been closely monitored in and by France, President Francois Mitterrand praised Benin, citing it as the model that Africa needed to emulate.²²⁶ He also cautioned that little aid would flow to African countries that maintained their authoritarian regimes.²²⁷ It is unsurprising that most francophone countries then began convening similar national conferences.²²⁸

In the course of and after the NC, Benin is claimed to have been “one of the few countries to have received the financial incentives promised to countries that choose to democratize”.²²⁹ Foreign aid rose from 234,69 million dollars in 1988 to 311,93 million dollars and it was not until around 1997 that foreign aid was reduced.²³⁰ The international community also generally supported Soglo, who defeated Kérékou. Support of a financial nature included reprieves from and actual delays in debt reimbursement, a fact that made Benin's public purse less strained.²³¹ In return, this created a feeling in the “common” people that democracy and development are interlinked.²³² Though the Structural Adjustment Programs still remained fairly unpopular, the fact that civil servants received their salaries more regularly than had been the case before the NC, meant that the “foreign aid-driven economic plan was generally considered as positive.”²³³ Benin, for its part, continued to project the image of “a democrat”. The reason for this, one interview participant hypothesized, was that “the support of certain technical and financial partners is conditioned by the image Benin projected.”²³⁴ Other than facilitating the democratisation process, intentionally

²²⁵ Interview with Serge, 28 February 2020, Calavi-Abomey. Translated by Ezechias Djima.

²²⁶ Interview with Mpopo above.

²²⁷ Heilbrunn, note 88, at 280.

²²⁸ See Bierschenk, note 1, at 338 (“The Beninese National Conference became the model for similar conferences in seven other African states within the ensuing three-year period (Gabon 1990; the Republic of the Congo, Mali, Niger and Togo 1991; Zaire 1992; Chad 1993)”).

²²⁹ Mamaudou Gazibo, note 210, at 80.

²³⁰ *Ibid.*, at 73.

²³¹ *Ibid.*

²³² *Ibid.* See also, Rachel M. Gisselquist (note 1) at 801.

²³³ *Ibid.*

²³⁴ Interview with Jonathan (note 208 above)

or unintentionally, the support of pro-democracy groups in their call for change, as well as to the Soglo regime after the conference, played a great role in fostering real constitutional change.

In the present day, though, and other than the general control which France has over Francophone countries, there is little interference by France in democratic exercises. Maxime felt that this is because, “France has no friends, it has only interests” and consequently, it does not support democracy in Benin because, “it does not have its interest at stake.”²³⁵ Boko K. Hyacinthe, though that generally:

France treats Benin differently. Though France has some influence, say in the adoption of the West African Franc (CFA), the decision was general and not about Benin only. In Beninese politics, the French have tried to intervene, or so it is claimed, but they have been unsuccessful. It is said for instance that they had wanted Houngbenji to win but this did not happen.²³⁶

There has for a long time been a general lack of interest by most international actors in Benin’s democracy after the NC. According to Badet:

The international community, at the beginning, was interested in the democratic process in Benin, but gradually its position is that things have improved in Benin and has somewhat neglected to follow certain aspects. With the exception of some countries, such as America, the international community does not send observers to the elections as before and as they do in countries such as Nigeria, Niger, Burkina and Togo. They are no longer involved as before because they consider Benin stable.²³⁷

There is an interest, however, from “international NGOs, [like] Amnesty, Journalists without Borders and ECOWAS” though their interest cannot be compared to the influence that the US and other external forces, like the UK and France, had.²³⁸ Many countries nevertheless have opted to support Benin through financial assistance over the years. As Juliet put it, “Benin receives development aid from Japan, France, China and the Netherlands.”²³⁹ It is only after the 2019 Parliamentary elections that the US expressed concerns, with Patricia Mahoney, the US Ambassador to Benin, stating that the elections were “neither fully competitive nor inclusive” and did not “reflect the Benin that” they knew.²⁴⁰ In reaction, a fact that shows his sensitivity to Benin’s

²³⁵ Interview with Maxime above.

²³⁶ Interview with Boko K. Hyacinthe (above)

²³⁷ Interview with Gilles Badet (note 141 above).

²³⁸ Interview with Françoise Agui-Daho *ijuviste*, above.

²³⁹ Interview with Juliet.

²⁴⁰ Neil Munshi, ‘Benin Democracy Suffers Blow as President-Backed Parties Win,’ *Financial Times* 1 May 2019 <<https://www.ft.com/content/7fc32690-6bff-11e9-80c7-60ee53e6681d>> accessed 11 November 2020.

external image, Talon conceded in a television show that what had happened did not “honour the democratic image of Benin” and that the situation brought “discredit on” Benin’s democracy and on him.

7.5.2 Influence of structural conditions

Beneath actor-based initiatives were structural conditions that had a profound influence on Benin’s transitional trajectory. As observed, Benin is and has been a neo-patrimonial and ethnically diverse society. However, ethnic cleavages, the north-south divide and the neo-patrimonial nature of the society did not stand in the way of the transition that occurred in the 1990s. It can be argued in this regard that the economic crisis in the mid- and late 1980s was the main reason behind the regime’s collapse and the attendant reforms. This crisis was in turn precipitated by the choices that Kérékou had made, more particularly the adoption and subsequent imperfect implementation of Marxist-Leninism. As observed, nationalisation of private companies, more so foreign ones, destroyed the relationship between Benin and external actors, especially France. Also, it emerged that the nationalized assets were used, courtesy of entrenched neopatrimonialism, to reward friends and cronies of the Kérékou regime.²⁴¹ Heilbrunn observes in this regard as follows:

Kérékou allocated influential positions in nationalised industries to political supporters, but despite consistent Marxist-Leninist rhetoric, those appointed seem to have looked upon public enterprises as an avenue to personal riches.²⁴²

Most of these institutions were consequently run down as they were not managed effectively.²⁴³ Since the early 1980s thus, the economy started doing badly. This was partly because nationalisation had led to the development of parallel markets other than the formal ones,²⁴⁴ with the consequence that the nation was increasingly unable to meet its obligations through the mainstream political economy.²⁴⁵

Benin had in the early 1980s also been reliant on export/re-export of cotton from Nigeria.²⁴⁶ There was an “economic down-turn of these markets”.²⁴⁷ On the

²⁴¹ Heilbrunn, note 88, at 282.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ John R. Heilbrunn, ‘Commerce, Politics, and Business Associations in Benin and Togo,’ (1997) 29 (4) *Comparative Politics* 480.

²⁴⁵ *Ibid.*

²⁴⁶ Kathyryn Nwajiaku, ‘The National Conferences in Benin and Togo Revisited,’ (1994) Vol. 32, No. 3 *The Journal of Modern African Studies*, 429, at 433. See, See T. E. Vittin, ‘Benin: du

other hand, a rather cosy relationship had arisen between the informal parallel markets and the state, but one which was detrimental to control of economic activities or at least the ability of the state to raise revenue to fulfil its obligations. When there was an attempt to reverse that trend, it was resisted through the support of pro-democracy voices.²⁴⁸ Yet, it was becoming increasingly apparent that the state was unable to pay its teachers and other civil servants. Heilbrunn summarizes the state of affairs in Benin that precipitated these activities in the following terms:

A Marxist-Leninist regime had imposed a centrally-planned economy on an overwhelmingly agrarian country which by 1990 was bankrupt; corrupt administrators had emptied the state's coffers and alignment with the Soviet bloc had limited access to low-interest loans from Western development agencies.²⁴⁹

There is also another perspective to the illicit trade. According to Heilbrunn, the elites had always exploited the parallel markets and did not want to reform them as this would have threatened the gains that were associated with the smuggling businesses.²⁵⁰ This created a parallel impetus to quickly "reconstruct the economy" so as to "avoid any redistribution of influences and assets"²⁵¹ away from the elites, who were in a "continuous process of intermixture, the old elements incessantly attracting, absorbing and assimilating the new".²⁵² Unfortunately for this group, the military regime in Nigeria closed the borders and arrested smugglers around 1984.²⁵³ This had a devastating effect on the parallel economy that was booming and which the elites still wanted to control. As early as 1985, thus, protests had become commonplace in Benin, more so by students and by trade union formations.²⁵⁴ By 1988, three state-owned banks had collapsed.²⁵⁵ By the end of 1989, civil servants had gone unpaid for about seven months.²⁵⁶ News about corruption continued to be propagated, which led to strikes from virtually all sectors. It is this scenario that made Kérékou reliant on the

system Kérékou au renouveau démocratique', in Jean- Francois Medard (ed.), *Etats d'Afrique noire: formations, mécanismes et crises* (Paris, 1992), 93-115.

²⁴⁷ Kathyryn Nwajiaku, note 246 at 433.

²⁴⁸ *Ibid.*

²⁴⁹ Heilbrunn, note 88, at 281.

²⁵⁰ Heilbrunn, note 88, at 279

²⁵¹ *Ibid.*

²⁵² Robert Michels, *Political Parties, a sociological study of oligarchical tendencies of modern democracy* (New York, 1962) 343.

²⁵³ Heilbrunn, note 88, 281.

²⁵⁴ Bierschenk, T. (2009). *Democratization Without Development: Benin 1989-2009*, Department of Anthropology and African Studies University Mainz (Working Paper, 100) 343.

²⁵⁵ *Ibid.*

²⁵⁶ Kathyryn Nwajiaku, note 246 at 438.

French and the outside world.²⁵⁷ As if closure of the border with Nigeria was not enough, an oil crisis in Nigeria made it worse.²⁵⁸ At that time, and as observed, the French had already been seeking to have Kérékou abandon his socialist policies. Kérékou dissolved PBRT and established a new party.²⁵⁹ He also capitulated to IMF conditionalities on aid. Inopportunistly, for him, democracy-demanding forces had taken advantage of the crisis, which assumed political dimensions, and pushed for change. With the crisis, Kérékou could not maintain his patronage networks such that they “had mostly dried up by the end of 1989”.²⁶⁰

Benin never completely recovered from the economic crisis. It lived through the 1990s with immense donor support.²⁶¹ In 1990, when the democratisation process commenced, it had a GDP of about USD 1.96 billion.²⁶² Benin ranks today, as one of the poorest countries in the world.²⁶³ It is a “least developed country” with a GDP of USD 9.27 Billion (as at 2017).²⁶⁴ Benin’s economy is very small when compared with its neighbour Nigeria, which has a GDP of USD 375.8 billion (as at 2017) and South Africa, whose GDP stands at USD 349.4 billion. According to the World Bank, “the poverty rate remains high, at 46.4% in 2018, with a poverty line of \$1.90 a day in purchasing power parity”.²⁶⁵ Benin’s economy depends mostly on re-export and transit trade with Nigeria, subsistence farming and the export of cotton.²⁶⁶ Cotton accounts for about 40% of GDP and its production continues, sadly, to decline according to the Food and Agriculture Organisation of the United Nations (FAO) due to “poor management practices”.²⁶⁷ Because of these poverty levels, “the state is highly

²⁵⁷ *Ibid.*

²⁵⁸ Signonna Horace Adjolohoun, note 56, at 59.

²⁵⁹ Dictionary of Benin (note 117 above) at 283.

²⁶⁰ Kathryn Nwajiaku (note 246 above) at 433.

²⁶¹ *Ibid.*, at 446.

²⁶² Mamoudou Gazibo (note 210 above) at 69.

²⁶³ See BBC News, ‘Country Profile Benin,’ 29 April 2019, <<https://www.bbc.com/news/world-africa-13037572>> accessed 11 November 2020; Gisselquist (note 2 above) 790.

²⁶⁴ See, United Nations, Least Developed Country Category: Benin Profile, <<https://www.un.org/development/desa/dpad/least-developed-country-category-benin.html>> accessed 11 November 2020; see also, UN List of Least Developed Countries, <<https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>> accessed 11 November 2020.

²⁶⁵ World Bank in Benin, <<https://www.worldbank.org/en/country/benin/overview>> accessed 11 November 2020.

²⁶⁶ *Ibid.*

²⁶⁷ See Food and Agricultural organization of the United Nations (FAO, Integrated Production and Pest Management Programme in Africa, <<http://www.fao.org/agriculture/ippm/projects/benin/en/>> accessed 11 November 2020.

dependent on foreign aid and investment”.²⁶⁸ The scourge of corruption, which has afflicted many African countries, continues to devour Benin too.²⁶⁹ A BTI report remarks in this regard that “officeholders who break the law and engage in corruption rarely face prosecution”.²⁷⁰

The post-1989 economic situation is thought to be the reason behind Benin’s inability to consolidate its democracy. There are though who argue, contrary to Freedom House’s assessment that though Benin has experienced regular elections, it is argued, it has “minimal democracy”.²⁷¹ Gisselquist attributes this state of affairs to many factors, including, first, the fear in each election that the loser will not accept the result, second, the fact that “many Beninese appear to have contradictory views on democracy”, and, third, that Benin is simply an “illiberal democracy”.²⁷² This state of affairs is attributed to neopatrimonialism and abject poverty. As Gisselquist puts it:

The explanation that I find most convincing, however, points to one of the key characteristics that makes Benin a “deviant” democracy- its low levels of economic development. Factors that go along with low levels of economic development – such as poverty, illiteracy and poor infrastructure – surely affect citizens’ access to information, their means or ability to monitor and evaluate platforms and performance of their elected representatives and their ability to hold their elected leaders accountable if their interests are not represented.²⁷³

Democratisation in Benin in one respect challenges the Lipset hypothesis- the claims that democracy and economic development are linked.²⁷⁴ Poverty and an economic crisis provided an impetus for democratic change even if what was embraced is just “nominal democracy”. The crisis made it more vulnerable to exogenous shocks and endogenous developments, which included socialism’s general loss of legitimacy, demands from Bretton Woods Institutions, and a united democracy-demanding group. The crisis also meant that Kérékou could not dilute an otherwise avowed pro-democracy group’s strength through co-optation, especially during the first elections in 1991.

²⁶⁸ Bertelsmann Stiftung, BTI 2016 — Benin Country Report. Gütersloh: Bertelsmann Stiftung, 2016 at 23, <https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Benin.pdf> accessed 11 November 2020.

²⁶⁹ See Gisselquest (note 2 above) at 799.

²⁷⁰ BTI Report, note 268 at 11.

²⁷¹ Gisselquest, note 2 at 810.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ Seymour Martin Lipset ‘Some social requisites of democracy: Economic Development and Political Legitimacy,’ (1959) 53 *American Political Science Review* 69.

7.5.3 Design based factors

Under this section, change to formal powers and existence of effective judicial review are considered.

7.5.3.1 Change to formal constitutional norms

In the early 1990s, Benin substituted its constitution. The main agenda for the NC was the creation of a new constitution that would guarantee pluralism. Even though, prior to 1990, Benin was ruled under a constitution, the Kérékou government was essentially a military regime and the main task for conference participants was thus the creation of a framework that could facilitate the civilian exercise of power.²⁷⁵ As is highlighted below, and in spite of its limitations, the new constitution introduced entrenched rights, created “two rounds” of presidential elections, re-introduced term limits and, most importantly, established a strong form of judicial review. These structures, it is contended, militated against backsliding, even in the post-Soglo period. As Badet, for instance, noted:

Our constitution is a very good constitution considering the fact that it has lasted 30 years and has helped us to manage the difficulties and crises we have encountered.²⁷⁶

Agua-Daho also explained that the constitution is a good one because it “guarantees fundamental freedoms and human rights. It is very modern and well elaborated and structured.”²⁷⁷ Indeed, the Bill of Rights is relatively comprehensive, in spite of the few claw-back clauses, cataloguing both the traditional civil and political rights as well as socio-economic rights.²⁷⁸ It also incorporates the rights in the African Charter on Human and Peoples’ Rights, noting that the Charter is an integral part of the Constitution.²⁷⁹ It does not have a general limitations clause and whereas, as already mentioned, there are claw-back clauses, some of the rights are presented in “absolute language” without contemplation of state limitations. The right to culture,²⁸⁰ rights relating to education,²⁸¹ the right to life,²⁸² rights related to fair trial,²⁸³ and the right

²⁷⁵ Signonna Horace Adjolohoun, note 56 above.

²⁷⁶ Interview with Badet (note 141 above)

²⁷⁷ Interview with Françoise Agua-Daho *ijuviste*, above.

²⁷⁸ *Ibid.*

²⁷⁹ Article, 7 Constitution of Benin.

²⁸⁰ Article 9

²⁸¹ Articles 12 and 13.

²⁸² Article 15

²⁸³ Article 16 and 17.

against torture,²⁸⁴ are illustrations. On democracy, the Constitution provides that the election of the president must take place “with uninominal majority ballot in two rounds.”²⁸⁵ Because of this innovation, the opposition is given a chance to unify, particularly during the second round. Soglo, for instance, lost to Kɔrɔkɔu in the 1996 elections following a second-round coalition between Kɔrɔkɔu and Houngbenji.²⁸⁶

Other than these features, which make the formal constitution attractive, is the fact that it imposes term limits. The term limit is bolstered by the requirement that a president must not be more than 70 years at the time of filing his candidacy.²⁸⁷ This provision, though subject to amendments, is protected by an entrenched clause which subjects it to a three-fourths majority in the National Assembly, which in turn requires a referendum, unless the amendment was passed by a four-fifths majority.²⁸⁸ This is easy to achieve in a country with a dominant party, but it is much more difficult in societies like Benin where there is an independent candidate or the ruling party does not always have the majority. The other important design choice in the Beninese constitution is that presidential elections are not conducted at the same time as other elections, particularly those for the National Assembly. Presidential elections thus receive undivided attention.

The Beninese Constitution has limitations when contrasted with other constitutions. For instance, it vests enormous powers in the hands of the President; provides for a unicameral parliament unlike in many places where parliament is split into two bodies; and, most importantly, provides that some rights are subject to claw-back provisions. There were indeed calls for formal change during the interviews. For Mompo, for instance, the Beninese Constitution:

should not be revised. It should be changed completely. It is not in line with our reality today. It was for a while... it's a constitution of France. It must be changed. It is not also for someone to stay in his office and say what should be put in the Constitution. Rather, everyone, all the people must be involved in writing a new constitution.²⁸⁹

Those who say that the Constitution is good also qualified that it has limitations and there is a need to review it. For Badet, for instance:

²⁸⁴ Article 18.

²⁸⁵ Constitution of Benin, article 43.

²⁸⁶ Gisselquist, note 2, at 790.

²⁸⁷ Constitution of Benin, Article 44.

²⁸⁸ See Title XI, Constitution of Benin.

²⁸⁹ Interview with Kassa Mompo (note 102 above).

no human work is perfect and there are points on which things can always be improved in the light of what experience has shown us.²⁹⁰

These sentiments were also echoed by other participants. For John, “Benin needs to change the Constitution because the 1990 constitution is dead and outdated. It no longer takes into account some of the aspirations of the people nowadays”.²⁹¹ In Juliet’s view, also:

No human work being perfect, it is quite logical that after nearly 30 years of organisation, the fundamental law of Benin should be changed to take into account new realities. There are many provisions that are outdated, at least out of date, which do not facilitate the functioning of institutions, or bodies that are not useful.²⁹²

Others nonetheless thought that formal change was not necessary. As Jonathan put it: “a change in our constitution is not opportune for the moment because it is one of the best in the sub-region. Moreover, it offers better conditions for development if everyone plays his or her role perfectly.”²⁹³

In conclusion, even though the formal constitution was the target of pro-democracy groups, it did not precede real democratic change. At the time of its promulgation, the hitherto de facto authoritarian constitution had substantively fallen into desuetude. Nevertheless, Benin enacted a new constitution at the dawn of the TWD though it is assessed in this thesis as not being normatively attractive. Some of the structures it established, though, provided an enabling environment for entrenchment of its democratic constitution. As observed, one of the most important institutions under the 1991 constitution is judicial review whose influence on real constitutional change is discussed in the section that follows.

7.5.3.2 Existence of effective judicial review

Prior to 1990, Theodore Holo, a judge of the Constitutional Court, stated, “there was hardly any form of judicial review in Benin.”²⁹⁴ As such, and just like the formal constitution, judicial review played no role in activating or facilitating the transition witnessed in Benin in the early 1990s. Her constitutional order has nonetheless benefited immensely from this institution, especially at the instance of the

²⁹⁰ Interview with Badet (note 141 above).

²⁹¹ Interview with John above.

²⁹² Interview with Juliet, Cotonou, 25 February 2020.

²⁹³ Interview with Jonathan (note 208 above).

²⁹⁴ Theodore Holo, ‘Handling of Petitions by the Constitutional Court of Benin,’ in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford University Press, 2017) at 315.

Constitutional Court established under the 1990 Constitution.²⁹⁵ In Rotman's assessment, the "role of the Beninese Constitutional Court in protecting human rights is a landmark feature of Benin's transition to democracy".²⁹⁶ The President of the Constitutional Court, Robert Dossou, also once observed about the Court that it:

contributed and still contributes to the democratic renewal. In is an institution that cannot be overlooked today for political stability and social peace in Benin.²⁹⁷

After the NC, the institution of judicial review has been extremely effective and has helped in a great way to hedge against regression.²⁹⁸ The central judicial review institution is the Constitutional Court, which has "highest jurisdiction in constitutional matters".²⁹⁹ Part of the court's jurisdiction is to "judge on constitutionality of the law",³⁰⁰ "guarantee human rights and the public liberties",³⁰¹ ensure "regularity" of referendums, and review the legality of presidential elections.³⁰² This Court is also the "regulatory body for the functioning of the institutions and for the activity of public authorities".³⁰³ In turn, this Court has enjoyed the trust of political actors and, as Seige put it, "both the decisions of the Supreme Court and the Constitutional Court are generally respected".³⁰⁴

The success of Benin's Constitutional Court is attributed to a number of factors, including its sociological legitimacy, legal security and independence, and its relaxed rules of standing, which give any citizen the right to approach the Court seeking redress.³⁰⁵ The source of the Court's sociological legitimacy lies in a number of factors, too. According to Justice Elisabeth Pognon, "public opinion respected the institution" because its members had extensive professional experience and probity and were "free

²⁹⁵ See also, Signonna Horace Adjolohoun, note 56 above, at 52 ("In Africa, the Constitutional Court of Benin has been termed as the most Kelsenian model of its kind, arguably the leading concentrated model of constitutional review on the continent. After two decades of practice, the achievements of Benin's 'constitutional revolution' speak for themselves".)

²⁹⁶ Bruce A Magnusson, 'Democratization and Domestic Insecurity: Navigating the Transition in Benin' (2001) 33 (2) *Comparative Politics* at 221.

²⁹⁷ Media of Information and Education, No. 001- 1st Trimester, Published in English, at 4.

²⁹⁸ Horace Signonna Adjolohoun, 'Benin,' <http://www.icla.up.ac.za/images/country_reports/benin_country_report.pdf> accessed 11 November 2020.

²⁹⁹ Article 114, Constitution of Benin.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*, article 50.

³⁰³ *Ibid.*

³⁰⁴ Interview with Seige.

³⁰⁵ Horace Signonna Adjolohoun, note 48 at 57. See also, Gilles Badet, *Les Attributions Originelles de la Cour Constitutionnelle du Bénin*, (Friedrich Ebert Stiftung, 2013) 158–63.

of any suspicion of clientelism or bias".³⁰⁶ Second, the court was intricately connected with the National Conference, such that the first members of the HRC were the members of the Transitional Constitutional Court for the years 1991-1993. These included Bishop Isidore De Souza, who chaired the Council, and former presidents Maga, Zinsou and Kouandete, some of whom were exiled by Kérékou's military regime. Some of the members subsequently remained in the Court, such as Hubert Maga and Professor Alexis Hountondji.³⁰⁷ Some other members of the Transitional Court also became members of the Court again over the years. For instance, Theodore Holo, who served in the Transitional Court, was a member of the Court in its fourth term of the 2nd formation from 2009 to 2013.³⁰⁸ Robert Dossou became a President of the 4th Court, too.³⁰⁹ Dossou was the dean of the Faculty of Law at the *Université Nationale de Bénin* and together with the president of the bar association, Rene Ahouasous, presented a list of reforms to Kérékou that needed to be implemented just before the transitional arrangements.³¹⁰ In 2008, having been a minister, he became the President of the Constitutional Court of Benin.³¹¹ It is for this reason that it has been remarked that:

The origin of this court's legitimacy has strong ties to the transition government, beyond the legal framework established in the members of the new constitution. The members of the HRC served as the first members of the Constitutional Court, but before the Court took on its permanent form in 1993. The non-partisan authority embodied in the HRC therefore carried over into the early years of the new court, lending additional legitimacy to the institution designed to interpret the distribution of political powers in the new system.³¹²

Regarding the source of the Court's prestige, Badet observed as follows:

The country's political history has showed that absence of a means of political arbitration justified military rule. The Court's philosophy is that it is as open as possible and decides facing politicians to the extent that they can no longer deny the fact that a court solution has been put to them and they must put the solution in place rather than ignore it.³¹³

³⁰⁶ Constitutional Court of Benin Bulletin, Media of Information and Education, No. 001- 1st Trimister, Published in English, at 21.

³⁰⁷ *Ibid*, at 8-9.

³⁰⁸ *Ibid* at 13

³⁰⁹ *Ibid*.

³¹⁰ Heilbrunn, note 88, at 285.

³¹¹ See Cabinet <<http://www.cabinetrobertdossou.com/a-propos-du-cabinet/article/me-robert-dossou>> accessed 11 November 2020

³¹² Seely (note 181 above) at 370.

³¹³ Interview with Gilles Badet (note 141 above).

In turn, the Court enjoys relative institutional security and there are limited threats to its independence. As Badet put it in an interview for this study:

Almost 25 years ago, not everyone liked [the Court], but people are now more receptive to its work. Citizens sometimes threaten the Court with comments in newspapers, on the radio and on television. After elections, losing candidates criticized the Court as a “Court of Miracles” though this has not happened in the recent past... The Court is also at times criticized by political actors, but there has not been a threat as such to its independence and to the freedom of its members to make the decision.³¹⁴

This security is linked especially with the criteria for appointment and removal of its members.³¹⁵ Fully constituted, the Court has a total of seven members, four of whom are appointed by the office of the National Assembly while three are appointed by the President.³¹⁶ These should be three magistrates, two appointed by the office of the National Assembly and one by the President; and two high-level jurists, professors or practising lawyers having at least fifteen years of experience, one of whom is appointed by the office of the National Assembly and the other by the President.³¹⁷ Also, the Court must have “two persons of great professional reputation”, one of whom is appointed by the office of the National Assembly and the other by the President. In terms of security of tenure, members are “irremovable” from office and cannot be prosecuted except with the authorisation of both the Constitutional Court and the office of the Supreme Court sitting in joint session and only for “flagrant offence.”³¹⁸ This is not, however, to suggest that Beninese courts are completely insulated from influence. In Juliet’s view:

The courts have tried in great detail to deal with “requisitions”, interference from the central power and authority, but this is not effective. There is still influence.³¹⁹

As mentioned also, the Court’s success is ascribed to relaxed rules of standing. Under the Constitution, any citizen has the “right to appeal to the Constitutional Court against the laws, texts, and acts presumed unconstitutional”.³²⁰ Further, any citizen “may complain to the Constitutional Court about the constitutionality of laws whether directly or whether by the procedure of the exception of unconstitutionality

³¹⁴ Interview with Gilles Badet (note 141 above).

³¹⁵ See, Horace Signonna Adjolohoun, note 56 at 58.

³¹⁶ Article 115, Constitution of Benin.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Interview with Juliet (note 292 above).

³²⁰ *Ibid.*, article 3.

invoked".³²¹ With this authorisation, the Court has "many" opportunities to enforce the Constitution.³²² According to Sedge:

As simple citizen, if you see that the government doing something that is potentially harmful to democracy, you can approach the court for intervention. In 2016 when the new President took office, citizens noticed that on official documents the mode of presenting the flag was different. A citizen approached the Constitutional Court which ruled, in favour of the citizen, that the official documents did not respect the layout of the colours of the Beninese flag.³²³

It is not, however, "ordinary" citizens alone who approach the Court to ventilate breaches of the Constitution. Beninese political elites, too, are fond of the Court and refer disputes there, even those which in the assessment of the Secretary General of the Court, could be better addressed through political forums. He said in the interview:

Political actors in Benin have a habit of settling their disputes through courts. This has resulted in a great "judicialisation of problems". Many problems that could be settled politically have often come before the courts be it the Constitutional Court, Supreme Court or the ordinary courts. A problem such as how a logo of a political party should look like is still referred to court.³²⁴

Armed with immense formal powers and sociological legitimacy, the Court has contributed to democratic consolidation in Benin over the years in a profound way. There are in this regard, numerous disputes that have come before the courts, most of which have been decided in a way that has supported democracy.³²⁵ In 1994, just as the new institutions were beginning to strengthen, a budget crisis rocked the country, setting the National Assembly at loggerheads with the Executive. This crisis was precipitated by the National Assembly's accusing President Soglo's wife of engaging in corrupt activities.³²⁶ Whereas Soglo had won the presidency as an independent candidate, his wife had formed a political party that Soglo subsequently joined.³²⁷ Soglo invoked his emergency powers and submitted his own draft budget in place of

³²¹ *Ibid*, 122.

³²² Generally, see Horace Signonna Adjolohoun, note 56 at 58. See also, Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights,' (2004) 17 *Harv Hum Rts J* 281

³²³ Interview with Serge, 28 February 2020, Calavi-Abomey. Translated by Ezechias Djima.

³²⁴ Interview with Gilles Badet, Constitutional Court of Benin, Cotonou, 9 March 2020, transcript by Ezechias Djima.

³²⁵ Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Enforcing Human Rights,' (November 12, 2003), *Bepress Legal Series*. *Bepress Legal Series*, Working Paper 104. <https://law.bepress.com/expresso/eps/104>

³²⁶ Bruce A. Magnusson (note 296 above) at 221.

³²⁷ Tozzo Ìmile A, 'Rosine Soglo, famille et entreprise politique,' *Politique africaine*, 2004/3 (N° 95), 71-90. DOI: 10.3917/polaf.095.0071. <<https://www.cairn.info/revue-politique-africaine-2004-3-page-71.htm>> accessed 11 November 2020.

the one that was submitted by the National Assembly.³²⁸ Though the claim he made was that the budget by the National Assembly was too generous, the National Assembly's version was simply incompatible with the agreements that Benin had entered into with the donors and the IMF in fact issued a statement about the budget.³²⁹ The Court delivered four judgments, two of which were on procedural issues and two on substantive ones. Concerning the substantive issues, the Court first affirmed through DCC 30-94 of October 1, 1994 the National Assembly's limitation of the president's invocation of emergency powers, finding that its budget had not violated international agreements as envisaged under article 147 of the Constitution. In a separate judgement, DCC 31-94 of 1 October 1994, the Court ruled against the National Assembly for venturing into budget items such as salary that were within the discretion of the Executive. To some extent, the decision of the Court settled the stalemate.³³⁰

In 1994 also, Benin's National Assembly created a law for the establishment of an autonomous electoral body. Prior to that, elections were managed by the Ministry of the Interior and therefore the government had control over them. Following the enactment of the law, President Soglo referred the matter to the Court, which found that the law was unconstitutional.³³¹ In the mid-1990s, too, it is said that Soglo accepted the 1996 result because of the Court's adjudication of the presidential election dispute.³³² In the same year, when Kérékou came back to power, he declined to say certain words of the oath on the basis that he had just gotten "born again"³³³ In particular, he did not mention "ancestors" when the 1990 Constitution provides that the oath of President should be made before, "[b]efore God, the spirits of our ancestors, the Nation and before the Beninese People, the sole holder of sovereignty".³³⁴ The Court invalidated his oath and compelled him to retake it, which he did 48 hours afterwards, this time round mentioning "the spirit of our ancestors".³³⁵

³²⁸ Gisselquist (note 2 above) at 798.

³²⁹ Bruce, A. Magnusson (note 296 above) at 225.

³³⁰ *Ibid.*

³³¹ DCC 34-94 of 23 December 1994.

³³² Fomunyoh, Christopher, 'Democratization in Fits and Starts,' (2001) 12 (3) *Journal of Democracy* 45.

³³³ Yale Richmond and Gestrin Phyllis Into Africa: Intellectual Insights (Nicholas Brealey Publishing 1998)

³³⁴ Article 53, Constitution of Benin.

³³⁵ Lou Sifa, 'Beninese Fear Their Democracy May Soon be Under Attack,' 27 May 2018, *The African*, <<http://www.myafricanmagazine.com/beninese-fear-their-democracy-may-soon-be-under-attack/>> accessed 11 November 2020; Fomunyoh, note 332, at 45.

This decision, Fomunyoh noted, “sent a strong symbolic message to Кйрйkou that his actions in office would be keenly scrutinized by the Court”.³³⁶

This trend has largely continued over the years. In 2006, Beninese deputies decided to extend their term beyond the four years that had been set out in the constitution to five years. The extra years would have been extended without any direct reference to the people. The Court, in “protecting direct democracy” following a request by several citizens, ruled that the amendment was unconstitutional. In particular, the Court ruled that the National Assembly and its President had inter alia, “violated its own internal rules”³³⁷ In yet another decision, DCC-08-072 of 25 July 2008, the Court declared the adjournment of debates (sine die) over an extraordinary meeting that had been called to vote and decide on bills ratifying loan agreements under the framework for coastal erosion unconstitutional.³³⁸ The Court insisted in that case that the bill had not been accompanied by a proposal to increase revenue or equivalent savings as a result of the amendment, and the President of the National Assembly should not have admitted it.³³⁹ In 2001 also, President Кйрйkou approached the Court seeking to move the election date. The Court reviewed his claim and found it inadmissible.³⁴⁰

The Court’s human rights jurisprudence has also been outstanding. In 1998, a journalist, Robert Amegah, was transmitting live the memorial parade but was arrested because of an order issued by a senior police officer.³⁴¹ He was handcuffed and taken to a police station where he was kept for about three hours. The President of the journalist’s union of the private press (UJPB), Mr. Сйlestin Акpovo, filed a complaint to the Constitutional Court. It is not clear what exactly Amegah was engaged in given the claim by the police to the courts that he was engaged in rebellion and in disturbing public orders.³⁴² The Court found that there was no violation of press freedom through his arrest, mainly because it could not establish that he was a journalist in the absence of any documents such as a press card. The Court did, however, find, which was critical in a country that had just come from long-standing military rule, that the putting

³³⁶ *Ibid.*

³³⁷ DCC 06-074 of 8 July 2006.

³³⁸ DCC-08-072 of 25 July 2008.

³³⁹ *Ibid.*

³⁴⁰ DEL-P 01-045.

³⁴¹ DCC 99-013 of 10 February 1999.

³⁴² *Ibid.*

of handcuffs on a reporter in a bid to “neutralize” him constituted inhuman and degrading treatment and also that it infringed his physical integrity.³⁴³ The police had not proved the Court decided, that he had put up an insurmountable resistance to deserve that he should be handcuffed, for his “master”.

The Court’s consolidation of its authority has moved beyond the formal structures of power to informal ones, evidencing how judicial review can foster real constitutional change. Around 2001, King Egba Kotan II, a King of the Yoruba in the State of Dassa in Benin, inflicted corporal punishment on Boris Gbaguidi, who was supposedly guilty, in a bid to avert divine punishment.³⁴⁴ The practice in Dassa was that, whenever one was caught stealing or committing incest and related sexual offences, one would be hauled to the Royal Palace, which had a court-like forum, where one would be severely punished. That is the fate that Gbaguidi suffered, a fact that grieved him, necessitating a claim to the Constitutional Court. The Court found, in his favour, that the monarchy is not a republican institution and considering that Benin was a secular state without any royal powers granted by the Constitution in matters of justice, the King was in violation of the Constitution and his infliction of corporal punishment amounted to inhuman and degrading treatment. In a 2006 decision again, the Court decided that a customary practice of Dahomey that confers the status of a slave on a party to proceedings was unconstitutional.³⁴⁵ In 2009, a law that offered a different approach to adultery between men and women was found to be in violation of both the Constitution and article 26 of the African Charter on Human and Peoples’ Rights.³⁴⁶ In that case, a challenge was made against articles 336-339 of the Penal Code, which provided that a husband could be punished for adultery if it was committed at home. The protection that this law offered to men for adultery committed outside the homestead did not, however, extend to women as they were punishable regardless of where the adultery took place. The Court clarified that accusations of adultery were not in its view unconstitutional, but that the differential approach of the Penal Code to male and female adultery was.

It is noteworthy, though, that it is not the Constitutional Court alone that has participated in constitutional protection and enforcement. As observed, the Beninese

³⁴³ *Ibid.*

³⁴⁴ DCC 02-014 of 19 February 2002.

³⁴⁵ DCC 06-076 of 27 July 2006.

³⁴⁶ DCC 09-081 of 30 July 2009.

Constitution also vests in both the High Court of Justice and the Supreme Court jurisdiction in matters of public regulations to ensure constitutional compliance. The Supreme Court is the highest court on “administrative and judicial matters” and also in matters of “management of the accounts of the state” and has competence, too, over “disputed matters in local elections”.³⁴⁷ The Constitution invites the government to consult the Supreme Court “more generally in all administrative and jurisdictional matters”.³⁴⁸ It also has the authority to draft and modify all legislative and regulatory texts.³⁴⁹ The High Court, for its part, has competence to judge the president and members of the government for, inter alia, “infractions committed in the exercise of or on the occasion of exercise of their duties”.³⁵⁰ With this kind of framework, Benin can be said to be one of the jurisdictions whose courts have strong de jure review powers, not only over legislative enactments but also over other policy matters of the state generally.

Though the institution of judicial review has flourished over the past years, President Talon’s period has elicited fears that the Court’s independence has been severely imperilled. As Hyacinthe put it:

Before the Talon era, courts were quite powerful and could overrule the government. In the recent past though, the situation has changed. It is said that the current head of the Constitutional Court was President Talon’s private legal advisor. Everything from him is now just constitutional.³⁵¹

Hyacinthe’s sentiments were echoed by other participants. In John’s view, “justice... is now an instrument [for] settling scores with opponents”.³⁵² Jonathan’s resigned assessment of the current state of affairs was that “the current government controls the entire judicial system and holds it with an iron fist. No judge in Benin can oppose this government”.³⁵³ Aside from global authoritarian diffusion that has bedevilled older democracies, Benin’s regression from a democratic to a hybrid constitution in 2019 could consequently be attributed to the weakening of the institution of judicial review that had hitherto assisted in consolidating its democracy after the NC.

³⁴⁷ Article 131.

³⁴⁸ Article 132, *ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ Article 136, Constitution of Benin.

³⁵¹ Interview with Boko K. Hyacinthe (above)

³⁵² Interview with John, above.

³⁵³ Interview with Jonathan above.

7.6 Summary and concluding observations

Benin, like other many Sub-Saharan African countries had an authoritarian constitution at the inception of the TWD. TWD ushered in a democratic real constitution in Benin which has been stable over the years or at least until the reign of President Talon. Unlike most African countries, its political order has witnessed leadership turnover several times at the instance of elections. Even in the Talon era, civil and political rights are generally respected, too. The successful transition is attributed to pro-democracy group's persistent calls for reforms. The economic crisis that started in the mid-1980s made the regime vulnerable to both democracy-demanding groups as well as Bretton Wood Institutions and their political conditionalities. Rather than play an obstinate role, France assisted in convincing Kerekou to convene a national conference and, as discussed in the Chapter, negotiated an amnesty for him. Kerekou was dislodged from power during the transitional arrangements, though he was party to it and later exited the stage after an election in 1991. The three actor-based conditions were consequently present in Benin.

Following the collapse of the authoritarian order, Benin did not suffer from a reversal, it is contended because of some aspects of formal constitutional change as well as the adoption and indeed existence of strong form of judicial review. Some of the aspects of change to formal powers included presidential terms as well as "two rounds" of elections. The idea of two terms of elections particularly helped it overcome problems associated with competitive authoritarianism, such as opposition disunity as opposition parties often rally behind a candidate and out an incumbent. Discounting President Talon's era, the institution of judicial review in Benin has played a significant role in protecting democracy and shaping political discourse in general. This has created, by and large, a constitutional culture committed to the protection of rights and democracy, even when the formal constitution in Benin still vests enormous powers in the hands of the President.

CHAPTER 8: RESULTS AND DISCUSSION – EXPLAINING CONSTITUTIONAL CHANGE IN SUB-SAHARAN AFRICA

8.1 Introduction

This chapter concludes this study by discussing its findings and their implications. It commences in section 8.1 by revisiting in summary form the problem sought to be addressed and the approach used. Its second section, section 8.2, revisits the problem with the existing literature on the conditions for constitutional change that necessitated this study. Section 8.3 summarises the findings from the case studies under the various themes considered. Section 8.4 answers the research questions based on the case study findings and is followed by a general discussion in section 8.5. Section 8.6 concludes this study.

8.2 General conclusions on constitutional conditions

Prior to the TWD, many political orders in SSA were authoritarian.¹ The making of authoritarian constitutionalism in Africa is traceable to both colonisation and post-independence governance. Regarding colonisation's input, electoral democracy as we understand it today was introduced into Africa by former colonial masters who largely disregarded it. Post-independence governments for their part did not disestablish the oppressive and authoritarian practices and norms that had been developed and applied during the colonial period. Instead, most African governments engaged in constitutional dismemberment or disregard for the better part of the pre-1989 epoch. As a result, most governments were either military or single-party regimes.² Opposition politics, a lone civil society activity, remained proscribed and it is only in respect of a few polities, such as Botswana, Mauritius and later in Madagascar and Liberia that opposition parties were legally in operation. Though civil society organisations – to be precise NGOs – existed in most countries, their activities were confined mainly to the provision of humanitarian support or social services. Policy was shaped and implemented solely by ruling factions.³ Ideologically, some polities leaned towards Russia and adopted socialist ideologies or their variant forms, while others remained allied to the west. All in all, authoritarian rule was the norm rather than the exception in the pre-1989 era.

¹ See Chapter 1.

² *Ibid.*

³ See discussion under Chapter 2.

In the late 1980s and running through early 1990s, African countries encountered the democratic diffusion associated with the TWD (TWD). The effects of the TWD were first felt in Africa in the late 1980s and were preceded by an economic crisis that hit most of the countries. At that time also, the IMF and the World Bank in an attempt at addressing the crisis in Africa connected the situation to poor governance and started imposing conditionalities to aid as did other Western donor countries. This crisis, together with western pressure for democratisation, dealt a serious blow to one-party states, especially those that did not have strong ties with their western colonial masters or those that had leaned towards Moscow.⁴ There was little funding from Russia which had hitherto offered enormous military support to African countries, such as Mozambique, Angola and Ethiopia, as Russia itself was facing economic problems.⁵ Part of the political conditionalities to aid imposed by the Bretton Woods Institutions, other than Structural Adjustment Programs, was that African polities had to open up their political orders for competition.

Hence, and as observed in Chapter 1, many authoritarian regimes collapsed in the early 1990s and the idea of periodic elections was largely restored. Constitutional conferences were also held in many countries and formal changes adopted. In spite of the profound effects of the TWD, as Chapter 1 revealed, different transitional outcomes were registered in different countries. South Africa, Sao Tome and Principe, Cape Verde, and Benin successfully transitioned to democratic constitutions. Others, such as Kenya, Nigeria, Zambia, Malawi, Ivory Coast, Tanzania, and Niger partially transitioned. Another group of countries, to which Cameroon, Angola, Central African Republic, Sudan, Equatorial Guinea and Rwanda belong, either did not transition at all or quickly relapsed into their pre-1989 constitutional conditions. A related though slightly different problem was that some polities that had transitioned to hybrid or democratic constitutions, such as Ethiopia and Mali respectively, experienced real constitutional change towards authoritarianism: they relapsed after transition.

Chapter 2 of this study highlighted that efforts towards understanding the misfortunes of democracy in Sub-Saharan Africa have been partly hindered by the general neglect of African constitutional orders by leading constitutionalists in the study of themes such as constitutional change and stability. In any case, Chapter 2

⁴ *Ibid.*

⁵ Tamás Gerócs, 'The Transformation of African–Russian economic relations in the Multipolar World-System,' (2019) 46 (160) *Review of African Political Economy* 317-335.

contended, existing studies have a bias towards formal constitutions and by this fact, are not helpful in understanding polities whose *de jure vs de facto* gap is wide. This does not, however, mean, as the Chapter contended, that there are no studies that have tried to understand the problematics of democratic governance in the region. In particular, it was explained that four themes in the literature emerge in a bid to understand democracy and its problems and the problems of constitutional rule in general. In summary, these include (a) the cultural appropriateness discourse that is sceptical about democracy's success on account of its perceived or real incompatibility with African conceptions about governance; (b) the exclusionary constitution-making thesis that blames constitutional non-enforcement and effectiveness on the partisan and non-inclusive constitution-making processes in the early 1990s; (c) the institutional design limitation discourse that sees the solution in further constitutional changes to divest executive arms of government of the enormous powers that they are still felt to possess; and (d) the wealth factor discourse that is less hopeful about democratisation given the relatively poor economic status of African countries assessed against the Lipset hypothesis. All these discourses, Chapter 2 contended, have limitations, hence the need to undertake a further examination of the problems bedevilling democratisation in Sub-Saharan Africa from a different perspective.

The different angle, given the relations between formal constitutions and political orders in Africa – the wide *de jure vs de facto* gap – took into account what actually matters in shaping the constitutional conditions of polities: the real constitution. Settling on the real constitution was based on a sociological jurisprudence approach that encourages a concern for the “law in action” rather than “law in books”. Consequently, and not to fall prey to previous approaches, this study adopted a blended methodology that took into account doctrinal as well as qualitative empirical methods. For its doctrinal part, it synthesised texts in the form of constitutions, case law and most importantly scholarly articles in supporting its suppositions. The empirical component was achieved through case studies whose comparative logic was “most different” cases going by the transitional outcome. The primary source of information for these case studies is interviews which were undertaken in person or through Skype. They were supplemented by written interviews and secondary information available in databases such as Freedom House as well as in secondary sources. As Chapter 3 explained, the gathered information was analysed and presented using a social-science method known as Comparative Historical Analysis (CHA).

Pursuit of answers to research questions substantively started at Chapter 4, which theorised the idea of real constitutional change. Real constitutional change, it was contended, is the transformation from one constitutional regime to another and occurs in six different ways. Beside the written/formal constitution, the real constitution's other elements – quasi-constitutional legislation, conventions, informal powers and informal politics – when enforced can be broadly disaggregated into three types: authoritarian, hybrid and democratic. Real constitutional change was consequently theorised to occur under the stated six different ways when a constitution transforms from one form to another, i.e. say from hybrid to democratic or vice versa. Democratisation is thus change towards a democratic constitution, while regression is change towards an authoritarian one. It was then contended under this Chapter 4 that real constitutional change towards a democratic constitution occurs when enabling conditions exist. These conditions are actor-based (change to incumbent power actors, existence of effective democracy-demanding groups and candid support for democracy) or structural (social, economic and historical factors and contexts). Though a relationship was said to exist between de facto and de jure norms, scepticism was expressed concerning the ability of design-based conditions (change to formal powers and the existence of effective judicial review) to trigger real constitutional change especially in a rapid way. Instead, these design-based conditions were felt to contribute significantly in guarding against regression, which by itself is an integral ingredient of consolidation. It is these conditions of interest that were used in the case study chapters whose findings are collated in the section that follows.

8.3 Case study findings

This section summarises the case study findings first by mapping the shared context under which the transitional outcome should be understood and then gathering findings on the conditions of interest to which the transitional outcome may be linked.

8.3.1 Context and transitional outcomes

The choice of Cameroon, Kenya and Benin as case studies was informed by a preliminary literature review as well as the classificatory scheme provided by Freedom House, which largely conforms to the observable features of different constitutional typologies as stated in Chapter 4. When this study was conceived, Benin was selected as a country that had transitioned into and consolidated its democratic constitution. In the course of the study though, to be precise in 2019, its Freedom House rating changed from a “free” to a “partly free” country. Whereas this was thought to be fatal

to the inquiry, it in turn offered an opportunity to study regression which is also real constitutional change. Nothing substantial changed for Kenya and Cameroon, which had been selected to represent countries that partially transitioned or those that did not transition at all respectively. It is noteworthy in this regard that the empirical data collected for the sake of this study buttressed, certainly with slight variation, the classificatory criteria used to profile Cameroon, Kenya and Benin as “not free”, “partly free” and “free” countries and the regression of Benin which is thought to have started in 2017.

The case study chapters commenced by tracing the different paths that were followed in the post-independence period until 1989, at the inception of the TWD. Each of these countries had a different path though towards authoritarian retention and consolidation. Cameroon and Kenya had relatively low leadership turnover, with both of them having two presidents – Ahidjo and Biya in the case of Cameroon and Kenyatta and Moi in the case of Kenya. The two presidents were also “civilians”. None of these countries experienced violent constitutional ousters and political rupture akin to what had been seen in many other African countries. In contrast, Benin – previously known as Dahomey – had experienced chronic coups and constitutional overthrows between 1960 and 1972. The state of affairs only changed in 1972, when Mathieu Kerekou assumed leadership through a coup. Unlike in Kenya and Cameroon, most governments in Benin were, mostly, if not at all times, military. The major difference between Kenya and Cameroon, on the one hand and Benin, on the other, is that Kerekou adopted socialist policies which inspired his nationalisation of the private assets and made him to lose favour with the France, Benin’s former colonial master. All in all, both of these countries had proscribed opposition activities and were ruled by single-party regimes as at 1989 at the inception of the TWD in Africa.

Upon encountering the TWD, and based on the classificatory scheme provided in Chapter 4, these three countries ended up at different destinations. Their transitional outcomes as at 2019 can be presented as follows:

Country	Nature of the real constitution before the TWD	Outcome: Resultant real constitution
Cameroon	Authoritarian	Authoritarian

Kenya	Authoritarian	Authoritarian > Hybrid
Benin	Authoritarian	Democratic > Hybrid

Based on its Freedom House profile and the interviews conducted for this study, Cameroon did not at any time experience real constitutional change. Its authoritarian constitution can be adjudged as consolidated. In the case of Kenya, real constitutional change occurred first in 2002 though prospects for its transformation had become more apparent in 1997. Since 2002, its constitution has remained hybrid, implying consolidation of that form of constitution. Benin, for its part, transitioned to a democratic constitution until around 2019, when her Freedom House ratings sharply changed to “partly” free. Interviewees felt that this change was reflective of the state of affairs in Benin after Yayi Boni. Thus, it transitioned from an authoritarian to democratic constitution in 1991 and, in 2019, it experienced a change to a hybrid constitution.

This portrayed state of affairs does not mean that there has not been any change to the elements of the real constitution. As discussed in Chapter 5, Kenyan courts have since 2010 struck down a host of statutes that fostered authoritarianism. However, and as discussed in Chapter 4, change to elements of the real constitution is not synonymous with real constitutional change. Though, however, reliance was placed on Freedom House rankings, the process of real constitutional change as cautioned in Chapter 3 could occur in an unnoticeable way as the society evolves in ways out of reach even of Freedom House inquiry. This study can potentially be invalidated, accordingly, for failing to take into account this almost certain way through which real constitutional change occurs. Nevertheless, and by focusing on certain key features of the different typologies, it is defensible to claim that thus far, real constitutional change has not been registered in Cameroon. Otherwise, there would be a noticeable change in political practice on the basis of the theorised observable features of each typology. In the segment that follows, a summary is given of the case study findings in terms of the conditions of interest.

8.3.2 Actor-based conditions

Based on the theorisation in Chapter 4, this study sought to understand in all three case studies whether actor-based conditions were present. The first actor-based condition was change to incumbent power actors, the second was the existence of effective -

demanding groups and the third was candid promotion of democracy by international actors. The findings in each of the case studies is summarised in the sections that follow.

8.3.2.1 Change to incumbent power holders

The focus in relation to this theme was on the holders of political power at the highest level and the political parties in power. In all three case studies, it is only in Benin that there has been a substantive change to incumbent powers holders. In Kenya, there has been a qualified change, while in Cameroon this condition was found to be absent. In the case of Cameroon, as Chapter 5 showed, Biya and his party CPDM have remained in power both before and after the TWD. Like Kenya's President Moi, Biya exploited opposition disunity to "win" elections in the early 1990s, having also effected legal changes that barred opposition unity. Upon completion of constitutional term limits set through the 1996 amendments, Biya orchestrated a constitutional amendment in 2008 that allowed him to run for additional years. Through this initiative, Biya has been Cameroon's only President and CPDM's leader both before the TWD and to date. As Chapter 5 further explained, part of the reason behind Biya's reluctance to allow for alternative leadership is the fear, especially within CPDM, that, should he leave, he and his close allies will most likely be prosecuted.

In Kenya, by contrast, as shown in Chapter 6, Moi and his party, KANU, remained in power. It was not until 2002 when a dissident group of KANU politicians, disgruntled by Moi's nomination of Uhuru Kenyatta as his "successor", rallied behind Moi's former Vice-President, Mwai Kibaki, and defeated Uhuru. KANU remained in existence, though, having been abandoned by Uhuru who nevertheless was closely associated with it. KANU has been one of the political parties that supported Uhuru's successful 2013 and 2017 bid under two different political party names: The National Alliance (TNA) and Jubilee Party. Unlike in Benin, political actors in Kenya are traceable to the pre-1989 epoch, hence the claim that there has not been a "substantive" change to incumbent power holders in Kenya.

In Benin, the ruling party, PRBP, dissolved in the late 1980s. After its dissolution, and even before the 1991 elections, Mathieu Kérékou, the then President and leader of the PRBP, handed over executive authority to a body known as the High Republican Council (HRC). Other than general regime vulnerability and collapse, the assurance that Kérékou would not be subjected to prosecution for deeds committed

during his reign eased his decision to hand over power to the HRC and also to accept the 1991 electoral loss. Since then, there has been power change from Soglo, to Kĩrĩkou, to Boni and ultimately to Talon most of whom were elected as “independent candidates”. Hence, change to incumbent power holders was and has remained a present condition of interest in Benin.

8.3.2.2 Existence of effective Democracy-Demanding Groups (DDGs)

Under this theme, what was sought to be understood is whether there were well mobilised DDGs in the three polities. It was established that DDGs have been quite effective in both Kenya and Benin, though in Benin (a) the group included government workers and (b) the ruling regime became more defenceless towards the demands by DDGs than in Kenya. In the case of Benin, pro-democracy forces, which included university students, civil servants and religious leaders, riding on the political impetus provided by the hitherto clandestinely operating Communist Party of Benin, triggered, through chronic protests, the collapse of the PRBP and substantively took over power from Kĩrĩkou. As discussed in Chapter 7, upon Kĩrĩkou’s dislodgment from power, the HRC took over and managed Benin’s transitional arrangements. It also became its first National Assembly before the legislative elections.⁶ Even though the Communist Party of Benin was not involved in the National Conference, participants in the conference were drawn from various quarters and included academics, religious personalities, NGOs, as well as past political leaders.⁷ In Kenya, though DDGs did not have a serious say in the early 1990 reforms other than the fact that they prompted it through some protests, their continued call for constitutional reforms over the years assured their participation in the 2008/2009 constitution-making processes that culminated in the 2010 Constitution. After 2010, and in spite of the frequent co-optation of opposition figures by governments, DDGs have continued to effectively protect the constitution through occasional demonstrations and litigation.

In Cameroon, by contrast, DDGs were divided along Anglophone/Francophone lines and while Cameroon became host to many civil society organisations in the early 1990s, they never effectively mobilised for democracy. This, as already mentioned, is because of excessive violence towards activism for democracy and co-optation of individuals and groups by CPDM. The main DDG in Cameroon is Anglophone Cameroonians, but their concern seemed to be less about the pursuit of democracy for

⁶ See Chapter 5.

⁷ *Ibid.*

all Cameroonians in general than about addressing the ills perpetrated by post-colonial governments towards them. This “division” became more apparent in the 1990s, when the Social Democratic Front (SDF), the main Anglophone party, was embroiled in internal discord, partly exemplified by its failure to embrace and trust its Francophone constituency. For this reason, the group has not elicited collaboration from its counterpart Francophone-orientated DDGs, which could be equally dissatisfied with the Biya regime but on somewhat more regional-neutral grounds. Over the years, as shown in Chapter 5, DDGs have not constituted a unified force against Biya, mostly because of co-optation of political actors into the Biya regime, the repression that continues towards activism and the absence of any formidably coordinated appeal for democracy against CPDM from both Anglophone and Francophone neutral forces. Hence, while this condition of interest was present in Kenya and Benin, it was absent in Cameroon.

8.3.2.3 Candid promotion of democracy by international actors

Other than the general imposition of conditionalities to aid by Bretton Wood Institutions, some powerful international actors supported the Biya and Moi regimes at the inception of the TWD, thereby weakening calls for democratisation from other international actors or emboldening these regimes towards DDGs. As Chapter 5 showed, France and the United States have played a particularly obstructive role in democratisation in Cameroon. France has for a long time supported Biya and it is said to have influenced the 1991 elections that almost gave victory to an Anglophone-based party, the SDF. As observed, Anglophone Cameroonians are a relatively formidable political force, though their opposition to the Biya regime has less to do with Biya’s authoritarian tendencies than with addressing past injustices towards them and resisting “frenchification”. With this inclination, Anglophone success could mean that France will most likely lose its influence over Cameroon. With French support, Cameroon only made perfunctory concessions to the IMF and World Bank. This was in the form of legalising opposition parties and allowing hitherto proscribed freedoms, such as association. The stance taken by France over Cameroon is in turn thought to have influenced the other main donors’ approach towards Cameroon’s democratic credentials. In the 2000s, Paul Biya became an ally of the US in its fight against terrorism, especially Boko Haram. With American and French support, Biya has over the years remained in power paying no heed to democracy as no powerful actor cares. Britain, which colonised the Anglophone part of Cameroon, has for its part abandoned the region and largely ignored the plight of its inhabitants.

The situation in Kenya is slightly similar to that in Cameroon. As observed in Chapter 6, Thatcher's government had become reluctant to protest Moi's authoritarian practices and it was not until her ouster in the 1990s that Britain became explicit in its condemnation of Moi's authoritarian rule. While other Scandinavian countries had taken to censuring human rights abuses in Kenya, Britain praised Moi. Britain's hesitant support for Kenya's democracy is linked to its geo-strategic and military interests in Kenya. The US, for its part, had military interests in Kenya, too, as it pursued Saddam Hussein in the early 1990s. While its Senate and the US Ambassador to Kenya, Mr Hempstone, attacked Moi's authoritarianism, the George W. Bush administration continued to support him. It was not until the late 1990s, when Moi's authoritarianism became more naked as he countered anti-regime protests, that the Bush administration changed its tune. The ouster of Thatcher in Britain as well as this change of view on the part of the Bush administration contributed to Moi's decision to legalise multi-party politics. Over the years, powerful nations and actors, such as the European Union, the United States and Britain – which still retain their geo-strategic interests – have mainly focused on political “stability” and have been less interested in ensuring that democratic elections are free and fair. This assessment is based on their endorsement and support for electoral outcomes even in instances when the electoral outcome is declared to be invalid, as occurred in the August 2017 presidential election.⁸ In any case, Kenya and Cameroon now increasingly pursue trade-related bilateral relations with countries like China.

In Benin, France's intervention was not for the protection of the Kérékou regime even if it ultimately negotiated an amnesty for him.⁹ As shown in Chapter 7, the relationship between Benin and France had deteriorated in the late 1970s when Kérékou took over power and commenced a massive nationalisation program that targeted assets and entities owned by foreign entities and individuals. France and its citizens were a victim of this enterprise. This relationship was mended only in the 1980s and, as discussed in Chapter 4, it was not until 1983 that a French President visited Benin. In the late 1980s, the French Ambassador is said to have also visited Kérékou several times to persuade him to abandon his nominal socialist ideology. When student and worker protests had become chronic and assumed political dimensions, the French Ambassador suggested during the bicentennial celebrations of

⁸ See Chapter 5.

⁹ See Chapter 6.

the French Revolution a national conference for Benin established on the French model. France also negotiated an amnesty for Kérékou who handed over power to the HRC and also accepted his 1991 electoral defeat by Soglo.¹⁰ Though over the years France has taken an interest in Benin's politics, it has not stood in the way of domestic forces. The US for its part, was generally happy with the collapse of another socialist regime and has over the years supported Benin as a development partner. As discussed in Chapter 7, aid to Benin increased after its transition to democracy as a message to other African countries. Hence, candid promotion of democracy by international actors was a present condition in Benin, but largely absent in Kenya and Cameroon.

8.3.3 Influence of structural conditions

Efforts by various actors to push these three countries towards democratic constitutionalism cannot be understood if divorced from the structural conditions that either triggered, shaped or undermined efforts at destabilising authoritarian constitutions in the region. The general observations about structural conditions based on the case studies are: (1) some of these conditions are shared across contexts while others are limited to certain contexts; and (2) an underlying condition that is found in a particular political order, such as neopatrimonialism, can shape the transitional outcome differently in a different context. From the case studies, certain underlying shared conditions can be identified, namely (a) neopatrimonialism and the attendant neopatrimonial nature of politics; (b) ethnic/racial and or regional enclaves; (c) economic conditions; and (d) longstanding linkages with powerful external actors.

In Cameroon, the Anglophone/Francophone divide, its relative economic affluence and less reliance on foreign aid, chronic neopatrimonialism, and its relationship with France are the underlying conditions that have arguably impacted on efforts by democracy-demanding groups to drive change. In particular, the Anglophone/Francophone divide re-directs discussion about democracy in Cameroon as a whole to whether the Anglophone's historical and present grievances should be addressed by the ruling regime. Each side of the divide sees the other as an existential threat and for the Anglophone group, democracy is felt to be the only feasible means through which it can get hold of power and correct longstanding efforts at assimilation and resource exploitation in the region. The SDF, a relatively powerful opposition movement, has been unable to solicit popular formidable support from the

¹⁰ *Ibid.*

Francophone region, which has received better treatment from the successive “Francophone regimes” over the years. This condition is compounded by France’s interest in not losing its present influence over the Cameroonian government, an event that is likely to occur if an “Anglophone Political Party”, such as the SDF, takes power. For this reason, as explained, France is accused not only of supporting the “Francophone” governments over the years, but also of ensuring that Biya remains in power. As observed, it is widely claimed that in the 1991 elections, France interfered to ensure that Biya secured a narrow win over the SDF’s John Fru Ndi, an Anglophone. The relative economic affluence that Cameroon has, when contrasted with its neighbours in any event, makes Cameroon less vulnerable to donors’ conditions, particularly when it has partly looked to Beijing as a development partner. In the late 1980s, though, Cameroon plunged into an economic crisis, a fact that made it fairly vulnerable to the demands of the IMF and the World Bank and partly explains the re-introduction of multi-party politics. Neopatrimonialism, as a structural condition, for its part explains the frequent co-optation of political factions in Cameroon, the effect being that it has prevented the emergence of a serious unified opposition movement. As if that is not enough, several Anglophone figures are frequently co-opted by the Biya regime to give a formal impression that the government is all-inclusive.

Kenya shares neopatrimonialism, relative economic affluence and a special relationship with its former colonial master – in Kenya’s case Britain – with Cameroon, but differs to the extent that, while in Cameroon the regional (Anglophone/Francophone) divide shapes power dynamics between groups, it is the ethnic factor that counts as a major underlying structural condition in Kenya. Contemporaneously with “accepting” multi-partyism, Moi’s KANU ethnically profiled members of his non-Kalenjin tribe try to prove his objection to multi-partyism. This revived the claims made for a single-party state in the 1960s and indeed all the elections after 1992 have had manifest ethnic undertones. In the years that have followed the TWD, politics – either normal or constitutional – have been ethnically mobilised with large tribes often creating alliances and “winning” elections. Whereas ethnic cleavages may thus not have been anything beyond being used as a spurious attack on democracy, they were subsequently exploited by the ruling regime in the first multi-party elections after the TWD and have impacted on Kenya’s ability to transition to democratic constitutionalism. Regarding Kenya’s links with the outside world, Moi’s bare compliance with IMF and World Bank conditionalities was partly informed by the

support that George W. Bush and Margret Thatcher offered him in the late 1980s. Over the years, and because of the geo-strategic interest of the US, the UK and the United Nations in Kenya, what has been preferred by the international community in place of democracy has been peace and stability. Kenya's relative economic affluence, too, like Cameroon's, also makes it less aid-reliant and consequently not easily amenable to demands from the outside. Neopatrimonialism is also a structural condition that at times operates hand in hand with ethnic cleavages and has had its share in the obstruction of Kenya's quest for democracy through frequent co-optation of opposition politicians. This fact has made democracy-demanding groups less strong than they could have been had they been acting in one accord with the political factions.

Some of the underlying conditions in Kenya and Cameroon can also be traced in Benin, but they played out differently. Neopatrimonialism, for instance, was as prevalent in Benin after Kérékou's takeover as it had been before 1972.¹¹ The economic crisis in the 1980s made the Kérékou regime unable to sustain its patronage networks.¹² This contributed to the collapse of the ruling regime and to its vulnerability to internal demands for democracy. Whereas Benin has had the North-South divide, it did not seem to influence the transitional trajectory. Also, Benin has a special relationship with France, but the relationship went sour in the 1970s and the first half of the 1980s following Kérékou's adoption of Marxism-Leninism as BPRB's ideology and nationalisation of corporate assets. The French Ambassador had, as already mentioned, persuaded Kérékou to abandon his minimalist socialist ideology, but this did not mean that he enjoyed French support.¹³ In any event, the Kérékou regime had become a foe of the Americans during the Cold War and enjoyed little support from the West at large because of this fact. Further, Benin's chronic economic crisis of 1985, epitomised by its inability to pay its workers, made it more susceptible to IMF and World Bank conditionalities on aid and indeed it liberalised politics way before, rather than after or as part of, the constitutional reforms associated with the TWD. In sum, some structural conditions in the case of Kenya and Cameroon impacted on efforts by internal actors but somewhat facilitated DDGs in Cameroon.

¹¹ See Chapter 6.

¹² See Chapter 6.

¹³ *Ibid.*

8.3.4 Design-based factors

In this section, a summary is given of the influence of design-based factors, namely (a) change to formal powers and (b) the existence of effective judicial review.

8.3.4.1. Change to formal powers

Cameroon and Kenya did not substitute their normatively unattractive formal constitutions in the early 1990s.¹⁴ Cameroon's Parliament passed ordinary legislation that, inter alia, allowed for multi-party politics and also for the exercise of some rights, such as freedom of association.¹⁵ After the first legislative elections in Cameroon in 1991, which did not give Biya even a bare parliamentary majority, Parliament changed the law – following an alliance between Biya's CPDM and Dakole Daissala's Movement for the Defence of the Republic (MDR) – and barred pre-election alliances.¹⁶ Beyond these measures, CPDM commenced what it considered a comprehensive constitutional revision process that culminated in the 1996 revisions.¹⁷ In a bid to formally comply with international actors' demands for opening up the political order to competition, Kenya too amended its Constitution to remove the clause that had declared it a single-party state.¹⁸ It also restored some provisions, such as those that provided for the security of tenure of judges. These two were parliamentary initiatives effected by the ruling regime of the time, KANU, which had an absolute majority. Democracy-demanding groups – dissatisfied with the less than expected token concessions made by Moi – persisted in their call for a new constitution, a call that ultimately ended with the Constitution of 2010 after several failed attempts, one of which was a draft constitution rejected in a referendum. The writing of the 2010 Constitution was, unlike Cameroon's 1996 revision, participatory. The similarity between Kenya and Cameroon – that distinguishes their change to formal powers from the Beninese example – is that for Kenya and Cameroon,

¹⁴ See the discussion under Chapters 4 and 5.

¹⁵ See Chapter 4.

¹⁶ Dibussi Tande, *Scribbles from the Den: Essays on Politics and Collective Memory in Cameroon* (Langaa RPCIG, 2009), at 127.

¹⁷ See Charles Fombad (eds) *Constitutional Adjudication in Africa* (Oxford University Press, 2017) ("On the whole, the 1996 Constitution remains a controversial document, not only because of the perception that it was imposed, but also because it is technically an inferior document to the one it purports to amend, and is less liberal and progressive. There was lack of adequate consultation, especially of the Anglophone community")

¹⁸ See Chapter 5 of this study.

constitution-making initiatives that culminated in these countries' constitutions came at a time when the impetus created by the TWD had substantially dissipated.¹⁹

In the early 1990s, Benin embarked on a robust constitution-making process and was the first among the Francophone countries to use the idea of a “national conference” as a means of plotting a way out of its authoritarian past. As observed, Kérékou asked Robert Dossou, who as a member of the democracy-demanding groups had previously prepared a list of required reforms, to convene a conference of “*forces vives, de la nation, quelles que soient leur affinités*” (all living forces of the nation whatever their political persuasion) to discuss constitutional reforms).²⁰ The process of making the 1990 Constitution was itself fairly all-inclusive to the extent that democracy-demanding groups, with the exception of the Communist Party of Benin that dismissed the process as a bourgeois charade and did not participate, played a significant role in the process. While the 1990 Beninese Constitution has limitations, such as the claw-back clauses discussed in Chapter 6, it has entrenched democracy, political rights and profoundly judicialised politics.²¹ The 1990 Constitution was not the ultimate prize for democracy-demanding groups, but rather part of the transitional process package, which also included the ouster of Kérékou.²² In summary, Kenya and Benin substituted their constitutions through processes that were fairly inclusive.

8.3.4.2. Existence of effective judicial review

A review of the case studies shows that since the early 1990s, Benin has had a strong judicial review system under the tutelage of its Constitutional Court. This Court, which enjoyed enormous sociological legitimacy in the 1990s, has a strong reputation for human rights as well as general constitutional protection. As observed in Chapter 7, the Court countered various decisions by Kérékou after he came back into power in 1996 – such as its decision on the taking of the oath – and helped the Soglo government to navigate its way through a serious constitutional “budget crisis”. Chapter 7 also highlighted instances when the Court intervened to protect elections or the republican nature of government against invasive and authoritarian pre-colonial practices. The impression created from reading its decisions is that the Beninese Constitutional Court has actively participated in guarding the 1990 Constitution against relics of pre-1989

¹⁹ See discussion in Chapters 4 and 5.

²⁰ Kevin Shillington, *Encyclopedia of African History*, (Taylor & Francis Group, New York, 2005) 245- 246.

²¹ See discussion in Chapter 6.

²² See Shillington, note 20 at 246.

authoritarian constitutionalism and its manifestations. Since the early 1990s and till around 2018, the existence of effective judicial review was a present condition in Benin. This did not however precede democratic transition.

In Kenya, by contrast, judicial review did not flourish either at the dawn of the TWD or immediately thereafter. It was not until the early 2000s, when Moi left the political scene, that courts started incrementally enforcing the Bill of Rights contained in the then 1963 Constitution. At this time also, courts started participating in the constitution-making process and in one instance, forestalled the famous or rather infamous Bomas constitution-making process. On matters relating to electoral democracy, and true to the behaviour and role of courts in authoritarian regimes, Kenyan courts often sided with the incumbent. As a result, public confidence in the judiciary as an arbiter of electoral disputes was low, a fact that explained the failure of opposition parties to refer their grievances regarding the 2007 elections to court with the effect that Kenya plunged into post-election violence. It is the 2009 Kofi-Annan led mediations that partly led to a new constitution in 2010. The 2010 Constitution in turn embodies a strong judicial review system and as claimed in Chapter 6, Kenya's failure to regress to an authoritarian constitution after 2013 is partly attributable to the role that courts have played after that constitution's promulgation. Though on average Kenyan courts have not done well on matters of "mega politics", they have nonetheless assisted in the cleanup of authoritarian legislation and practices that were in use in the pre-1989 epoch.

In Cameroon, by contrast, judicial review has not been effective either at the inception or after the TWD. Cameroon established a Constitutional Council as part of the 1996 constitutional "reforms". As discussed in Chapter 5 though, Fombad has labelled this institution a "faithful servant" of an "unaccountable master".²³ Access to the Council is highly restricted and its judges are not independent as they are appointed by the President. Under the revised 1996 Cameroonian Constitution, it remains the duty of the President to guarantee the independence of courts. Some election petitions are filed in the Cameroonian courts, but they are largely dismissed. It is only in respect of parliamentary elections, which by and large are low stakes politics compared to the Presidential elections, that the Supreme Court has invalidated results. When an amendment was sought in 2008 to extend Biya's term, it is unsurprising that

²³ Fombad, note 17 above

the Constitutional Council of Cameroon did nothing about it. Overall, the legal order has not benefited from judicial review, whose effectiveness is a largely absent condition.

8.4 Explaining real constitutional change

What do these case study findings mean about the problematics of constitutional change and stability in Sub-Saharan Africa? To answer this question, the segment that follows refers to and answers the research questions that were posed in Chapter 3 of this study.

8.4.1 The different real constitutional change outcomes

One of the questions that this study addresses is why there were different real constitutional change outcomes in different political orders following the encounter with the TWD. Based on the case study findings, three explanations stand out. First is that whereas change to incumbent power holders can be considered a result rather than a cause of real constitutional change, this condition was decisively enabling in democratic transition. Consequently, African countries that remained with their pre-1989 leaders and parties did not transition to a hybrid let alone a democratic constitution. Benin transitioned to a democratic constitution because Kérékou and his PRBP were ousted from power, just as Kenya transitioned to a hybrid constitution in 2002 when Moi resigned and his nominee was defeated. In Cameroon, the incumbent remained put and the pre-1989 constitutional conditions too. The assumption that underlies this explanation is that through change to incumbent power holders, focal points and patterns of informal politics that constitute real constitutions can be substantially re-oriented or destabilised, producing real constitutional change. It is arguable, in this regard, that Kenya did not completely transition to a democratic constitution because its change to incumbent power holders is qualified by the fact that political actors that were associated with the dark pre-1989 epoch were assimilated and merely took over from Moi under new outfits.

Second, SSA countries reached different outcomes because of the different support the ruling regimes received at the inception of the TWD and thereafter from powerful international actors. Cameroon's Paul Biya received support from France and the US notwithstanding his poor human rights records. In Kenya, too, Britain and the US have continued to play ambivalent roles in their "promotion" of democratic governance. In these two set-ups, the powerful international actors are interested in "political stability" as they pursue their economic, military or other geo-strategic

interests. In Benin, by contrast, France played a facilitative role by convincing Kérékou to abandon socialist policies and subsequently to hold a National Conference which created a new constitution. The US, for its part, has been supportive of Benin as a development partner. The different transitional outcomes can consequently be linked to the role that powerful international actors played, and have continued to play, which differ according to context-specific interests or lack thereof in different countries.

Third is that whereas DDGs are somewhat present in most political orders and pushed for democratisation, the extent of economic and/or political crisis in the late 1980s shaped the transitional outcome considerably. Consequently, DDGs were more effective in zones where the regime was profoundly destabilised. As observed, Benin, like other countries, plunged into an economic crisis in the mid-1980s with the effect that the government was unable to sustain the bureaucracy let alone BPRT's patronage networks. Benin consequently became party to chronic worker and later student strikes whose demands turned political as they started pursuing democracy. Fearing that he would be excluded from the transitional arrangements, Kérékou agreed to cede power, including military control, to transitional agencies that were established at the behest of elites in an attempt to amicably resolve the political crisis that had ensued. The crisis in Kenya and Cameroon was not life-threatening to the Moi and Biya regimes respectively. These two countries had previously been described as the "shining stars" of Africa because of the prospects for economic growth that they displayed at a time when African countries were doing badly. Though these governments engaged in repression, they were still able to sustain their government machinery. Unlike in Benin, civil servants were not involved substantively in calls for democracy in the early 1990s nor were the protests chronic. When, therefore, Moi and Biya resorted to "liberalising" politics, the main reason appears to have been to appease international actors rather than yielding to domestic pressure. Based on these three experiences, Sub-Saharan African countries can be said, also, to have attained different outcomes because of the different degrees of economic and political crisis at the commencement of the TWD.

8.4.2 Relationship between ostensible and real democratic constitutionalism

This issue concerns "sham" constitutionalism in Sub-Saharan Africa. Put differently, the main issue is why African countries engaged in robust constitution-making processes that culminated in new democratic constitutions, yet democracy has not flourished. In

this regard, Kenya, Cameroon and Benin, like many other African countries, either substituted or amended their constitutions to embrace democracy at the *de jure* level. As observed, Benin changed its constitution in 1991 through substitution, Kenya did so in 1991 through an amendment and in 2010 through substitution, while Cameroon changed its constitution in 1996 following revisions. Kenya's 2010 Constitution comes closer to the liberal-democratic ideal on paper than Benin's, yet it has not succeeded in changing Kenya's hybrid constitution to a democratic one.

In the African context, ruling regimes simply aim at pre-empting DDGs' demands and resort to changing formal powers as one easy way to head off an anti-authoritarian crusade mobilized around the demand for a "new constitution". This is what happened in Kenya and Cameroon in the 1990s. In Kenya, President Moi amended section 2 [a] of the constitution to allow for multi-partyism to thwart ever-growing demands for deeper reforms and also to satisfy the donor community. The constitutional revision processes in Cameroon that resulted in the 1996 revised Constitution also appear to have served this end. Having complied with the international community's quest for multi-partyism as well as democracy-demanding groups' desire for new constitutions, the huge impetus for democratic reforms was quickly overwhelmed by authoritarian resurgence. It is noteworthy in this regard that change to formal powers in Benin happened after the collapse of the Kɔ̄rɔ̄kou regime and the 1990 constitutional reform process had much to do with creating a framework for the way forward.

In a more direct way though, formal constitutions or their prescriptions do not just form part of the real constitution. Neither also do changes to the formal constitution. Rather, they require appropriate institutions, sympathetic actors and a conducive socio-political context to be enforced. Based on the Beninese experience, translation of formal to real constitutional change requires an underlying change in the political environment under which the formal arrangements are enforced. In Benin, the new constitutional arrangements were implemented by "outsiders". Outsiders in the sense that Kɔ̄rɔ̄kou lost to Soglo in the elections that were conducted in 1991 just after the conference, while the Constitutional Court, whose contribution in guarding against regression was described in Chapter 7 as profound, was composed of individuals that participated in the transitional arrangements. In particular, the first members of the HRC were the members of the Transitional Constitutional Court for the years 1991-1993. These included Bishop Isidore De Souza, who chaired the Council, and former

presidents Maga, Zinsou and Kouandete, some of whom were exiled by Kérékou's military regime. Some of the members subsequently remained in the Court, such as Hubert Maga and Professor Alexis Hountondji. Therefore, ostensible commitment to democracy has not translated into democratic governance on the ground because the political environment in which the new arrangements were introduced remained inconducive to such a change.

8.4.3. Reason(s) behind the endurance of authoritarianism in Sub-Saharan Africa

The direct response to this question is that the enabling conditions for real constitutional change towards a democratic constitution have not been realised. These are discussed in section 8.3.8, which considers the necessary and sufficient conditions for real constitutional change.

In addition, an inference can be drawn from Chapter 4, which theorized the idea of the real constitution. In that chapter, it was contended that the real constitution, which is what really matters, is made up of both formal and informal aspects. In line with the discussion in section 8.3.8, it can also be concluded that the endurance of authoritarianism is explained by the fact that, beneath largely unenforced democratic formal constitutions, authoritarian norms making up the real constitution remain.

8.3.4 Difficulties in democratic consolidation in Sub-Saharan Africa

The factors influencing the non-consolidation of democracy may be studied in countries that transitioned to either democratic or hybrid constitutions but regressed. A democracy-enabling legal environment and an effective judicial review institution stood out in the Kenyan and Beninese cases as important countermeasures against regression from either a democratic or hybrid constitution. Though Kenya's 2010 Constitution played no role in shaping real constitutional change, Chapter 6 showed that it had hedged against regression, particularly after Moi's sponsored prodigies took hold of power from 2013. It did this by supplying courts and DDGs with the (textual) democratic basis with which to resist the use of authoritarian norms that had remained in the quasi-constitutional statutes and attempts at their (re-)introduction. This has also been the case largely for judicial review. On the other hand, the limitations of the 1990 Beninese Constitution, especially the claw-back rights clauses, have not prevented regression from a democratic to a hybrid constitution after President Talon's accession to power. As chapter 7 showed, Benin regressed to a "hybrid" constitution because of

the weakening of the institution of judicial review that had hitherto safeguarded the constitution from breaches and neglect. We see formal change being invoked for authoritarian consolidation. In Cameroon, the amendment in 2008 that removed Presidential term limits helped in consolidating authoritarianism. Hence, African political orders that transitioned to either democratic or hybrid constitutions have not consolidated their democracies because of the ineffectiveness of judicial review as well as the presence of constitutional institutions that either vest too much power in the executive or qualify rights.

8.3.5 Necessary and sufficient conditions for change to and stability of democratic real constitutions

It is problematic to pinpoint a single condition that can be said to be sufficient for real constitutional change from an authoritarian/hybrid to a democratic constitution. Given the somewhat shared underlying structural conditions, it seems though that actor-led conditions play a more pivotal role in shaping transitions than structural ones. This, it is contended, is because the influence of underlying structural conditions can be mitigated by intervening acts. For instance, while many African countries succumbed to the 1980 economic crisis, aid from former colonial masters or other countries with geo-strategic interests in some contexts militated against the regime weakening that this crisis had generated in the contexts in question. We saw in section 8.3 in this regard that Kenya and Cameroon received support from Britain and France, a fact that made it much easier for their autocratic leaders to resist pressure for democratisation than in contexts like Benin, whose regimes were more exposed. Nevertheless, structural conditions should not be dismissed because they appear to explain the stability of hybrid constitutions in the region and either triggered or facilitated the transitional outcomes of virtually all constitutional orders in the region after the TWD in one way or the other.

There are numerous different conditions for real constitutional change towards a democratic constitution, often shaped by jurisdiction-specific underlying structural conditions. A society with an authoritarian real constitution requires, at the very least, a change to the incumbent power holder, a proactive democracy-demanding group and resolute support for the group's initiatives by influential international actors. Where these three actor-based conditions are all present, the likelihood of change to a democratic constitution is increased considerably. Where any of the three is absent, the chances that the constitutional regime will either not change at all or end up as a

hybrid regime are conversely enhanced. While the status of judicial review and formal constitutional change as pre-conditions for real constitutional change may be contested, this research has established that they play a role in stabilising constitutional regimes. In the case of democratic and hybrid constitutions, the existence of effective judicial review is necessary to guard against regression.

8.5 Discussion

In this section, the plausibility of the preliminary findings just set out is explored by examining the conditions for transitional outcomes in a broader list of countries selected on the basis of criteria discussed in Chapter 3. The countries in consideration are Uganda, Equatorial Guinea, South Africa, Niger, Ethiopia, Madagascar, Cape Verde and Ghana. In particular, the findings are discussed by linking them to supportive or contradictory evidence. This is done for the sake of validating the findings and mapping out probable qualifications.

8.5.1. Validation and refining of findings

Regarding change to incumbent power holders, it was observed that this is an enabling condition as much as it is also a result. A cursory study of countries that experienced real constitutional change to democratic constitutions affirms this finding and the conclusion drawn from it. South Africa's National Party,²⁴ Cape Verde's *Partido Africano da Independência de Cabo Verde, PAICV* (African Party of Independence of Cape Verde),²⁵ and Ghana's National Democratic Congress (NDC),²⁶ which were in power at the inception of the TWD, were all dislodged prior to these countries' transitions. Conversely, and with the exception of Ghana – which transitioned at first to a hybrid constitution – countries that did not experience leadership turnover retained their authoritarian status. In this regard, Teodoro Obiang Nguema has been Equatorial

²⁴ Roger Southall, 'The South African Elections of 1994: The Remaking of a Dominant-Party State,' (1994) 32 (4) *Journal of Modern African Studies* 629.

²⁵ Bruce Baker, 'The Most Democratic Nation in Africa?' (2006) 44 *The Journal of Modern African Studies*, 505.

²⁶ See Freedom House, 'Freedom in the World 2001 Ghana' <<https://www.refworld.org/docid/5278c96414.html>> accessed 14 June 2020.

Guinea's only President since 1979²⁷ and Uganda's Yoweri Museveni has also been President since 1986, just like Cameroon's Biya.²⁸

Change to the incumbent power holder is, nevertheless, not a condition confined to political orders that successfully transitioned. Neither is it also completely absent in authoritarian regimes. Most hybrid (such as Niger and Madagascar) and some authoritarian (Angola) regimes in SSA have also experienced a change to the incumbent power holder, either at the inception of the TWD or afterwards. Niger's National Movement for Development of Society and its leaders Seyni Kountché/Ali Saibou were displaced from power by Mahame Ousmane's Democratic and Social Convention;²⁹ Madagascar's Association for the Rebirth of Madagascar under its long-term leader Ratsiraka was replaced by Albert Zafy's National Union for Democracy; and Angola's Dos Santos, who had been in office since 1979, was succeeded by Joao Manuel Goncalves Lourenco. As speculated in Chapter 4, though, Angola's case qualifies this condition as there is no substantive change to the incumbent given that the party in question, the People's Movement for the Liberation of Angola (Movimento Popular de Libertacao de Angola- Partido do Trabalho, MPLA), remained in power.³⁰

This study's findings in relation to the role of DDGs are affirmed by the experience of some other countries, such as South Africa, but qualified by the experience of Ghana and Cape Verde. These two countries (Ghana and Cape Verde) did not transition under the influence of proactive DDGs. In South Africa, pro-active civil society organisations were party to the anti-apartheid movement and the process of enactment of the 1996 Constitution also saw their substantive participation. The political wing of the DDGs was the African National Congress (ANC) which, together with the umbrella body representing hundreds of civil society organisations, the United Democratic Front (UDF), was part of an aggressive "anti-apartheid resistance" to which

²⁷ Dadoua Aboussou, Kwame Nkrumah and Félix Houphouët-Boigny, *Divergent Perspectives on African Independence and Unity* (Cambridge Scholars Publishing, 2019) 7; Bertelsmann Stiftung, *Country Report — Equatorial Guinea* (BTI 2020) Göttersloh, <https://www.bti-project.org/content/en/downloads/reports/country_report_2020_GNQ.pdf> accessed 23 June 2020.

²⁸ Sabiliti Makara S, 'Presidential Term Limits in Uganda: Do Elections Provide an Avenue for Alternate Power Succession?' In Mangala J. (eds) *The Politics of Challenging Presidential Term Limits in Africa* (Palgrave Macmillan, Cham, 2020).

²⁹ Soli Abdourahmane, 'Conference Nationale du Niger (Niamey: Impremérie des Arts Graphiques du Niger, n.d.

³⁰ AFP, 'Joao Lourenco: The ex-general who is set to rule Angola,' (*Daily Nation*, undated), <https://www.nation.co.ke/kenya/news/africa/joao-lourenco-the-ex-general-who-is-set-to-rule-angola-442420>> accessed (13 November 2020); Peter Fabricius, 'Angola under Lourenço: more than just a promising start?' (*African Portal*, 10 June 2019).

the transition to a democratic constitution should be partly credited.³¹ In Cape Verde, by contrast, democratisation is associated almost exclusively with dissidents from PAICV.³² As Barker put it, “[d]emocracy [in Cape Verde] was born amid very limited popular participation and low levels of political violence, and so there is no history of people power.”³³ In Ghana, too, DDGs may not be said to have orchestrated the return of multi-party politics in the early 1990s. As Gyimah-Boadi puts it, “Ghana’s professional bodies declined to participate openly in the country’s prodemocracy movement in the early 1990s.”³⁴ After the liberalisation of political rights, though, “civic associations and nongovernmental organisations (NGOs) proliferated.”³⁵ They subsequently participated significantly in consolidating Ghana’s hybrid constitution and subsequent migration to a democratic one.³⁶

In any case, some countries that merely stopped at the hybrid phase, like Kenya, had or have over the years had very proactive DDGs. In the early 1990s, student and worker launched protests under the umbrella *Union des scolaires nigériens (USN)* and *Syndicat national des enseignants du Niger (USTN)*, which pushed for the establishment of a constitutional government in Niger. Following the death of certain students who were shot, the protests became ferocious.³⁷ The ensuing social unrest forced Ali Saibou to convene a national conference akin to the one that had taken place in Benin.³⁸ Like in Benin, delegates who were drawn from the DDGs declared the conference sovereign, stripped Ali Saibou of power and appointed an interim Prime Minister.³⁹ Madagascar for its part has a sturdy social movement culture that has

³¹ Hennie Kotze and Pierre Du Toit, ‘The State, Civil Society, and Democratic Transition in South Africa: A Survey of Elite Attitudes,’ (1995) 39 (1) *The Journal of Conflict Resolution* 27.

³² Barry Ames *et al*, ‘Democracy, Market Reform, and Social Peace in Cape Verde, Afro Barometer Paper No. 25 (2003) <<https://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo25.pdf>> accessed 25 June 2020.

³³ Bruce Baker, ‘The Most Democratic Nation in Africa?’ (2006) 44 *The Journal of Modern African Studies* 505.

³⁴ *Ibid.*

³⁵ *Ibid* at 79.

³⁶ E. Gyimah-Boadi, Ghana’s Encouraging Elections: The Challenges Ahead (1997) 8 (2) *Journal of Democracy* 78 at 79.

³⁷ Sebastian Elischer ‘Trade Union Mobilisation and Democratic Institutionalisation in the Republic of Niger (2019) 46 *Review of African Political Economy* 204 at 210.

³⁸ *Ibid.* Also, see Samuel Decalo, *Historical Dictionary of Niger*, 3rd ed. (Scarecrow Press, 1997,) 265–266

³⁹ Pearl T. Robinson, ‘The National Conference Phenomenon in Francophone Africa,’ (1994) Vol. 36, No. 3 *Comparative Studies in Society and History*, 575-610 at 580.

occasioned nightmares for successive ruling regimes since the late 1980s.⁴⁰ The collapse of Ratsiraka's dominant party, the *Avant-garde de la Revolution Malgache* (AREMA), in the early 1990s, was precipitated by demonstrations directed by a charismatic opposition figure at that time, Albert Zafy.⁴¹ Describing this event, Marcus observes that "Zafy Albert was able to lead an 80,000-strong civil servants'" strike in Antananarivo.⁴² In 2002 also, protests by Ravalomanana's supporters and well as his forceful takeover of power following a disputed election led to the ultimate dislodgement of Ratsiraka from power, after his re-election in 1996.⁴³ In 2009 again, protests in Antananarivo under the leadership of Andy Rajoelina brought Ravalomanana's term to an end.⁴⁴ Notwithstanding the vibrant activities of these social movements, however, Madagascar's constitutional regime has remained a hybrid democratic-authoritarian one.

Nevertheless, there is wider concurrence with the findings in Cameroon on the role of DDGs. This condition remained absent in authoritarian polities. In Equatorial Guinea, civil society is described as a "disempowered voice".⁴⁵ Opposition parties in Uganda, too, that could have stirred anti-Museveni protests, have been said to have "remained weak due to internal challenges and an unfair playing field."⁴⁶ In any case, over the years, disproportionate violence and persecution have been used against individual activists and politicians.⁴⁷ These coercive strategies are supplemented by frequent co-optation of politicians from the opposition side, as has been the case in Cameroon.⁴⁸ In Angola, civil society has been described as "a weak public force".⁴⁹ The disempowerment of civil society and DDGs in general in authoritarian contexts is affirmed by their rather negligible participation in the post-1990 constitutional reform

⁴⁰ Fredrickson, Molly, 'Malagasy Conceptions of Good Governance and Democracy,' (2010) 7 *Independent Study Project (ISP) Collection* 818 at 827.

⁴¹ Richard R. Marcus and Paul Razafindrakoto, 'Participation and the Poverty of Electoral Democracy in Madagascar,' (2003) Vol. 38, No. 1, *Africa Spectrum*, 27-48, at 29.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Equatorial Guinea G Justice, 'Disempowered Voices The Status of Civil Society in Equatorial Guinea,' (2011) Report <https://resourcegovernance.org/sites/default/files/DisempoweredVoices_CivilSocietyEquatorialGuinea.pdf> accessed 20 June 2020.

⁴⁶ BTI at 3.

⁴⁷ Bertelsmann Stiftung, *BTI 2020 Country Report — Uganda*. (Gьtersloh: Bertelsmann Stiftung, 2020) at 10.

⁴⁸ Paula Cristina Roque, 'Angola's Fazade Democracy,' (2009) 20(4) *Journal of Democracy*, 137 at 142.

⁴⁹ *Ibid* at 139.

processes that resulted in the constitutions adopted in these regimes. Angola's 2010 Constitution has in this regard been described as the MPLA's "self-serving Constitution."⁵⁰ Uganda's constitution-making process that resulted in the 1995 Constitution was also exclusionary, with Tripp explaining that "[a]t no time was Uganda's Constitution making exercise a neutral and open process, free from manipulation."⁵¹ Equatorial Guinea's 1991 Constitution was also prepared almost exclusively by the *Democratic Party of Equatorial Guinea (Partido Democrático de Guinea Ecuatorial – PDGE)*. Literature discussed in Chapter 2 on non-participatory constitution-making, most likely, has these contexts in mind.

Lastly on actor-based conditions, there is stronger validity to the finding that regimes that received support from powerful international actors resisted, somehow, democratisation. Cape Verde's process of democratisation, which is not linked to any "external" intervention, points in this regard to the absence of obstructive external influence.⁵² Though Ghana's Jerry Rawlings "allowed" transformation "on his own" so that he could not be seen to be subdued by external pressure, the relatively good relationship he enjoyed with the US and Britain arguably explains the partial transition registered in the early 1990s. The collapse of South Africa's apartheid regime occurred way later in time than would have been expected because, arguably, of the support that the National Party received from the US, which saw it as an ally in its anti-communist campaign in Africa. In spite of growing international opprobrium against apartheid in the 1970s, and especially in the 1980s, the United States, Britain and Israel maintained good relations with the National Party.⁵³ Later, when an arms embargo had been imposed on South Africa, France continued to supply South Africa with arms.⁵⁴ But for the pressure exerted by the US Congress and the intervention of

⁵⁰ Albano Agostinho Troco, Electoral Politics and Political Transition in Post-War Angola Progress, Problems and Prospects (2009) 8(2) *Journal of African Politics* at 35.

⁵¹ Aili M Tripp, 'The Politics of Constitution Making in Uganda' <http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6_Framing.pdf> accessed 1 April 2017. See also, Joe Oloka-Onyango, Constitutional Transition in Museveni's Uganda: New Horizon or another false Start? (1995) 39 (156) *Journal of African Law* 156-72.

⁵² *Ibid.*

⁵³ Anonymous, 'Partners in Apartheid: U.S. Policy on South Africa,' (1944) 11 (3) *Africa Today* 2-17.

⁵⁴ Ivan du Roy, 'Remembering French Investments in Apartheid South Africa,' 17 December 2013, *Multinational Observatories*, <<https://multinationales.org/Remembering-French-Investments-in>> accessed 13 November 2020.

certain senators,⁵⁵ the relationship between Washington and Pretoria would have been unmoved by anti-apartheid mobilisation.⁵⁶

The verdict that powerful international actors obstructed democratisation in SSA finds greater validation in authoritarian set-ups. In Uganda, the delayed “liberalisation of politics” let alone democratisation are partly explained by support offered to the Museveni regime by Britain and the United States.⁵⁷ At a time when political conditionalities were imposed on aid and the US was concerned about democracy in Africa, Washington is accused of having had a “soft attitude” towards Museveni.⁵⁸ In Okoth’s assessment, “evidence of democracy, human rights and good governance was not applied on Museveni’s regime”.⁵⁹ Similarly, in Equatorial Guinea, US support for Obiang has fostered the endurance of authoritarianism. As Jensen puts it:

Equatorial Guinea's major foreign donors Spain, France and the US, have been instrumental in the attempt to provide Obiang's regime with a veneer of democratic legitimacy.⁶⁰

The US has been particularly ambivalent. Bill Clinton closed the US Embassy in Equatorial Guinea, but after the discovery of oil, George W. Bush secretly re-established it in 2003.⁶¹ Because of the US’s interests in region, Equatorial Guinea’s human rights record is rarely condemned.

The claim, also, that structural conditions impacted on transitional outcomes but differently depending on the context is affirmed through a cursory look at transitional circumstances. Though ethnic, racial and regional enclaves have affected the transition to democracy in different ways, it is indefensible to claim that the mere fact that there is homogeneity within a polity will impact positively on real constitutional change. Perhaps, Cape Verde can be claimed to be one of the very few

⁵⁵ Chris Simkins, ‘US Anti-Apartheid Movement Helped Bring Change to South Africa,’ 24 April 2014, *Voice of America*.

⁵⁶ Alex Thomson, *U.S. Foreign Policy Towards Apartheid South Africa, 1948–1994 Conflict of Interests*, (Palgrave MacMillan, 2008).

⁵⁷ Jeff Haynes, ‘The Importance of External Actors to Democratisation and Development in Ghana and Uganda ECPR Joint Sessions, Workshop 4, University of Copenhagen, April 14-19, 2000 at 28-29 <<https://ecpr.eu/Filestore/PaperProposal/7cb30287-6a3b-46e6-afb9-bc897116da81.pdf>> accessed 3 July 2020.

⁵⁸ Godfrey Okoth Pontian, *USA, India, Africa During and After the Cold War* (University of Nairobi Press, 2010) at 191.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ David Wallechinsky, ‘Dictator of the Month: Teodoro Obiang Nguema of Equatorial Guinea’ Allgov Blogs, <<http://www.allgov.com/blog/allgov-blogs/dictator-of-the-month-teodoro-obiang-nguema-of-equatorial-guinea?post=37918>> accessed 13 November 2020.

African countries that boasts a “homogenous society, free of ethnic competition.”⁶² Yet, ethnic homogeneity cannot explain its democracy because its homogeneity did not prevent the pre-1989 authoritarianism. We can also see other divided societies, such as South Africa, striving for and indeed attaining democratic constitutionalism amidst profound racial cleavages. Thus, the mere existence of ethnic, racial or regional divisions is not necessarily an impediment to democratisation if South Africa and Benin are anything to go by. That is also the case with Ghana, whose ethnic cleavages are very pronounced and manifest in politics, but did not impede graduated change after Jerry Rawlings to a democratic constitution.⁶³ There are also cases like Niger, where the influence of ethnic cleavages was largely surmounted, without generating a democratic constitution as was the case in Benin.⁶⁴ In fact, Equatorial Guinea, which is largely homogeneous, without a significant racial or regional divide let alone an ethnic one, has been unable to change its authoritarian constitution. By and large also, the presence of a dominant majority ethnic group in Uganda – the Baganda – makes claims about the influence of ethnic cleavages appear overstated. All in all, while ethnic and regional cleavages have been a structural factor that has shaped the transitional outcome in places such as Kenya, Cameroon, Ethiopia,⁶⁵ and Madagascar,⁶⁶ these counter illustrations weaken the Kenya and Cameroonian findings. Lastly, neopatrimonialism, which is also a notable feature of African politics, appears to have been overcome by some societies. While neopatrimonialism can thus be used to explain the apparent failure of societies that are considered to be profoundly corrupt, such as Madagascar,⁶⁷ Ethiopia,⁶⁸ and Kenya, one wonders why it did not have this effect in Benin and Ghana.

⁶² See Baker above, at 504.

⁶³ On ethnic mobilisation of politics, see Charles Fernandes Taylor ‘Ethnic Politics and Election Campaigns in Contemporary Africa: Evidence from Ghana and Kenya,’ (2017) 24:6 *Democratization*, 951-969; Peter Arthur, ‘Ethnicity and Electoral Politics in Ghana's Fourth Republic,’ (2009) 56(2) *Africa Today* 45-73.

⁶⁴ Jibrin Ibrahim, ‘Political Exclusion, Democratization and Dynamics of Ethnicity in Niger,’ (1994) 41 (3) *Africa Today*, 15-39. (“Niger has so far succeeded in its transition from an austere, ethnically based and authoritarian military regime to a civilian, democratically elected pluralist regime. Nonetheless, this success does not imply the establishment of a stable and non-problematic form of liberal democratic politics in the country.”)

⁶⁵ John Young, ‘Ethnicity and Power in Ethiopia,’ (1996) Vol. 23, No. 70, *Review of African Political Economy*, 531-542; Lovise Aalen, *The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation under Ethnic Federalism* (Brill, Leiden, 2011).

⁶⁶ Generally, see Richard R. Marcus, note 41.

⁶⁷ *Ibid.*

⁶⁸ Semahagn Gashu Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (Routledge, 2014) at 150.

The conclusion that change to formal powers alone does not result in real constitutional change likewise finds enormous support across many cases. Change to the formal constitution especially in hybrid regimes did not generate democratic constitutionalism even if it dismantled some of the formal legal apparatus that supported authoritarianism. This particular conclusion finds support in the fact that in some hybrid contexts other than Kenya, the constitution-making process shares similarities with democratic contexts to the extent that DDGs were substantively involved in crafting the “new” constitution. This is particularly true for constitutional orders whose leaders fell victim to the western assault on communism, like Mengistu in Ethiopia and Ratsiraka in Mozambique. In these contexts, the post-1989 constitution-making process was spearheaded by hitherto emancipated groups such as the ERPF in the case of Ethiopia, the UNST in the case of Niger and the Zafy-led National Union for Democracy and Development in the case of Madagascar.⁶⁹ Further validation of this claim comes from authoritarian regimes that adopted new constitutions in the 1990s but without undoing their authoritarian real constitutions. Even Eritrea, the country with the most authoritarian constitution on the continent, enacted a constitution in 1997 through a consultative process, yet President Afwerki declared in a 2015 interview that “everyone knows the constitution does not exist”.⁷⁰ This means that it is not just about changing or creating a new constitution, especially where the executive retains enormous de jure and de facto powers.⁷¹

Lastly regarding judicial review, it is observable also that most countries that successfully transitioned and consolidated their democracies embraced and have had an effective and viable judicial review system. South Africa’s Constitutional Court has played a significant role in shaping the post-1996 constitutional system.⁷² In Ghana, too, even before the country transitioned to full-blown democracy, its Supreme Court started forcefully countering the pre-1989 legacy, for instance, when it issued a judgment disestablishing the political question doctrine, which had gained currency in pre-1989 Ghana, and declaring that commemoration of the coup d’état that obliterated

⁶⁹ Marcus, note 41.

⁷⁰ Haddas Ertra interview with President Isaias Afewerki, President of the State of Eritrea, January 2, 2015.

⁷¹ See Comparative Constitutions Project, ‘Constitutional Rankings,’ <<https://comparativeconstitutionsproject.org/ccp-rankings/>> accessed 4 June 2020.

⁷² See Generally see James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016, Cambridge: Cambridge University Press)

Ghana's fourth republic was not consistent with the "democratic ethos of the country's new Constitution".⁷³ Cape Verde, too, has a strong Constitutional Court that has fostered democratic growth and which "does not seem to suffer from serious corruption problems".⁷⁴ There is no evidence, nevertheless, that these countries transitioned to democratic constitutions because they had strong systems of judicial review that protected democracy prior to 1989.

As would be expected, courts in authoritarian regimes remain largely ineffective and obliged to the ruling regime. Though the 2010 Angolan Constitution empowers Angola's Constitutional Court and confers sufficient legal security on it,⁷⁵ it has still not contributed meaningfully to authoritarian demise. After a detailed analysis of the Court's structures and reasoning mode, Thomashausen concludes in a 2016 book chapter devoted to judicial review in Angola that:

The Angolan Constitutional Court has disappointed many who believed it would soften the authoritarian rule of the Dos Santos presidency, in power for the past thirty-five years, since 20 September 1979.⁷⁶

In Uganda, Museveni's bid to run for another term after attaining the age of 75 was given a nod by the Supreme Court. Further, election petitions against Museveni's "victories" have also been decided in his favour.⁷⁷ In Jude Murison's view, the Supreme Court, is "unwilling to rule against the president".⁷⁸ Indeed, according to the 2020 BTI report, Uganda's "judiciary's independence is under pressure from the executive."⁷⁹ In a like context, Equatorial Guinea, the judiciary is at the mercies of the President literally and in 2015.⁸⁰ The situation in Eritrea is worse. Though courts exist, they do not enforce the 1997 Constitution as it has not been implemented. The only

⁷³ See Prempeh H.K, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,' (2006) 80 (4) *Tulane Law Review* 1 at 4.

⁷⁴ Michael Bogdan, 'The Law of The Republic of Cape Verde After 25 Years of Independence,' (2000) 44: 86 *Journal of African Law*, at 92. See also article 215, Constitution of Cape Verde.

⁷⁵ Article 180, Constitution of Angola

⁷⁶ Andre Thomashausen, 'Super-presidentialism in Angola and the Angolan judiciary,' Charles M Fombad (ed.) *Separation of Powers in African Constitutionalism*, (Oxford University Press, 2016).

⁷⁷ See *Male Mabirizi & Ors v Attorney General* (Consolidated Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.) [2018] UGCC 4 (26 July 2018).

⁷⁸ Jude Murison, 'Judicial Politics: Election Petitions and Electoral Fraud in Uganda,' (2013) *Journal of Eastern African Studies* 492.

⁷⁹ Bertelsmann Stiftung, BTI 2020 Country Report — Uganda. Gьtersloh: Bertelsmann Stiftung, 2020, 14.

⁸⁰ Bertelsmann Stiftung, BTI 2020 Country Report — Equatorial Guinea. Gьtersloh: Bertelsmann Stiftung, 2020. at 10.

right that a citizen can litigate is the right to a writ of habeas corpus but, according to Dirar and Tesfagabir, “the High Court has been unable to enforce orders of habeas corpus” because of “the political situation in Eritrea”.⁸¹

A paradigmatic illustration of this study’s finding that judicial review is instrumental in guarding against regression is Ethiopia. Rather than establishing a constitutional court akin to what exists in Benin or South Africa, Ethiopia’s 1995 Constitution settled for an entity known as the House of Federation, which is part of the legislative body, to interpret the Constitution and “resolve” constitutional disputes.⁸² This entity has an agent known as the “Council of Constitutional Inquiry” made up of legal experts who frame issues for the House of Federation to make preliminary determinations. This entire scheme, whatever its underlying philosophy, is according to Adem Kassie Abebe, “unique” but “ineffective.”⁸³ Under it, Ethiopia regressed from a hybrid to an authoritarian constitution, which can be linked to the absence of an impartial and empowered institution of judicial review. Since its creation, the Council and the House have only once (in 2014) invalidated a law on the basis that it contravened Ethiopia’s Constitution. In a rather resigned mood, Abebe observes that many cases that have been referred to the council have been rejected on the basis that they did not “raise a constitutional issue”.⁸⁴

8.5.2. Qualifications

The findings of this study may be subject to various qualifications. Section 8.4 has already hinted at countries where enabling conditions are present and yet democratisation has remained a challenge. Salient examples from the discussion are Niger and Madagascar. It would seem also that certain enabling conditions play a much more pronounced role in some contexts than in others. While greater emphasis has been placed on change to incumbent power holders as the most vital condition, the Ghanaian and Cape Verdean transitions suggest that incumbent power holders can facilitate real constitutional change even in the absence of other actor-based conditions. Looking beyond the influence of shared structural conditions, these

⁸¹ Luwam Dirar and Kibrom Tesfagabir Teweldebirhan, ‘Introduction to Eritrean Legal System and Research,’ <<https://www.nyulawglobal.org/globalex/Eritrea1.html>> accessed 4 July 2020.

⁸² Richard R. Marcus, note 41.

⁸³ Adem Abebe, ‘Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia,’ in Charles Fombad (eds) *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 181 at 181.

⁸⁴ *Ibid* at 196.

scenarios nevertheless point to the existence of other conditions at play that shape real constitutional change outcomes besides those on this study's radar.

Secondly, the view taken in Chapter 4 of this study and confirmed in its findings is that change to formal powers may not result in democratization, especially in a rapidly visible way. If this claim holds, then the adoption of a normatively attractive formal constitution alone cannot trigger authoritarian constitutional demise. However, aspirations for formal change and calls for the establishment of a liberal order, such as happened in Kenya and Benin, can become DDGs' arsenal against authoritarian enclaves. As stated in chapter 1, the change to formal powers in SSA in the post-independence era encouraged authoritarian entrenchment by providing an enabling environment for the subsistence of operative norms and practices. New constitutions were thus seen as a culmination, or rather a by-product, of efforts by DDGs and to some extent international actors. When DDGs demand a new constitution, their expectation is real constitutional change. In this sense, new constitutions are seen by DDGs as the end game of their political project. Looked at this way, formal constitutional change can be seen to have a relationship to real constitutional change.

Third is that though majority of the countries in SSA generally followed the transitional path taken by either Benin, Kenya or Cameroon, others did not. This is particularly true for post-war countries like Liberia. When most other African countries were firmly authoritarian, Liberia had a hybrid constitution following a coup by Samuel Doe in 1980 and the subsequent introduction of multi-party politics. It moved from a "partly-free" to a "not-free" rating at the inception of the TWD, having plunged into a civil war.⁸⁵ Between 1989 and 1997, Liberia was embroiled in a civil war, claimed to have been orchestrated by Charles Taylor.⁸⁶ A second civil war erupted in 1999 against Taylor, who subsequently resigned.⁸⁷ While the restoration of peace changed its rating to a "partly-free" country in 1998, it regressed from 2001 to 2005 during the reign of

⁸⁵ Freedom House Freedom of the Press [Excel] Data <<https://freedomhouse.org/reports/publication-archives>> accessed 13 November 2020.

⁸⁶ Robtel Neajai Pailey and David Harris, 'We don't know who be who: post party politics, forum shopping and Liberia's 2017 elections, (2017) (27) 5 *Journal of Democratization*, 758-776; Robtel Neajai Pailey and David Harris 'Liberia's run-up to 2017: Continuity and Change in a Long History of Electoral Politics,' (2017) 44 (152) *Review of African Political Economy* 322, 323.

⁸⁷ David Harris "'From 'Warlord' to 'Democratic' President: How Charles Taylor Won the 1997 Liberian Elections, (1999) 37 (3) *Journal of Modern African Studies* 431-455.

Gyude Bryant.⁸⁸ Since Sirleaf Johnson, the first female African president took over, Liberia has been considered a “partly free” country.⁸⁹ Though the findings from the case study chapters may assist in explaining how Liberia could transition to a democratic constitution, they cannot explain its transitional trajectory since 1989.

8.5.3. Implications for ongoing discussions

This section revisits the literature review to consider what the findings of this research project mean for ongoing debates about the causes of real constitutional change. In addition to showing that Africa as a region has been left out of mainstream comparative law research, Chapter 2 discussed four existing explanations and their limitations. This section starts by examining what the findings in this chapter add to those explanations. It then goes on to highlight what its findings mean to global debates on the themes that have a relationship to this study.

Chapter 1 noted that one of the enduring explanations for constitutional failure in SSA is the cultural (in)appropriateness of democracy. According to this explanation, democracy is a Western institution, introduced in a distorted way and is in any case incompatible with African conceptions and pre-colonial experiences of governance. We see through this study, however, that transitions to democracy were actually impeded by the connection that autocratic regimes had with powerful western countries, especially the US, France and Britain. The findings of this study consequently run contrary to the idea that democracy is bound to fail because of its origins and how it was introduced. In any case, and as pointed out, this claim does not hold sway in polities such as Benin, which were party to the distorted way through which democracy was introduced but successfully embraced democracy.

Second, Chapter 2 noted that there exists an “exclusionary” constitution-making discourse that associates democratic disappointments in Africa with the exclusionary manner in which post-1990 constitutions were made. This study has shown that even if this claim holds, the converse is not true, i.e. that an inclusive democratic constitution-making process does not automatically translate into real democratic constitutional change. Put differently, formal change on its own does not address the problematics of sham constitutionalism. As was shown, Kenya’s constitution-making process that culminated in the 2010 Constitution was fairly inclusive yet it has not succeeded, thus

⁸⁸ Freedom House, note 85.

⁸⁹ *Ibid.*

far, in completing Kenya's transitional journey. As long as other elements of the real constitution are enforced, this suggests, formal change processes cannot result in democratisation, however consultative they are. By the same token, Japan's transitional success, founded as it was on an imposed constitution, may partly be explained by the disruptions to the underlying real constitution occasioned by the US invasion.

Related to participatory constitution-making was the design discourse that linked poor constitutional performance to institutional design choices that vest enormous powers in the executive. While this study has affirmed the intuition underlying this idea – that formal powers matter – it has found that this is so only when formal powers are enforced or deployed for instrumental reasons by ruling regimes. Over the years, democracy has flourished more in Benin than in Kenya in spite of the fact that Kenya's 2010 Constitution is much more attractive normatively than Benin's. Kenya has a bicameral legislature, an entrenched and sophisticated devolved regional semi-autonomous government, "independent" offices and institutions as well as a robust justiciable bill of rights. Because of pervasive authoritarian norms in Kenya's legal order, however, ostensible commitment to democratic governance has not translated into real constitutional change. What this means is that constitutional design should not just focus on institutional but also transitional arrangements.

Lastly in this vein, in relation to African constitutionalism, this study has shown that contrary to the Lipset hypothesis, country wealth is not correlated to democratisation. Chapter 2 already cast doubt on the Lipset hypothesis on the basis that Benin was one of the economically poorest countries yet it transitioned to democracy. As shown there, its transition was occasioned by the vulnerability of the Kérékou regime to demands for democratisation by DDGs that linked the economic problems in the country to poor governance. That had in any case been the stance taken by the international community, especially the Bretton Woods Institutions. Vitaly though, poor economic conditions meant that the Kérékou regime was unable to maintain its patronage networks. By contrast, the ruling regimes in Kenya and Cameroon were less vulnerable to demands for democratisation partly because of the support that they received from their former colonial masters and also their relative economic affluence. Given these findings, the wealth factor thesis may need to be revised.

Regarding debates at the global level, this study has pointed to two respects in which the literature needs to be extended. First, study of phenomena associated with constitutional change such as longevity, resilience and amendment is relevant to the Global South, especially in hybrid and authoritarian contexts, but only if it focuses on the real, rather than the formal, constitution. In an earlier chapter, this study theorised the idea of the “real constitution” and thereby proffered a framework that can be further developed and used in the study of this sub-theme in comparative constitutional law. Critically, concern for the real constitution may shift the focus to emergent themes such as constitutional change through desuetude, which has so far received less than the required attention, despite being possibly the most profound way that constitutional norms, especially unwritten ones, transform. Linked to this is the idea that, whereas there is growing concern for informal constitutional change, this study’s findings could inspire a concern for studying change, whether formal or informal, to (both valid and invalid) informal constitutional norms.

In addition, the ongoing debate at the global level about constitutional rot or democratic decay can benefit from the links this study has drawn between regression to (poor) textual prescriptions and weakening of the institution of judicial review. Kenya’s hybrid real constitution has been shown to be held together by a normatively attractive formal constitution whose main import has been to guard against regression. Benin has regressed because its formal constitution still vests enormous powers in the President. Yet, in western liberal democracies, there is enormous faith vested in unenacted aspects of constitutions – especially conventions – with constitutional texts lagging behind democratic practice.⁹⁰ In the wake of authoritarian diffusion and the rise of populism, this study recommends that the place of “informal norms” should be reconsidered when looking for answers to questions such as the causes of democratic decay.

8.5.4 Opportunities for further research

In the course of undertaking this research project, two areas that fell outside the scope of this study emerged and need to be examined if real constitutional change and stability are to be comprehensively understood. First is the role of the military in fostering or frustrating real constitutional change and transformations in Sub-Saharan Africa. In the

⁹⁰ See e.g. Janeke Geraldts, ‘The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It,’ (2016) 2:77, *Dans Revue interdisciplinaire d'études juridiques*, 207-233.

pre-1989 era, as Chapter 1 showed, governments were either military or sustained by the military. They were at the centre of the coups that characterised this era. As the Cameroonian case showed also, Biya's "New Deal" was partly frustrated because of his overreliance on the military. In the recent past, we have seen military interventions in Niger, Mali, Madagascar, Zimbabwe and Sudan facilitating leadership transitions or restoring constitutional and political order amidst political crisis. The presence of a democracy-supporting military is another condition for real constitutional change that this study recommends should be investigated.

Further, Botswana and Mauritius are the only countries that did not transform into authoritarian polities in post-independence Africa. While there are insights from Benin and Kenya on conditions that guard against real constitutional change towards an authoritarian constitution, there is a need to examine the conditions that enabled two exceptional polities to survive the authoritarian onslaught. This may particularly be of help to polities like Benin and Mali that transitioned to democratic constitutions after the TWD but regressed. Related to this is the question of what became of the authoritarian norms that were implanted by colonial governments in these two contexts.

8.5.5 Recommendations

There is no predictive theory flowing from this study on what needs to be done to complete the otherwise stalled or partial transitions to democratic constitutionalism. Nevertheless, some insights can be deduced from successes and failures and commendations drawn from them. Core among them is how to deal with the "incumbents' factor": As observed, democracy is likely to flourish and institutions that support it are likely to be stronger and independent in cases where incumbents see themselves out of power. Indeed, the place and role of incumbents in transitional arrangements has been profiled to be pivotal in shaping the various transitional outcomes. What has seemed apparent is that in cases where incumbent power actors feel "safe", they are likely to accommodate real constitutional change. As the Beninese case revealed, Kerekou became willing to cede power to the HRC and subsequently to concede defeat in the 1991 elections because an amnesty had been negotiated for him. Conversely, Cameroon's Paul Biya has remained in power because, partly, of fear within CPDM that prosecutions for the ills committed during Biya's tenure is likely to follow his exit from power. The commendation to political and legal reformers is that

amnesty is an incentive that could be exploited to soften incumbent's obstruction towards transitions.

Second is how to deal with neopatrimonialism's influence on democracy. Neopatrimonialism remains a perverse spectre in Africa with strong expressions in politics and by extension in real constitutions and how they change. A particularly common way through which this spectre has impacted real constitutional change is the fact that opposition parties and figures are often co-opted by ruling regimes leading to offsetting of DDG's strength. This happened in the early 1990s in Cameroon and most of the time in Kenya's history. Though this study is sceptical about aptitudes of formal change, constitutional designers might need to consider the possibility of proscribing post-election alliances. While these kinds of coalitions and alliances have worked elsewhere and may in fact be desirable, they provide an ample opportunity for neopatrimonialism to stifle democracy in setups- where vast African polities fall- where there is already a dominant political party. It is consequently recommended that constitutions should be amended to bar post-election alliances where the "winning" party has attained some bare minimum victory.

Third, democracy stands a higher chance of getting consolidated if the institution of judicial review is strengthened and attractive norms adopted. This may be achieved through formal change, directed at fortifying institutional security for juridical review institutions as well as dismantling claw back clauses that are often invoked to stifle the exercise of democracy supporting rights. In this way, judicial review may assist in gradually updating democratic credentials of polities through riddance of authoritarian enclaves in legislation. It is therefore recommended that constitutions with clawback clauses be amended.

8.6 Overall conclusion

This study has sought to understand problems associated with real constitutional change in Sub-Saharan Africa after the TWD. Democracy's core problem has been that authoritarian norms and practices that developed under colonialism and the immediate post-independence period became entrenched in most legal and political orders. At the inception of the TWD, these norms were disrupted as regimes collapsed, control of governance returned to civilians and new constitutions were created to foster democratic establishment. Unfortunately, these ventures did not succeed except in a

few polities, perhaps because of a false assumption that formal constitutional change would *ipso facto* lead to democratic governance on the ground.

On the contrary, this study has established, real constitutional change to a democratic constitution is contingent on the satisfaction of certain actor-based conditions, namely change to incumbent power holders, the existence of pro-active democracy-demanding groups and candid support for democracy by powerful international actors. In Sub-Saharan Africa, the absence of any of these conditions shaped the transitional outcome after the TWD if the findings from Cameroon, Kenya and Benin are anything to go by. Underlying the success or failure of these actors, however, are context-specific structural conditions which either triggered, facilitated or foiled their capacity to drive democratisation. Ultimately though, even as real constitutional change is unravelled, there is hope that African societies' constitutional conditions are bound to improve as certain key conditions, such as change to incumbent power holders, are satisfied, even by means other than elections. As such, African constitutional orders may not need to pass through experiences akin to those that mature western democracies went through for democracy to be realised.

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APPENDIX NO. 1: QUESTIONNAIRE/INTERVIEW GUIDE

Research subject: Real Constitutional Change in Sub-Saharan Africa after the Third Wave of Democratisation: A Comparative Historical Inquiry

Dear Respondent/interviewee

My name is Munabi Duncan Okubasu. I am a PhD researcher, registered at the Institute for Jurisprudence, Constitutional and Administrative Law at Utrecht University in the Netherlands. I have since 2015 been researching on stability of the real (actual, descriptive, effective), rather than the formal (written/prescriptive) constitution in Sub-Saharan Africa under the supervision and readership of Prof. Philip Langbroek, (Utrecht University, Netherlands) and Prof. Theunis Roux (UNSW, Australia). My research is interested in understanding, amongst others, stability of normatively attractive, effective constitutions in SSA; what is behind the endurance of illiberal and authoritarian constitutionalism in SSA post "third-wave of democratization" (1989) and the prospects and limitations of formal constitutional change as a bid to push Sub-Saharan Countries towards effective liberal democracies.

Part of the methodology for this study is case study. My selected case studies are Cameroon, Benin and Kenya. For these case studies, I intend to obtain the views of key persons, which provide key insights on my research questions. I have selected you because I believe that you observe legal and political processes with interest.

The views I am seeking are meant to be used solely for the study and are not to be divulged. My research is guided by ethical codes relating to confidentiality. In this regard, I will use pseudo name in my analysis for participants that do not want their identity to be revealed.

Have attached a letter from my advisor, Prof. Dr. Philip Langbroek, in support.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D Okubasu', with a stylized flourish at the end.

Duncan Okubasu, LL.M

Part A: Preliminaries

Date of the interview:	
Place where the interview was conducted	
Name of the Interviewee/Occupation:	
Would you like your identity to be concealed?	

Part B: Questions (You are at liberty to write your answers on extra-piece of paper)

- 1. If a liberal democratic real constitution is one under which free and fair elections are conducted and civil and political rights are actually protected and guaranteed would you classify Kenya/Cameroon/Benin as a liberal and democratic, hybrid (having both liberal and authoritarian attributes) or an authoritarian country in Africa (particularly during the period 1989 to 2019? (Kindly explain your answer)**

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- 2. In your view has there been a significant change of incumbent political actors in Cameroon/Kenya/Benin? from 1989 at the dawn of the Third Wave of Democratisation till 2019? (kindly explain your answer)**

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- 3. Have the civil society, faith-based organisations and other non-governing elites such as opposition movements been effectively involved in reform of the constitutional and political system in Cameroon/Kenya/Benin from 1989 till 2019? (kindly explain your answer)**

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4. Has the international society been interested in candidly supporting liberal democracy in Cameroon/Kenya/Benin? (kindly explain your answer)

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5. Does the formal constitution in Cameroon/Kenya/Benin conform with liberal and democratic values and should it be changed? (kindly explain your answer)

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6. What underlying conditions do you think shape politics and constitutional developments in Cameroon/Kenya/Benin

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7. Have courts in Cameroon/Kenya/Benin been bold enough to enforce liberal and democratic values? (kindly explain your answer)

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Thank you for your participation!

APPENDIX 2: SCHEDULE OF INTERVIEWS

- Interview with Interview with D Juma, Nairobi, 22 September 2017.
- Interview with Grace (Presudoname), 22 September 2017.
- Interview with Y (Via Skype) (Presudoname), 3 September 2019
- Interview with Christian Aime Chofor, Bamenda Cameroon, 28 August 2019
- Interview with G, Yaoundй, Cameroon 10 March 2020.
- Interview with Jonatan Morse (Skype) 15 January 2020.
- Interview with H, Bamenda, Cameroon, 24 February 2020.
- Interview with Gregory (Presudoname), Younde, Cameroon 10 March 2020
- Interview with Gregory, Younde, Cameroon 10 March 2020.
- Interview with Jean, Younde Cameroon, 11 March 2020.
- Interview with Joshua Nyawa Malinzo, Nairobi, 19 February 2020.
- Interview with Dr Lydia (Presudoname) Nairobi, 19 September 2019.
- Interview with KO, Nairobi, 16 September 2017.
- Interview with Victoria, Nairobi, 17 April 2019.
- Interview with Stephen Brown, Amsterdam, the Netherlands 28 May 2019.
- Interview with C Kubai, Nairobi, 8 September 2017.
- Interview with James Ochieng, Nairobi, 26th April 2019.
- Interview with James Olela, Busia, 28 April 2019.
- Interview with Tom Onyango, Nairobi, 26 April 2019.
- Interview with Joshua Wabwire, Nairobi, 26 August 2019.
- Interview with Vincent Juma above, Nairobi, 21 August 2019.
- Interview with Serge, 28 February 2020, Calavi-Abomey. Translated by Ezechias Djima.
- Interview with Kassa Mompo, Benin workers union confederation headquarters, Cotonou, 5th March 2020. (Translated by Ezechias Djima).
- Interview with Maxime, Calavi Abomey, 26 February 2020
- Interview with Samwel, Abomey Calavi, 23 February 2020
- Interview with Juliet (Pseudo name), Cotonou, 25 February 2020.
- Interview with Franzoise Aguia-Daho йjuviste, Cotonou, Benin, 20 February 2020
- Interview with John (Presudoname) Cotonou, 23 February 2020.
- Interview with Boko K. Hyacinthe, Calavi-Abomey, 28 February 2020.
- Interview with DJIMA Yanique, Cotonou, Benin
- Interview with Jonathan, Porto Novo, 5 March 2020.
- Interview with Gilles Badet, Cotonou, 9 March 2020.

Verandering van reële constituties in Afrika bezuiden de Sahara na de derde golf van democratisering: een vergelijkend historisch onderzoek.

Samenvatting

Dit proefschrift probeert de transformatie en de duur van constitutionele ordes in Afrika bezuiden de Sahara na de democratiseringsperiode die de "Derde Golf van Democratisering" wordt genoemd te verklaren. Het effect van deze democratiseringsperiode werd gevoeld in Afrika vanaf het einde van de jaren tachtig en zag de ineenstorting van autocratische en militaire regimes en het herstel van politieke stelsels met meer partijen. In het begin van de jaren negentig gingen verschillende landen in Afrika bezuiden de Sahara, onder invloed van deze Derde Golf, over op grondwetswijzigingen met als doel het dominante autoritaire constitutionalisme ongedaan te maken. Helaas hebben deze inspanningen niet geleid tot de transformatie van politieke stelsels en het rechtssysteem van een autoritair naar een democratisch constitutionalisme. Met uitzondering van enkele landen, zoals Kaapverdië, Zuid-Afrika en Benin, is in de meeste landen nog steeds een reëel autoritair regime. Om deze stand van zaken te begrijpen, heeft deze studie zich gericht op de reële, in plaats van op de formele constituties en hun verandering, aangezien het duidelijk lijkt dat de grondwetten die tot stand kwamen na, of in opdracht van de Derde Golf ten prooi vielen aan schijn constitutionalisme. Door middel van een vergelijkend historisch onderzoek met Kameroen, Kenia en Benin als casestudies, heeft deze studie aangetoond dat formele grondwetswijziging een bescheidener potentieel had om politieke systemen te transformeren dan gedacht. In plaats daarvan laat deze studie zien dat de belindiging van autoritaire heerschappij in Sub-Sahara Afrika was gebaseerd op de aan- of afwezigheid van bepaalde aan (politieke) actoren verbonden condities. Deze werden op hun beurt gevormd door context-specifieke onderliggende structurele factoren. De onvoldoende, hoewel noodzakelijke voorwaarden voor verandering van de reële constituties zijn (a) verandering van zittende machthebbers, (b) het bestaan van effectieve groeperingen die democratisering eisen, en (c) een expliciete open bevordering van democratie door internationale actoren. Terwijl dus verandering in formele bevoegdheden werd gezien als een wondermiddel voor constitutionele kwalen die landen bezuiden de Sahara vóór 1989 teisterden, heeft deze studie aangetoond dat veranderingen die een normatief attractieve, formele grondwet veiligstellen, in het beste geval bescherming tegen democratische regressie kunnen

bieden. Dit lijkt ook het effectieve bereik te zijn van rechterlijke toetsing van Afrikaanse grondwettelijke bevelen. De studie beveelt aan dat prikkels - zoals amnestie - moeten worden gegeven aan zittende machthebbers om zichzelf veilig te weten wanneer ze niet meer aan de macht zijn, en dat anti-democratische allianties na de verkiezingen moeten worden verboden. Op die manier kan de samenwerking van oppositie groeperingen worden aangepakt die er op uit zijn om de pro-democratische krachten te verzwakken. Rele constitutionele ordes kunnen profiteren van een formele grondwetswijziging die clausules schrapt die terugkeer naar een autoritair regime mogelijk maken, en die constitutionele toetsing effectief mogelijk maken door de institutionele autonomie en de veiligheid van de toezichthoudende instanties te versterken. Op deze manier wordt waarschijnlijk een omgeving gecreëerd die bevorderlijk is voor democratisering en die regressie naar een autoritair regime moeilijker maakt.