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RESEARCH ARTICLE

Aspirational and representative constitutional identity in Africa

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Abstract

This article addresses the *problématique* of giving voice to homegrown traditions of constitutionalism in individual African countries. The scholarly discussion is combined with an applied concern about whether this could instil a wider grassroots embrace of the country's constitution, thereby consolidating constitutionalism and ensuring longevity. The investigation is carried through the lens of two sub-categories of the concept of constitutional identity: a representative one that reflects a country's particular political, social and cultural makeup, and an aspirational one that sets goals and ideals. The challenge, in both scholarly and applied terms, is how to ensure that a constitution instils a sense of public ownership by becoming more representative of a country's underlying makeup while also giving voice to modern aspirations to protect and promote individual human rights, and in doing so, also becoming self-sustaining as the foundational basic law guiding future generations. Attention is paid not only to the forms of constitutions but also to their function in both reaching ideals (in the positive sense of success) and staving off pitfalls (in the negative sense of success). The article also discusses whether these are best achieved through gradual terms over time or through the sudden big bang of mega reforms.

Keywords: Africa; aspirational constitutional identity; constitutional identity; constitutional universalization; homegrown constitutionalism; representative constitutional identity

I. Introduction

The concept of constitutional identity is relatively new to the scholarly debates on constitutions and constitutionalism in Africa. While disagreements over the precise nature of the term exist, there is a shared assumption that it is represents a guiding spirit to the entire constitution beyond the details of specific clauses. Constitutional identity is not only a scholarly concept, but one with direct applied relevance regarding whether a form of African constitutional identity is indeed within the reach of individual countries and, if so, whether this can help to instil a sense of public ownership of the constitution among a people, and thus contribute to consolidating homegrown constitutionalism across the continent and bringing longevity. Assuming these two tests are met – that a constitutional identity giving voice to different homegrown traditions of constitutionalism in individual African countries is indeed identifiable and attainable, and that

this in turn is capable of engendering a popular embrace – the manner of how one puts all this into action also matters. Is this is best achieved through piecemeal and gradual terms or a sudden big bang of comprehensive mega reforms?

While constitutional identity might indeed be a new scholarly addition to the debates on constitutions and constitutionalism in Africa, the continent's constitutional history is indeed full of *avant la lettre* applied examples of constitutional identity. One of the main themes driving this article is the two ideal types that mark the two ends of the spectrum of constitutional identity: an *aspirational* type setting goals and ideals; and a *representative* type that seeks to reflect a country's particular political, social and cultural 'constitution' (in the original etymological meaning of the word).[1] Both varieties of constitutional identity contain their respective subcategories and the spectrum includes variations and mixes in between the two ends. Moreover, both types have been put to the service of either change or continuity through evolutionary or revolutionary means throughout the history of constitutions and constitutionalism – in Africa and elsewhere. Despite the scholarly and applied variation and coexistence, the two still serve as helpful benchmarks, bringing a sense of order to the debate on constitutional identity and helping to steer the discussions.

The two ideal types of constitutional identity are first developed and discussed in the next section of the article. We then look back at Africa's more recent constitutional history to trace their impact. The challenge of identifying a form of constitutional identity for individual countries in an ethnically, linguistically, culturally diverse continent is inseparable from this debate. Following the construction of these two ideal types of constitutional identity, we discuss how to attain this in a manner that ensures popular embrace and longevity. After this, we propose ways to expand scholarly approaches to constitutions and constitutionalism in order to lay the groundwork for possible applied success. A key part of this broadening of our repertoire means we have to confront the post-Cold War universalization of one type of constitutionalism from the West and the attendant hurdles this puts in the path of the incorporation of homegrown varieties of constitutionalism in the non-Western world. It is particularly difficult to ensure that a constitution instils a sense of public ownership by becoming more representative of a country's underlying social, historical, cultural, traditional makeup while also giving voice to modern aspirations to protect and promote individual human rights and, in doing so, also becomes self-sustaining and remains in place as the nation's foundational basic law, guiding future generations through the as yet unknown challenges awaiting them. Reflecting on these questions, the article calls more attention to not only the forms of constitutions, but also their function in terms of both reaching ideals and staving off pitfalls.

II. Aspirational and representative constitutional identity

The concept of constitutional identity had not yet been invented in scholarly terms, but soon after independence many African countries replaced the constitutions bequeathed by the departing colonial powers and wrote new ones, putting their aspirations in writing.

[1]Heinz Klug calls this 'a broadly descriptive distinction between constitutional orders that are either aspirational or preservative in character'. Heinz Klug, 'Transformative Constitutionalism as a Model for Africa', in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *Global South and Comparative Constitutional Law* (Oxford University Press, Oxford, 2020), 141.

In former British colonies, these often involved the severing of the ties to the Crown and replacing the Governor-General as the head of state with an elected president, as well as placing the party of national liberation in a vanguard role to spearhead national unity, social development and economic progress. The new constitutions articulated the new utopian national aspirations, sometimes influenced by liberal Western ideas on development and progress setting evolutionary paths to these goals, and sometimes influenced by developmental ideas from the socialist Eastern Bloc setting revolutionary paths. What the post-independence constitutions of Africa – both in their liberal-nationalist and socialist-revolutionary guises – shared were aspirations for their newly independent nations. There was thus a deliberate gap between the existing political and economic status of the country and a desire to seek a more advanced and developed future. The constitutional identity was thus aspirational – that is, the basic law of the country was defined by a political, social and economic agenda, which it was to serve.

However, the long history of constitutions and constitutionalism had not always been about single uniform basic laws. Most constitutions of the world, in the West as well as in the rest, had gradually emerged in piecemeal form. Following the constitutive acts that were extended, revised and supplanted along evolving polities and the corresponding changes in sovereign relations between lay and ecumenical authorities, constitutions inevitably became uneven in structure and spirit, and were full of inconsistencies and even contradictions. Before the universalization of the one citizen, one vote plebiscitarian spirit introduced by the aspirational mega moments of the American and French Revolutions and the mega constitutional documents in the form of single uniform basic laws they created, constitutions were closer to the original etymological meaning of the term, and were representations of the underlying heterogeneity of human polities. Organically linked to the land, the history and the culture, constitutions were more about dividing political authority between the various constituent entities of the polity – be they prince bishoprics, city-states, kingdoms, various feudal fiefs and tributary states within imperial orders or chieftaincies, clans or affiliates of tribal confederations. Evolving through history, constitutions had come to function to order law and governance between the constituent parts of a polity, establish the rights and responsibilities of the different categories of their subjects, and put a hold on absolutism and arbitrary rule at the centre. Before the universalization of the one people, one moment, one document constitutions exemplified by the American and French plebiscitary democracies, all constitutions were amalgamations of the body of laws and customs constituting the polity. Their function was to ensure that law and governance did not become arbitrary. According to Martin Loughlin, this 'negative' variant of constitutionalism, driven by the need to put limits on arbitrary rule and impose checks on the central government, then lost its universality and was supplanted by 'positive' constitutionalism marked by aspirational utopian ideals.[2]

Instead of covering the entire human history of constitutions and constitutionalism, our aim here is to trace the complex relationship between the various sub-categories of positive and negative constitutionalisms, and the aspirational and representative constitutional identities they carried within them. In order to do this, we first provide an overview of African constitutions defined by aspirational constitutional identities that emerged during the course of the Cold War, which had pitted two competing geopolitical blocs and their associated political and economic models against each other. Common to both liberal-nationalists and socialist-revolutionaries of Africa who had adopted one of

[2]Martin Loughlin, 'Constitutional Imagination' (2015) 78(1) *The Modern Law Review* 1, 24.

these competing models were the utopian aspirations they held for their newly independent nations.

With the end of the Cold War, those aspirations were soon replaced by what Loughlin calls 'a functionally integrative scheme' resting on universalist rights foundations, representing a variant of 'positive constitutionalism shorn of most of its utopian features'.[3] The result is that now 'the theory and practice of modern Western constitutionalism provide the default setting for discussing constitutionalism in a global context'.[4] This, as Gavin W. Anderson points out, is combined with assumptions of 'constitutionalism's necessary institutional, benevolent and Western-originated character'.[5] Elsewhere Anderson had labelled the current mindset dominating both scholarly and applied approaches to constitutionalism 'liberal legalism', in which 'law is formal state law, which seeks to protect individual autonomy'.[6] A little later in the article, we will revisit how this prevailing view puts unintended hurdles in front of the quest to incorporate different forms of homegrown constitutional identity into the basic laws of African polities.

While the technocratic liberal-legalist variant of aspirational constitutional identity might have become more influential, representative constitutional identity has not become extinct. Instead of setting goals, this type of constitutional identity is closer to the original meaning of 'constitution' – that is, the foundations of what constitutes a society. It had long been the driving force behind the liberation struggles against colonial rule and the imperial constitutional order. The belief was that independence constitutions should represent what was already there, or was believed to be there, before foreign occupation. In an article titled 'Discovering a Constitution', Garret Barden articulates this argument in the historical context of Irish nationalist demands for self-government: 'One may think of [the constitution] not as the attempt to found and establish the polity but as the attempt to discover and express the characteristics of the polity that already exists.'[7] Irish nationalists seeking independence were thus in pursuit of the constitutional representation of what existed before colonialism.

It is imperative to note that both ideal types of constitutional identity, and their various sub-categories, came to serve different political agendas and carried progressive or conservative political colours at different times in history. Aspirational constitutional identities empowering a party of national liberation to serve the goals of national unity, social development and economic progress could in time transform into justifications for entrenched interests and the continuation of the status quo. Anti-colonial demands for drafting constitutions representative of a country's underlying realities could similarly become barriers to change and progress in time. The history of constitutions and constitutionalism in Africa – and elsewhere – is full of examples on both sides of the spectrum.

The very same constitutional identity could also come to mean different things at different points in time. To go back to Barden's example of the Irish revolutionary demands for liberation from the British and the quest for a new constitutional identity more representative of the country's social, cultural and religious realities, the inclusion of

[3]Ibid 24.

[4]Gavin W Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (2013) 20 *Indiana Journal of Global Legal Studies* 881, 894.

[5]Ibid 898.

[6]Gavin W Anderson, *Constitutional Rights After Globalisation* (Hart, Oxford, 2005) 40.

[7]Garrett Barden, 'Discovering a Constitution', in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution 1937–1997* (Hart, Oxford, 1998) 6–7.

Roman Catholicism as part of the country's new post-colonial constitutional identity of a self-governing free nation independent of the British Crown and the Anglican Church a little less than a century later came to be seen as a conservative constitutional identity holding the country back. On the European mainland, Belgium's 1831 constitution, which was adopted after the unitarist revolution against Dutch rule, was for a long time deemed to be one of the most democratic modern constitutions of Europe, defined by a novel progressive constitutional identity aspiring to national unity in the form of a uniform basic law. Its motto, *L'union fait la force / Eendracht maakt macht* ('in unity there is strength') characterized an aspirational constitutional identity unlike the more traditional heterogenous constitutions in other parts of the continent, where the collective rights and responsibilities of the aristocracy, local feudal units, the church and the higher bourgeoisie were enshrined at the expense of the rest of the citizenry. A century later, the very same Belgian constitution that had once been hailed as a progressive modernist basic law came to be seen as the embodiment of the centralist establishment, refusing change and denying the country's Flemings linguistic group rights and regional self-rule.

It was especially in the constitutions inspired by plebiscitary spirit of the French Revolution that aspirations were drafted into the basic laws of their respective countries. Instead of being representatives of the cultural, linguistic and religious constitutive makeup of the societies within which they were to function, these were aspirational action plans. When the French revolutionaries wrote *liberté*, *equalité*, *fraternité* ('liberty, equality, fraternity'), the French citizens were neither free, nor equal, nor in fraternity with each other after decades of upheaval. Later on, when the French Third Republic constitution incorporated the 'one and indivisible nation' as its constitutional identity, only just over half of French citizens spoke standardized French. But a century later, the progressive nation-building constitutional aspirations of late 1870s came to be seen as a conservative constitutional identity denying regional minorities and immigrants political, legal and cultural recognition and group rights.

Of course, the fact that the concept of constitutional identity entered the lexicon of scholars of constitutions and constitutionalism recently does not mean that past constitutions did not contain such identities. In fact, most of the oeuvre of one of the leading theorists of this concept, Gary Jeffrey Jacobsohn, is based on surveys of the past conducted along this conceptual benchmark.[8] Yet Jacobsohn does not distinguish between aspirational and representative constitutional identities. These two ideal types mark the two ends of a spectrum as we now turn our gaze back onto Africa's recent past.

III. Africa's journey through aspirational and representative constitutional identities

Almost all African countries had started their new post-colonial lives with 'a plurality of legal systems within the bounds of the individual state'.[9] These generally were seen as a continuation of the political choices made by colonial authorities in granting constitutional representation to the indigenous kingdoms, paramount chieftaincies, emirates and

[8]Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, Princeton, NJ, 2003); Gary Jeffrey Jacobsohn (2006), 'Constitutional Identity' (2006) 68(3) *Review of Politics* 361; Gary Jeffrey Jacobsohn (2014), 'Theorizing the Constitutional Revolution' (2014) 2(1) *Journal of Law and Courts* 1.

[9]Arthur Schiller, 'Introduction', in Thomas W. Hutchison (ed), *Africa and Law: Developing Legal Systems in African Commonwealth Nations* (University of Wisconsin Press, Madison, WI, 1968) vii.

sultanates (and their traditional system of law) as part of the policy of indirect rule. Indirect rule was a system where, in some parts of their empire, the British had outsourced local governance to existing indigenous polities and granted them legal and political recognition under the imperial constitutional framework with (limited) territorial autonomy. It is important to note that this was often not the result of a principled respect for indigenous constitutionalism but rather of the more pragmatic concerns of day-to-day governance in the far reaches of the colonial empire. Practices on the ground ranged from recognizing existing traditional polities and empowering their legitimate rulers to hand-picking weaker and more docile pretenders to leadership, or in some cases even artificially creating new paramount chieftaincies to act as local agents in the service of colonial policies. Naturally, the consequences of indirect rule were not identical everywhere. But whatever the local variation, indirect rule led to recognition and consolidation of the offices of traditional governance and leadership, even if only in name.[10] Uganda, Ghana, Zambia, Botswana, Zanzibar and Northern Nigeria were leading cases where traditional African polities were represented within the imperial constitutional order. This heterogenous system was by no means democratic, but in many ways carried similarities to the pre-Revolutionary traditional constitutions of the West in which the constituent parts of the polities were recognized.

The prevailing assumption on the eve of independence was that new national constitutions would naturally recognize these existing traditional polities indigenous to African soil, and possibly would put in place federal or quasi-federal arrangements for their relationship with central governments. The initial political influence of the traditional African polities during the transition process to majoritarian self-government rule was short-lived, however. Federal and semi-federal constitutional arrangements in countries such as Ghana, Kenya, Uganda and Zambia, giving indigenous African polities constitutional representation, failed to take hold. This was due partly to the plebiscitary electoral victories of the parties of liberation movements, which led to political centralization; it was also partly the result of the changing international ideas in policy circles and academia. Writing in the midst of these changes, Arnold Rivkin informs us that, at the time, any constitutional idea deviating from the aspirations of national unity, social development and economic progress was discredited in international and national debates.[11]

Following a brief period of constitutional openness during transition when traditional African polities and indigenous systems of law managed to retain the constitutional prerogatives they had enjoyed under indirect rule, new post-colonial constitutions adopted soon afterwards rejected representative constitutional identities in favour of aspirational ones. Nation-building was the buzzword of the times, and there was no room for (what were deemed as backward and reactionary) traditional African structures in the project. In his 1973 survey of the continent's recent history of constitutionalism, B.O. Nwabueze had noted how little relevance traditional cultural systems had on the new constitutions of Africa.[12] Liberal-nationalists were looking for the speediest path to economically and politically catching up. The influence of modernization theories entrusting the central state with a developmental vanguard role further underpinned

[10]Thomas Spear, 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa' (2003) 44(1) *The Journal of African History* 3.

[11]Arnold Rivkin, *Nation-Building in Africa: Problems and Prospects* (Rutgers University Press, New Brunswick, NJ, 1969) 86–87.

[12]OB Nwabueze, *Constitutionalism in the Emergent States* (Hurst 1973) 25.

the rejection of indigenous forms of law and governance. It also happened to correspond to the ideas promoted by the various international agencies of the time.[13]

Policy coordination, standardization, harmonization of laws, centralization, were seen as paths to modernization and development – not only by the new cadres of national leadership but also by Western academics theorizing about law and governance (and the international agencies and donors where these theories were translated into practice). Writing in 1965, M.G. Smith called this 'the traditional preoccupation of Western sociologists with legal uniformity and centralized administration'.[14] The fact that preference for uniformity is indeed a normative choice was overlooked and instead it was conceptualized and presented as the only available path to progress – despite the warnings from scholars of indigenous law and governance that the belief 'that legal systems ought to be uniform and centralized' was a value stance itself.[15] As such, centralization and uniformity came to be represented as an incontestable technical component of modern law and governance.

This centralist preference for uniformity in the service of development and modernization goals influential among Western academic and policy circles was alternatively labelled 'law and modernization', 'law and development' or 'legal unification'.[16] The preferred path of various different liberal-nationalists was an evolutionary one, but they all shared aspirations towards end-goals deemed more ideal than the present. Such utopian aspirational views of law and governance, which were dominant in the West, happened to have their counterpart in the other side of the geopolitical divide defining the Cold War years, which shared the same goal of rapid modernization. As Martin Chanock observes, 'the emergence of development economics is contemporaneous with the Cold War and had both socialist and capitalist paradigms'.[17]

While ideas on constitutionalism were initially imported mostly from the West, ideas from the Eastern Bloc soon started to have an impact on Africa's constitutions. Socialist and socialism-inspired constitutions were all, by definition, aspirational. They enshrined similar goals of modernization, progress and development, but this time deriving their social class-based foundations and intellectual origins from the revolutionary Marxist-Leninist and Maoist versions of constitutionalism prevailing in the Eastern Bloc. A socialist constitution was 'an ideological constitution conceived as an instrument of social transformation'.[18] In this model, party and state were united.[19] Victor T. Le Vine's work shows how the Afro-Marxist regimes of the continent (Angola, Congo, Ethiopia, Madagascar, Mozambique, Benin, Burkina Faso) all shared this ideological

[13]Martin Chanock, 'Signposts or Tombstones? Reflections on Recent Works on the Anthropology of Law' (1983) 1 *Law in Context* 107, 113.

[14]MG Smith, 'The Sociological Framework of Law' in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development* (University of California Press, Berkeley, CA, 1965) 38.

[15]TW Bennett, *Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (Juta, Cape Town, 1985) Preface.

[16]Francis G Snyder, 'Law and Development in the Light of Dependency Theory' (1980) 14(3) *Law and Society Review* 723.

[17]Martin Chanock, 'Constitutionalism, Democracy and Africa: Constitutionalism Upside Down' (2010) 28(2) *Law in Context: A Socio-Legal Journal* 126, 131.

[18]Algeria's 1963 is a prime example. Saïd Amir Arjomand, 'Constitutions and the Struggles for Political Order' (1992) 57 *Archives Europeennes de Sociologie/Archives of European Sociology* 39, 63.

[19]SK Panther-Brick, 'Four African Constitutions: Two Models' (1979) 14(3) *Government and Opposition* 339, 344.

zeal.[20] The new constitutional identities were sometimes less revolutionary, but they still had their intellectual roots in the aspirational socialism-inspired constitutions – this time of the non-aligned movement, including countries such as India and Yugoslavia.[21]

Throughout Africa – including both Sub-Saharan Africa as well as the north of the continent – many political parties that had led the national liberation struggles adopted variants of socialism-inspired (but not fully socialist in the ideological sense) constitutions soon after acceding to power. These constitutions reflected the revolutionary visions of their new leaders, bringing nation-building policies and an activist state together in the pursuit of modernization, progress and development, while at the same time not completely eliminating private ownership and the market. Gamal Nasser's Egypt, Milton Obote's Uganda, Julius Nyerere's Tanzania, Kwame Nkrumah's Ghana and Kenneth Kaunda's Zambia are notable examples. Yet, like the Western-inspired constitutions, the constitutional identity was aspirational. That is, these constitutions stipulated end-goals different from the existing realities. It is, however, imperative to note that, notwithstanding those who might have had more instrumentalist agendas of using whatever tools were available in the service of power, for the majority who had rallied around either liberal-nationalist or socialist-revolutionary models, there was a shared utopian desire of advancement of their nations.

During this time, we also saw the injection of vaguely defined versions of 'Africanness' into state design. While the idealism might have been genuine in some places, in his study of these post-colonial reforms introducing 'Africanness' into constitutions, Muna Ndulo questions the motives of some of the leaders; and with the benefit of historical hindsight, interprets these as attempts to monopolize political power.[22] In the memorable phrase of Hasting Okoth-Ogendo, these were instances of 'constitutions without constitutionalism'.[23] Elsewhere, using the notion of 'Africanness' to delegitimize representative democracy and the rule of law was more explicit. Colonel Mobutu's policy of *authenticité* in the Congo, combined with the creation of a cult of personality around him, is perhaps the most cynical example of this.[24]

The end of the Cold War led to the evaporation of the appeal of any constitutional model that went against the Western variant. In the new era, the socialist model lost its influence as a constitutional guide.[25] This time, there was room for only one aspirational constitutional identity – albeit, as we had referred to Martin Loughlin's observation earlier – a technocratic one divorced from the utopianism of earlier variants.[26] The wave of constitutional reform across the continent in the 1990s was to echo the dynamics defining the 1960s and 1970s. Instead of modernization and development, this time it was liberal aspirations couched within technocratic terms. The various different national initiatives

[20]Victor T Le Vine, 'The Fall and Rise of Constitutionalism in West Africa' (1997) 35(2) *The Journal of Modern African Studies* 181, 191–3.

[21]Examples include Somalia, Guinea and Ghana. See ibid 191–93.

[22]Muna Ndulo, 'Constitution Making in Africa: Assessing Both the Process and Context' (2001) 21(2) *Public Administration and Development* 101, 106.

[23]Hasting W Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Paradox', in D Greenberg, S Katz, S Wheatley and MB Oliveiro (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, Oxford, 1993) 65–82.

[24]Georges Ngonzala-Ntalaja, 'The Authenticity of Neocolonialism: Ideology and Class Struggle in Zaire' (1977/1978) 22 *Berkeley Journal of Sociology* 115, 125.

[25]Julian Go, 'A Globalizing Constitutionalism' (2003) 28(1) *International Sociology* 71, 80.

[26]Loughlin (n 2) 24.

of constitutional restructuring of the 1990s shared a number of commonalities: democratization with an emphasis on elections, liberal public policy reforms, economic liberalization, and the protection and promotion of individual human rights. Common to all was an underlying belief that instant solutions were achievable through injecting aspirations into mega constitutional documents. According to TW Bennett:

> The present [early 1990s] talk about human rights has an echo of the 1960s, the heady days of 'law and development' and 'law and modernization', when it was believed that customary law was primitive and backward and should be swept aside to make way for a brave new legal order imported from the West.[27]

Hanna Lerner's comparative work on constitutions acknowledges this aspirational element in liberal constitutions that came to dominate the post-Cold War years: 'A constitution, according to the liberal paradigm, is a revolutionary moment in which supreme principles, intended to guide future generations and prevent the violation of human rights, are to be embedded in a formal document.'[28] Moreover, these supreme principles that are supposed to guide future generations can often go against the existing social realities.[29] In his influential 2010 book, *Constitutional Identity*, Gary Jeffrey Jacobsohn admits that the aspirational and representative do not always correspond: 'Constitutional identity can accommodate an aspirational aspect that is at odds with the prevailing condition in the society within which it functions.'[30] In his later work, Jacobsohn acknowledges how constitutional identity could indeed contain internal contradictions and outlined the two dimensions of what he alternatively labels 'disharmony', 'dissonance' and 'disequilibrium':

> The first is internal to the document (assuming one exists) and includes alternative visions or aspirations that may embody different strands within a common historical tradition; the second entails a confrontational relationship between the constitution and the social order within which it operates.[31]

If we stop, take a step back and reflect on Jacobsohn's dimensions of disharmony, dissonance and disequilibrium, two immediate questions arise for the politics of constitutional identity: first, who decides whose version of the history is put in the constitution; and second; who gets to decide on a constitutional identity that goes against the realities of society?[32] For Lerner, what she calls 'decisionism' comes with political and moral hazards: 'That is, the framers must take a stance and choose a side in the debate. However,

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[27]TW Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) 18 *Acta Juridica* 18, 32.

[28]Hanna Lerner, 'Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey' (2013) 65(4) *World Politics* 609, 615.

[29]One example is what known as 'transformative constitutionalism'. The term was first used by Karl Klare in reference to the need for changes in South Africa's transition to democracy: 'Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.' Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal of Human Rights* 146, 150.

[30]Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge University Press, Cambridge, 2010) 126.

[31]Jacobsohn (n 8) 16.

[32]Others who have theorized about constitutional identity also acknowledge this tension and believe that 'constitutional identity first emerges as a *lack* that must be overcome through a discursive process'. Michel

under unstable conditions of intense internal conflicts, such decisionism risks exacerbating the conflict and may even lead to violence.'[33] Moreover, the distance between the existing realities and the aspirational constitutional identity chosen by those who drafted constitutions can end up legitimating state activity and involvement purported to serve these ends. Historically, this had been the case in the previous round of injecting aspirations into post-colonial constitutions in Nasser's Egypt, Nyerere's Tanzania, Nkrumah's Ghana, Obote's Uganda and Kaunda's Zambia.

With socialist-revolutionary constitutions, one needed the cadres of the vanguard revolutionary party to educate and lead the African industrial working class (and the remaining majority of the society, which had not yet joined the industrial mode of production) along the path towards material and political ownership of the means of production. The liberal-nationalist variant similarly needed an activist state pursuing the goals of national unity and economic and social advancement progress. Despite being susceptible to political manipulation, we should also note that there was a utopian cause, in principle, above the leadership cadres and state institutions.

We had seen how post-Cold War constitutions all shared an emphasis on elections, liberal public policy reforms, economic liberalization, and the protection and promotion of individual human rights. Such aspirations then required legal, political and economic experts to guide the society and show how the most advanced constitutional clauses, legislation and reform policies imported from the West worked. But because all these were presented as an incontestable technical component of modern law and governance, there was an unintended potential for popular disillusionment whenever things fell short of their promises. In time, this could either fuel demands for another constitution or disillusionment would find extra-constitutional outlets.

The more worrying unintended potential originates from the combination of an emphasis on the ballot box as the core component of democracy, a technocratic constitution that was not always easily understood and embraced by the public at large; the constitutional exclusion or the deflation of more traditional polities indigenous to the land; and the absence of a utopian cause of ideology above the leaders and the parties to hold the elected officials to account. The combination creates the risk of legitimating the political dominance of those elected by 50 per cent plus one vote.

IV. Laying the scholarly foundations of long-term applied success

In her contribution to the collection *Constitution Building in Africa*, Sauda Nabukenya asks the key question that should give all interested in African constitutionalism pause for reflection: 'Why do constitutions in Africa not stand the test of time?'[34] As we saw earlier, constitutions containing both variants of aspirational constitutional identity, liberal-nationalist and socialist-revolutionary, failed to survive.

In his comparative historical study of what he calls 'Africa's original public institutions', Peter Skalnik provides an observation that is directly relevant to these discussions:

Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 756.

[33]Lerner (n 28) 616.

[34]Sauda Nabukenya, 'Why Constitutions in Africa Do Not Stand the Test of Time? Lessons and Perspectives from Uganda', in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojayé (eds), *Constitution Building in Africa* (Nomos, Baden Baden, 2015).

what is homegrown has more chances of longevity.[35] When we look back at Africa's constitutional history and reflect on the reasons for the failure of many of Africa's constitutions to stand the test of time, one potential explanation is their shallow roots in the home soil. Basil Davidson blames Western-biased post-colonial leaders who sought to emulate European modernist nation-states and ignored indigenous culture and historical heritage.[36] Many of the constitutional documents were perfectly crafted ideals in the abstract but often failed to strike a familiar chord across the population and instil a sense of national ownership. Abdullahi Ahmed An-Na`im believes that 'a homegrown concept that benefits from the experiences of other societies is more likely to succeed rather than a crude of coercive imposition of an alien concept'.[37] In an article in the *International Journal of Constitutional Law,* Kwasi Prempeh laments the way indigenous constitutionalism was left out of the reforms of the mid-1990s: 'Constitutional change in much of contemporary Africa has failed generally to redress or reconsider … the postcolonial exclusion of Africa's homegrown customary institutions from the formal structures of local representation and governance.'[38]

The main investigator of the pan-African initiative to record the multitude of unofficial and uncodified forms of indigenous law, the 'Restatement of African Law Project' (RALP) of the 1950s and 1960s Anthony Allott, credits a sense of grassroots embrace as one reason why the traditional laws indigenous to Africa survived: justice was popular, it was widely understood and people participated.[39] It is thus important to establish that, even when falling short on the formal notions of what modern constitutions should look like, a pervasive sense of public ownership of national constitutions – seeing them as 'our laws' – provides them with a self-sustaining autonomy necessary to withstand and navigate the known and unknown challenges that lie ahead. That lifeblood connecting a written document to a land and its people is vital for survival of democratic constitutionalism. As Sammy Adelman argues in his study of constitutionalism, pluralism and democracy in Africa 'it is only from the grassroots, from bottom up that democracy can emerge'.[40] And it is indigenous constitutionalism that has the deepest roots.

In and of itself, there are moral justifications for the constitutional recognition of the homegrown. Indigenous systems of law and governance with their roots in a community's own history and culture are part of a country's unique foundations – or, put differently, of its constitution. But independent of such moral, and more philosophical, considerations, a more pragmatic applied benefit also exists: constitutional longevity. A sense of popular embrace made possible through the inclusion of a representative constitutional identity will likely ensure that a constitution does not appear as if it were imposed by one political

[35]Peter Skalnik, 'Authority versus Power: Democracy in Africa Must Include Original African Institutions' (1996) 28(37–38) *Journal of Legal Pluralism and Unofficial Law* 109.

[36]Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (Random House, New York, 2005).

[37]Abdullahi Ahmed An-Na`im AA, 'Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives' (2009) 57 *Duke Law Review* 829, 834.

[38]Kwasi H Prempeh, 'Africa's "Constitutionalism Revival": False Start or New Dawn' (2007) 5(3) *International Journal of Constitutional Law* 469, 495.

[39]Anthony Allott, 'The Future of African Law' in Hilda Kuper and Leo Kuper (eds), *African Law: Adaptation and Development* (University of California Press, Berkeley, CA, 1965) 232.

[40]Sammy Adelman, 'Constitutionalism, Pluralism and Democracy in Africa' (1998) 42(30) *Journal of Legal Pluralism and Unofficial Law* 73, 86.

party, a small circle of experts or outsiders.[41] No matter how noble the aspirations, without a sense of ownership that comes with a representative constitutional identity, constitutions will lose the lifeblood that connects them to the people.

When imported from abroad in the form of a constitutional 'best practice' (or a legislation, a reform blueprint or a public policy), or drafted at home in line with the prevailing international notions of what liberal constitutions should look like, it is possible that not everything that is written will resonate among the public – regardless of no matter how well-intentioned its contents. Writing about the post-Cold War reforms, Brun-Otto Bryde, a former judge on the German Constitutional Court and a legal scholar involved in various constitutional reform processes around the world, draws attention to how little was learned from the past:

> There is a certain danger that the old mistakes are repeated. Like in the 1970s when the ironical name of 'legal missionaries' held more than a kernel of truth, we can again detect a certain missionary zeal to distribute one's own model world-wide without due regard to the problems of such transfers. 'What works well at home' is expected to work in the new democracies. In drafting new constitutions and reform-legislation we can again detect attempts at one-sided insistence on foreign models and reliance on the untested reception of such models. Fights between legal missionaries to sell their product and the influence of international donors can all again be observed and criticized. This problem is reinforced by the fact that like in the 1960s the development of the field runs the risk of having its research strategies imposed by donors who pursue their own economic and political agendas.[42]

In order to avoid repeating the applied mistakes in constitutionalism noted by Bryde, a few things need to be considered on the scholarly side. After all, if what is needed is for constitutions to be moored in the home soil so that they can generate grassroots support and thus face the known and unknown challenges that might lie ahead, we might have to temper our trust in perfectionism in the abstract. What needs to be added to the equation is not only the form of a constitution, but also its ability to autonomously function without outside help.

Once organically linked to the land, the history, the culture and the people(s), there is more of a chance of self-sustaining longevity for the times ahead when international support will be switched off or when the domestic situation deteriorates to the extent where formal institutions fall short of proving their functions of law and governance. While being far from ideal, in the midst of the collapse of the Somali state, the indigenous legal system of *xeer* and the uncodified and unofficial constituent social structure of clans prevented a descent into complete anarchy. There was civil war, but a modicum social order remained: *xeer* emerged to fill in the gap vacated by state laws; traditional elders were still respected, and largely obeyed; inter-clan arbitration put some lid on conflicts that could have escalated further; and instances of looting, murder, and rape did not reach

[41] In addition to this macro perspective, others believe bringing the modern and indigenous forms of law and governance closer at the grassroots level could also help remedy the workings of human rights at the local level. Charles Mwalimu, *Seeking Viable Grassroots Representation Mechanisms in African Constitutions: Integration of Indigenous and Modern Systems of Government in Sub-Saharan Africa* (Peter Lang, New York, 2009).

[42] Brun-Otto Bryde, 'Constitutional Law in "Old" and "new" Law and Development' (2008) 41(1) *Verfassung und recht in Übersee* / Law and Politics in Africa, Asia, and Latin America 10, 16.

the levels one would have expected in a context of state collapse. All this was in no way an alternative to the stability of a constitutional state, but what functioned in the absence of any formal notion of law and governance deserves more scholarly attention.

We might have arrived at a point in history when the field of constitutional studies has to consider embracing a more active research agenda studying function, especially in the non-Western context, in addition to its more traditional preoccupation with the form of constitutions. Four new avenues might serve this scholarly direction. The first would be to systematically expand the subject matter of the field of constitutional studies to include constitutions and constitutionalism across a wider spectrum of humanity, which contains not only non-Western experiences but also non-plebiscitary, more traditional, examples from the West. This might mean coming to terms with the messy heterogeneity of the world. Second, as a result of this openness towards diverse experiences, the field of constitutional studies would have to go further into the study of a common characteristic of non-Western constitutions – that is, collective group rights. Since such rights and obligations do not come in a single size, one would need more scholarly interest in comparative analyses across different communities, both within and across countries. In this context, scholarly debates on group rights from the West would also need more attention. The third avenue could be to devote more time to taking stock of the long-term consequences of constitutional changes and legal reforms framed in a way that includes both form and function. In addition to focusing on making new laws, writing new constitutions, adopting new reforms and implementing new policies, we should also turn our gaze back to study the outcomes of past initiatives, including both successes and failures. Fourth, while taking the conceptualization of constitutionalism beyond formal constitutions, scholarly inquiry could be framed more holistically where history, politics, and society are added to narrower legalistic perspectives. The lowest common denominator to all four is the insight that there might not be any easy and quick answers – which, in itself, would be a contribution to the field. Let us now reflect on what these four avenues to scholarly inquiry might separately tell us about constitutional identity in Africa.

Expanding the subject matter

Once we expand the subject matter of constitutional studies to include Sub-Saharan Africa, it becomes evident that there is no ready-made 'African' constitutional identity waiting to be discovered, incised and then injected into the text of a constitution. As Yash Ghai and Jill Cottrell put it, 'the most important generalization about precolonial systems in Africa is that it is almost impossible to generalize'.[43] Africa's 54 countries are all diverse internally – even those closest to ethno-linguistic homogeneity, Botswana and Somalia, contain minorities with indigenous systems of law and governance different from the majority. Distilling one constitutional identity from the multitude of constituent peoples inhabiting one country is a challenge; deciding on a meaningful pan-African identity agreeable to all is likely beyond reach. The possibility of constructing a compound national constitutional identity for individual African countries still exists, but this would require a lot of scholarly work on an uneven terrain. While some countries, their legal histories and the different traditional systems of law and governance of their constituent

[43] Yash Ghai and Jill Cottrell, 'The State and Constitutionalism in Postcolonial Societies in Africa', in Upendra Baxi, Christopher McCrudden and Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridge University Press, Cambridge, 2015) 167.

peoples have been extensively studied and documented, others are marked by a dearth of material. The amount of informational asymmetry is likely to hinder progress on some fronts, but the existing material already tells us that there are many different approaches to constitutions and constitutionalism. And due to the prevalence of legal pluralism across the continent – regardless of whether these coexist in harmony or in competition – the common factor is the complexity. There is thus a need to let go of the assumption that there is one traditional system, and it is despotic, reactionary, illiberal, patriarchal and backward. There is, however, one common characteristic across all of Africa's indigenous systems of law and governance: they tend to prioritize communal concerns and collective group rights and obligations. According to Francis M. Deng, this communitarian ethos – especially its preference for social consensus – instead of majoritarian consent could be incorporated in general terms into constitutions across the continent.[44]

Drafting standardized constitutional clauses and legislation to ensure the protection and promotion of equal rights for individuals is, by definition, easy. A shared emphasis on the individual – regardless of ethnicity, culture, region, religion, tribe, clan, original home jurisdiction or current domicile – means that one focuses on the drafting of clearly delineated and neatly articulated formal laws in standardized nationwide terms. These nationwide general goals put in writing are then enshrined as the law of the land (getting to deliver on these in the long run is another matter, of course). Drafting collective rights and responsibilities, the constitutional acknowledgement of the constituent parts of a polity and the recognition of the multitude of constituent peoples, cultures and legal traditions, on the other hand, is much harder – especially in a way that does not disenfranchise the smaller, more peripheral and marginalized communities. And it is here that some of the existing scholarly insights from the West, which are relatively under-explored in the African context, can enrich the field of constitutional studies.

Study of a common characteristic

Most indigenous systems of law and governance – in Africa and elsewhere – are defined by their inclination to prioritize communal concerns, and collective rights and obligations. Yet most constitutional clauses and legislation adopted in the post-Cold War wave of reforms tend to prioritize the individual over the community. The underlying moral and philosophical tension between the nationwide protection of individual human rights and freedoms, and the territorial or non-territorial recognition of collective group rights, also exists in the plurinational states of the West – a theme we will revisit in the next section.

From Switzerland to Canada, there are quite a few federal countries resting on plurinational societies that have to constantly navigate the philosophical faultline between nationwide standardized individual rights and territorially bound differentiated collective group rights. Instead of holding these countries back, arguably one consequence of the constant attention to this tension underlying the federal constitutional order has been a source of their constitutional longevity. That is, the tension between a collectivist 'what is' and the aspirational individualist 'what should be' need not bring the constitutional order down. An awareness of such a tension in the constitution might, in fact, be one of the main arteries that feeds the culture of constitutionalism. In federal countries

[44]Francis M Deng, *Identity, Diversity, and Constitutionalism in Africa* (US Institute for Peace Press, Washington, DC, 2008) 77–102.

where such a philosophical tension is a permanent part of the constitutional order, political debates become 'constitutionalized' in terms of references to federal and provincial/cantonal/state jurisdictions, applicable clauses in constitutions, different federal and provincial/cantonal/state legislation, high administrative courts ruling on the appropriate level of government, supreme courts interpreting the division of powers between the two orders of government and so on. All this put the brakes on plebiscitary electoral politics and populist polarization.

Devoting more attention to this philosophical tension in scholarly approaches to constitutionalism could help to soften the tendency to frame modernity and tradition as irreconcilable opposites. Laying such scholarly groundwork could render more likely the applied coexistence of modern aspirations towards protection and promoting individual human rights in standardized nationwide terms and the representation of the existing traditional systems of law and governance indigenous to the land in territorially bound terms. This is, of course, not a quick recipe for instant solutions, but more of a future investment – which brings us to the importance of long-term perspectives.

Taking stock of the long-term consequences

The third new avenue to scholarly inquiry in constitutional studies, we are proposing, is studying the long-term consequences of past initiatives. As we turn our gaze back and take stock, not only of the good intentions and aspirations of constitutional documents but also their long-term track record once put in place and implemented, we might perhaps become a tad humbler about the consequences of decontextualized perfectionism.

As we turn back and reflect, we should also revisit past advice that was not heeded and the long-term consequences of ignoring dissenters. The lengthy observation from Bryde quoted earlier is not the only example of those who failed to permeate the groupthink of a dominant mindset. Once mega reforms are initiated and scholars and experts are enlisted to write new constitutional clauses, legislation, and reform policies, the voices of prudence and caution can get lost in the euphoria. In the midst of South Africa's transition to democracy while the constitutional recognition of traditional polities and indigenous customary law was being debated, Gardiol van Niekerk was writing to draw attention to the lack of indigenous law training in scholarly terms:

> The problem of insufficient knowledge of indigenous law could be solved by providing a compulsory course in indigenous law at universities and in the meantime to provide in-service training for magistrates. Moreover, compulsory use of expert witnesses may bridge the gap whilst judicial officers at all levels are being trained in indigenous law.[45]

Her advice for more investment in scholarly knowledge beyond the confines of narrow legalism was for long-term applied success; it also leads us to the need to frame the study of constitutions and constitutionalism more holistically.

Framing inquiry more holistically

The fourth new avenue for constitutional studies would be to devote more attention to the history, politics and society of this diverse continent. In his 1979 study of the traditional

[45]Gardiol J van Niekerk, *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* (UNISA, Johannesburg 1995) 97.

legal systems of southern Africa, Simon Roberts was already warning us against separating the legal from interrelated political, social and cultural factors.[46] Similarly, Martin Chanock's study on the indigenous systems of law and governance in Malawi and Zambia had highlighted the need for a generalist articulation so these systems could be better integrated into national legal orders.[47]

Studying traditional constitutions and constitutionalism indigenous to Africa would need such a broader perspective in any case. This is more pronounced when there is a need for comparative knowledge not only between countries but also within countries across their constituent ethno-linguistic communities. Mastering such complexity and diversity would be beyond the reach of most individual scholars, of course, but even the acknowledgement that there are no simple answers would be a step forward. Such knowledge is also likely to serve the goal of softening the assumption that the views of enlightened progressives using Western legal concepts and tools, and those of the proponents of traditional laws and culture, are unbridgeable. T.W. Bennett sums up how these two often end up being painted as irreconcilable opposites:

> [P]oints of conflict between customary law and human rights are generally summarised as follows: human rights emphasise the individual while customary law emphasises the group or community; customary law stresses duties, human rights regimes generally stress rights; and customary law is imbued with the principle of patriarchy which means that any freedoms of thought, speech, movement or association are qualified by the respect due to all senior men.[48]

While we mostly offer a macro focus on constitutionalism and state design, at the local level there might be more of an integration emerging already. Carolyn Logan reports an interesting finding from Afrobarometer surveys conducted at the grassroots level throughout the continent, showing that citizens do not always see a contradiction between the modern political system and traditional forms of law and governance.[49] Interdisciplinary insights like this from other fields of study lend support to Bennett's call to temper the projection of a moral dichotomy. The pursuit of holistic knowledge is also likely to soften the unwarranted projection of certainty into the future. As the history of constitutions and constitutionalism attests, the spark for constitutional change is often lit outside the narrow confines of legalism. Canada's distinguished theorist and practitioner of constitutional politics, David R. Cameron, imparts us with the need to work with a readiness towards an uncertain future:

> In the hazardous business of forecasting, there is no particular reason to privilege linear extensions of the unaltered present into the future. We should keep ourselves open to the possibility that we may encounter unexpected shifts, sudden *virages*,

[46]Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Penguin, Harmondsworth, 1979) Preface.

[47]Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, Cambridge, 1985), Ch 12.

[48]Bennett (n 27) 23.

[49]Carolyn Logan, 'Selected Chiefs, Elected Councillors, and Hybrid Democrats: Popular Perspectives on the Co-Existence of Democracy and Traditional Authority' (2009) 47(1) *The Journal of Modern African Studies* 101, 109–21.

> startling reconfigurations of historical forces, that will carry the country in directions we would never have expected.[50]

Taken together, these four avenues can contribute to laying the scholarly groundwork for a more successful applied future, but we also have to note that a barrier sits in front of their promise: a particular approach to constitutionalism that has established near-universality with the end of the Cold War.

V. Three challenges of the one people, one moment, one document mindset

In our brief historic tour of Africa's journey through constitutional identities, we have seen how, with the end of the Cold War, one approach to constitutionalism from the West came to establish near-universal acceptance. Based largely on the American, and to a lesser extent French, plebiscitary democracies, the aspirations of the individual – best symbolized by the preamble of the US Constitution where the ideals of 'life, liberty, and the pursuit of happiness' of individual American citizens are enshrined – became the defining characteristic of this approach, both in scholarly and in applied terms.[51] While being a laudable aspiration in and of itself, this liberal-legalist mindset, and its underlying assumptions, create three distinct difficulties for the incorporation of homegrown varieties of constitutionalism unevenly coexisting in the diverse cultural landscape of Africa.

Assumed political culture and history

The first is the assumption of a common political culture and history that would allow the people to act as one and become the constituent power. Underlying this plebiscitary notion is the unacknowledged presumption of a uniform political culture that renders this possible – an angle that does not get much attention from scholars of constitutional studies.[52] In fairness, there has been criticism of the universalist projection of the American notion of 'we the people' to the more diverse countries of the West, especially in the context of plurinational states such as Belgium, Canada and the United Kingdom.[53] Another criticism of the presumption of one people has been raised in the context of the aboriginal peoples of the West. Most notable example of this line of thinking has been the work of James Tully – who, informed by the diverse experience of North American aboriginal constitutionalism, has questioned the neutrality of the presupposition of one

[50]David R Cameron, 'National Unity and Paradigm Shifts', in Robert C Vipond (ed), *The Daily Plebiscite: Federalism, Nationalism, and the Canadian Polity* (University of Toronto Press, Toronto, 2021) 125.

[51]This dominant mindset, derived from the American experience and exported to the rest of the world, is best exemplified by Bruce Ackerman's approach to constitutionalism, especially Bruce Ackerman, '*We the People', Volume 2: Transformations* (The Belknap Press of Harvard University Press, Cambridge, MA, 1998).

[52]For an overview of this historical tendency, see James Tully, 'The Historical Formation of Modern Constitutionalism: The Empire of Uniformity', in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995) 58–98.

[53]See, for example, Stephen Tierney, '"We the Peoples": Constituent Power and Constitutionalism in Plurinational States', in Martin Loughlin and Neil Walker (eds), *Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2008).

people as the constituent power.[54] In the African context, however, a similarly reasoned and sustained questioning of the one people presumption has not yet gained ground in scholarly and applied approaches to constitutions and constitutionalism.

The underlying diversity of indigenous constitutions ranging from the law and governance of elaborate and complex hierarchical kingdoms to the less structured constitutions of hunter-forager bands of the Kalahari and Namib Deserts, from the law and governance of the nomadic/pastoralist herders practising transhumance to the decentralized tribal confederations, Africa's indigenous constitutions do not come in identical form. As is the case with the plurinational democracies of the West, most African countries are amalgamations of peoples. And as it is the case with the aboriginal peoples of the West, some of these constituent peoples fall short of the necessary capability to project their interests and concerns onto the national political stage. The political, economic, demographic powers they sit on are often not comparable, creating the risk that the notion of a 'one people' constituent power would end up further strengthening the influence of the more powerful ethno-linguistic communities.

The presumed constitutional mega moment

Emanating from the universalization of the one people, one moment, one document approach to constitutionalism, the second difficulty confronting the desire to incorporate homegrown varieties of constitutionalism is the presumption of what Rivka Weill calls a 'constitutional mega moment'.[55] As Christine Schwöbel-Patel notes, 'the great constitutional moments are generally Western moments of democratic contestation'.[56] For the non-Western world, such moments might not only always exist without international involvement, but when they do exist, such a big bang of constitutional redesign might inflate the input of the politically, economically, demographically stronger communities with international friends, and in possession of better informational and legal knowhow than others.

This notion of a mega moment characteristic of the thinking of Bruce Ackerman and other liberal-legalists is, once again, the automatic projection of the experience of the French and US revolutions to the rest of the world.[57] In addition to the undeniable contributions to democratic theory and practice, one should also note that the 1792 French plebiscitary constitution that came into being did not last beyond eight tumultuous years, and the US constitution of 1789, despite the existence of the safety valve of a federal constitutional order, a fluid western border to absorb social and political discontent and numerous amendments, could still not contain the tensions that culminated in a civil war a few decades later. In contrast, the more traditional constitutions within the imperial systems of British, Holy Roman, Ottoman, Romanov and Habsburg Empires had been amalgamations of various constitutive acts across the ups and downs of history.

[54]James Tully, 'The Imperialism of Modern Constitutional Democracy', in Loughlin and Walker (n 53) 337.

[55]Rivka Weill, 'Evolution vs Revolution: Dueling Models of Dualism' (2006) 54(2) *The American Journal of Comparative Law* 429, 461 and 464.

[56]C Schwöbel-Patel, 'Global Constitutionalism and Geopolitics of Knowledge', in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *Global South and Comparative Constitutional Law* (Oxford University Press, Oxford, 2020), 70.

[57]Bruce Ackerman's constitutional mega moments, or what he calls 'constitutional transformations', are the Founding, Reconstruction, and the New Deal. See Ackerman (n 51).

While the majority of nineteenth-century constitutional reforms attempted in these imperial orders fell short of democratic success at a time when their political stability was undermined by the rise of nationalism, they impart to us the historical insight that uneven, gradual and piecemeal approaches to reform also exist, and might deliver better results when uncoupled from the upheavals of imperial dissolution. Given the heterogeneity of the diverse landscape of Africa, this evolutionary path might be a more prudent approach, compared with limiting ourselves to a big bang of constitutional reforms.

The expectation of a single, comprehensive, coherent and uniform basic law

The third difficulty facing the quest to incorporate homegrown varieties into the scholarly and applied approaches to constitutionalism flows from the third component of the prevailing conceptualization of constitutionalism – that is, the expectation of a single, comprehensive, coherent and uniform basic law to serve as the constitution. The unintended consequence of liberal-legalist aspirations is the discrediting of anything that deviates from a single constitutional document embodying the constitutive act. The fact that other, equally legitimate, evolutionary paths to constitutional reform have existed throughout human history seems to be under-explored in the current state of the field of constitutional studies. Yet not all omit this historical insight. As Rivka Weill puts it, 'Despite our belief that a single constitutional document should embody the will of the people, [the evolutionary model] shows that constitution-making may be achieved in multiple documents and even statutes.'[58]

The opportunity for the gradual evolution of the constitutions through the incorporation of formerly disenfranchised collective groups or the revision of pre-existing subnational constitutive acts for others hit the wall of expectations of a mega moment of mega constitutional documents approved by mega majorities. Once we put some brakes on the pursuit of perfectionism in the abstract and open our field of study to experiences from other parts of the world, we are likely to find that many constitutions that enjoy longevity contain internal inconsistencies – perhaps even contradictions – because they have been organically linked to the land, the people, the history and the culture, and represent the unavoidable and inevitable heterogeneity of human existence. These constitutions evolved along the various historical challenges and came to embody the accumulation of various foundational constitutive acts.

VI. Recasting constitutional success in both positive and negative terms

At the beginning of this article, when we started to develop the ideal types of aspirational and representative constitutional identity, we brought in Martin Loughlin's conceptualization of 'positive' and 'negative' variants of constitutionalism – one about doing things, the other about preventing things from happening.[59] In this closing section of the article, in light of the preceding discussions on aspirational and representative constitutional identity, and the different Western and non-Western perspectives on these, we will revisit the twin concepts of positive and negative constitutionalism to see whether they could also be put to the use of evaluating the success and failure of constitutions.

[58]Weill (n 55) 432.
[59]Loughlin (n 2) 24.

In addition to pursuing the positivist perfectionism of neat, tidy, comprehensive, ideal mega documents independent of the national and local contexts and adopted from abroad, scholarly approaches should also bring to the attention of the applied side of constitutionalism the importance of untidy, gradual, piecemeal, uneven arrangements that have long existed; these might enjoy more organic grassroots support, which could prove to be essential to stave things off – for instance, preventing the rise of elected authoritarianism riding the plebiscitary wave of 50 per cent plus one vote, preventing the hollowing out of democratic institutions other than the ballot box, and preventing the breakdown of law and order. Here the field of constitutional studies should be open to contextualize and embrace, in the words of Mahmood Mamdani, whatever classes and structures 'have a capacity for constitutionalism'.[60]

If we expand the definition of what is deemed success or failure, we might be able to better spot some of the potential benefits of non-Western approaches. Success in the positive sense is about doing things: writing constitutions, making laws, adopting reforms and implementing new policies. But success could also be conceptualized in the negative sense – that is, when internal ethnic conflict does *not* happen, when the laws are *not* disregarded, when the legitimacy of established order is *not* questioned, when the community-based collective settlements are *not* violated, when law and order does *not* break down, when the adopted constitutions are *not* dismantled or hollowed out in the long run.

The aim of this article was to try to see ways in which aspirational and representative constitutional identities could come to coexist in way that would set modern goals while ensuring homegrown roots keep them moored to enable them to withstand current and future challenges. Aspirational constitutional identities and the representation of a country's constituent peoples, cultures and legal systems need not appear irreconcilable if more of the elements of non-Western constitutions and constitutionalism are added to the repertoire of constitutional studies. We also tried to highlight the fact that the diversity of continent and the attending legal pluralism meant that there was no single ready-made 'African' constitutional identity awaiting discovery. The scholarly path forward was to master the underlying complexity to lay the foundations of long-term applied success. Bringing the scholarly and the applied closer would thus create opportunities for couching and framing modern aspirations in the language of one's own legal culture and diverse traditions. In other words, when the idealistic 'what should be' is articulated in a way that resonates with the familiar 'what is', then chances of the public embracing the constitutions increase and the need for interlocutors to connect the people to their constitution go down. This also means readiness to accept that chances of longevity might rest on tempering our expectations of perfectly crafted ideals in the abstract.

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[60]Mahmood Mamdani, 'The Social Basis of Constitutionalism in Africa' (1990) 28(3) *The Journal of Modern African Studies* 359, 374.