African Meeting Process for Debate and Proposals on Governance in Africa:

The Southern African Perspectives

Colloquium Proceedings
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Acknowledgments

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General Introduction

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1.1 Issues of a debate on governance in Africa

Beyond co-operation for development...

The massive diffusion of the term governance in Africa arises essentially from the context of international co-operation for development. It is within this framework, and under the aegis of the Bretton Woods institutions, that governance has become an unavoidable issue in the politics of development. Above all, it is presented in the guise of 'good governance', as a vector of neo-liberal state reform: it represents, in this form, a restrictive (managerial) and prescriptive approach to governance. It has been written into the logic of the politics of normative and institutional transference, since it became a toolkit for the construction of the Western liberal model of the state in the countries concerned. It is employed to reform state institutions with regard to effectiveness (budgetary austerity, market oriented policies, reduction in state intervention, privatisation etc), and to formal democracy (transparency, justice, promotion of the rule of law, civil and socio-economic rights and decentralisation etc). Far from taking into account the diversity of African societies, this toolkit tends to approach reform of the state as well as the regulation of society in a purely technical sense, thus facilitating the transfer or replication of a universal model which the actors in the beneficiary countries must appropriate, at least formally. Thus, imported, transposed and imposed, 'good governance' is perceived by the people as a product coming from the outside, from the West, as a new conditionality of the donors. "Governance? No thanks!" This *cri de coeur* had been expressed by one of the participants in a first meeting, a year and a half before that of Polokwane, organised

at Bamako by IRG[1] and ARGA[2] with the support of MAEE[3] and the FPH[4] on the theme: 'Between tradition and modernity, which governance for Africa?'.[5] The debates, at that time concentrating on the West African region, demonstrated that the term governance could not be reduced to its usage in the context of co-operation for development. The whole purpose and what was at stake at the meetings at Bamako and Polokwane was this: to facilitate analysis and encourage the emergence of new and alternative proposals for governance in Africa.

In effect, governance constitutes a prism for the analysis of the modalities of the exercise of power in a given group (family, enterprise, local organisation, state etc). More specifically, as concerns public governance, it is about a better understanding of the modalities of public activity, notably in the region of interaction between the state, international actors, civil society and the private sector. The journey of a government towards governance represents this transformation of public activity marked by a multiplication of the actors involved in the achievement of collective objectives. More broadly, governance concerns how societies organise and regulate themselves to 'live together', at a local and global level, as well as the creation of common rules of the game.[6] Thus the issues raised are very diverse: methods of management and collective regulation, legitimacy and the responsibility of actors and institutions, participation in power, links between different levels of government etc.

In reality, recalling the terms of reference of the Bamako Colloquium, "the modalities of governance in a society respond on the one hand to deep cultural references and, on the other hand, to the

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(1) Institute for research and debate on Governance
(2) Alliance to Refound Governance in Africa
(3) French Ministry for Foreign and European Affairs
(4) Charles Leopold Mayer Foundation
(5) The proceedings of the colloquium "Between tradition and modernity: which governance for Africa" are available at <www.institut-gouvernance.org>. This meeting was organised by IRG, CEPIA [Centre for Political and Institutional expertise in Africa] and ARGA in January 2007 with the support of MAEE and FPH. It brought together about thirty participants, the majority from West Africa, but also from north and South Africa, as well as some European participants. Some outside official observers, serving in Mali or coming from their headquarters, also participated in the colloquium. The colloquium served as a starting point for a more long term process, later defined as the Round for debate and reflections on governance in Africa, bringing together the setting up of research projects (in particular in the context of the thematic groups organised by ARGA) and the dissemination of analysis.
(6) IRG-ARGA. "Between tradition and modernity: which governance for Africa?". *Proceedings of the Bamako Colloquium*. Bamako-Mali. 23-25 January 2007. pp 9-10.

nature of the challenges confronted by that society at each point in its historical process". In effect, the governance of a country is anchored in history and in the socio-cultural context of the societies of which it is composed; it is 'glocalized', that is, anchored both in its societies and in the world. Yet, more often than not, international legitimacy has been favoured in national politics and development programmes create a gulf between the institutions of the recipient countries and their populations. As a result, states must meet the requirements both of international legitimacy, tied to aid for development, and of national legitimacy vis-à-vis their populations. Very often the two do not coincide. Worse, they diverge and are sometimes contradictory. From Bamako to Polokwane, via Lima (Peru) and Europe, the gulf between institutions and a society's own view of itself in a political sense, between legality and legitimacy, is a common denominator of the analysis of the current 'crisis' of governance. This is why the restoration of the political dimension in the analysis of governance is fundamental. For developing countries, this has brought about some positive changes on the part of donors: commitments with regard to alignment (the politics of development with national politics), and to appropriation (of the politics of development by actors in the countries concerned) made by the sponsors in the context of the Paris Declaration on the effectiveness of aid (March 2005[7]), as well as bypassing the managerial approach in favour of an integrated approach to governance, in particular by the European Union.[8] These developments have affirmed the need to take into account all dimensions of governance (economic, social, cultural, environmental etc) and as a result to have due regard to the diverse regulatory mechanisms (political, economic, social, cultural and historic) which come into play in the country concerned in order to understand and facilitate the anchoring of power in society: its legitimacy. For the IRG and its partners, the legality-legitimacy interaction is a fundamental prism through which one can view the governance of a

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(7) Endorsed 2 March 2005, the Paris Declaration is an international agreement to which over one hundred ministers, heads of agencies and other senior officials agreed, committing their countries and organisations to continue to increase efforts in harmonisation, alignment and managing aid for results with a set of monitorable actions and indicators.
(8) See "Governance in the European consensus on development: towards a harmonised approach within the European Union." <http://europa.eu/legislation_summaries/development/sectoral_development_policies/r13012_fr.htm>

country (states and societies), which in no case can be reduced to a linear, univocal or fixed relationship.

...To analyse governance in Africa

We must go from a technical institutional analysis to an analysis of the 'political fabric', or, the institutionalisation of power, characterising power not as an intangible given, but as a process of the interaction between different elements of society and its various structures. This link between power and actors (populations and institutions) is at the heart of the definition of legitimacy. From this perspective, the debates at Bamako brought to light the necessity of taking into account traditional values, history, and the past political experiences of West Africa, which represent the real source of   political authority. The Bamako colloquium enabled a greater emphasis to be placed on the analysis of the organisers' chosen themes, that of the accountability of power and that of the management of public goods (specifically with regard to land management). Three axes, including traditional and religious areas of competence, were analysed. The question of linking tradition and religion with the legalism of the post-colonial state emerged as a key issue for reflection on African governance. The fact is that in their daily life actors (civil society, the private sector and public institutions) mobilize, according to their own interests (material or symbolic) and to context, different sources of legitimacy of power which relate to different fields: tradition, religion, 'official' public law, international regulations etc. It follows therefore that for public institutions to be able to be an effective and positive source of social organisation, they should not only take into account the diversity of sources of legitimacy, but also promote and embody their constructive interaction, in order to enable the creation of a regulatory system shared and accepted by all. While participation of the various actors enables the expectations of the different sources of legitimacy to be taken into account, it is not sufficient to assure their constructive interaction. Participative governance and legitimate governance are not synonymous. The latter has broader, multiple and pragmatic implications, equally concerned with organising the co-existence of the sources of legitimacy and with analysing, discussing and assessing the impact of their various hybrid

forms. The accommodation of this effective plurality of sources of legitimate power constitutes the central pillar of an African approach to governance.

1.2 The meeting process for debate and proposals on governance in Africa

On this theme the participants in the Bamako colloquium felt that their colleagues in southern Africa had a lot to contribute, given that the constitutional processes in that region were well known for their endogenous nature ('home-grown' constitutions). How are tradition and modernity linked together in southern Africa? Is their inclusion in the constitutional process sufficient to provide a social anchor for the legitimacy of state power amongst their populations? What, specifically, are the other sources of legitimacy in that sub-region? The Polokwane colloquium was clearly intended to address this: to identify the different sources of legitimacy effectively mobilised by actors in southern Africa (in this case, constitutionalism, liberation movements, religion, tradition, etc), as well as the nature of their interaction, the links with authority and the norms with which they were associated, as well as the values underpinning them.

Furthermore, beyond the need to open up a dialogue of different views, disciplines and actors in the same sub-region, the Bamako colloquium clearly demonstrated the necessity of a better understanding and a comparative analysis of the realities in each sub-region of the African continent. This particular event then became the point of departure for a broader dynamic process, a 'meeting process for debate and proposals on governance in Africa' covering all five sub-regions of the African continent.

Polokwane: a forum for inter-cultural, inter-disciplinary and inter- actor dialogue

The meeting at Polokwane in June 2008 constituted the second stage of the Meeting process, for southern Africa. It brought together a very diverse group of actors (national and international political and administrative officials, researchers, customary chiefs and religious

representatives, unions, NGOs, etc) from three African sub-regions (five southern African countries,[9] one from the west – Senegal - one from the centre – Democratic Republic of Congo), joined by some Europeans (France) and Americans (USA). The fifty participants were able to express themselves in English, French, or Portuguese. We were very struck by the quality of the exchanges and the mutual respect shown by the participants, which enabled the colloquium to engage in a dynamic exchange of ideas which went beyond an understanding of the plurality of representation and interpretations under discussion.

The colloquium extended over four days of debate and was organised around three themes, which had been identified since Bamako as lying at the heart of the question of governance in Africa: firstly, the analysis of the sources of the legitimacy of power (liberation movements, traditions, religions, constitutions); secondly, the analysis of the nature of the interaction (co-existence, concurrence, overlaps) between different sources of legitimacy of power; thirdly, as an illustration of the difficulties of that interaction, the challenge of collective land management.

Other meetings will follow: Arusha in 2009 for East Africa, then two meetings in 2010 for central Africa and North Africa, and finally Addis Ababa, Ethiopia, seat of the African Union, in 2011. At this final stage the whole set of analyses and proposals can be put together and presented to the African Union, and at the same time a general report will be produced, drawing on the lessons learned not only from the African Meeting process, but from similar processes organised by IRG (Africa, Andean America), or co-organised by them in Central Asia.[10] As far as it is possible, we propose at each stage to invite colleagues from other regions or sub-regions. We hope thereby to capitalise on the wealth of experience and analysis, and also on those who proposed them.

Throughout the Meeting process we will focus on the same issues:

Which sources of power legitimacy are at work in the countries being studied ? How are they linked ? (in these analysis, the land issue

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(9) South Africa, Lesotho, Mozambique, Namibia and Zimbabwe.
(10) In association with *Modus Operandi.*

will remain, as far as possible, the transversal issue) ; what are the questions and proposals that can be drawn from this in order to better understand real governance in the societies in question and to promote the construction of more legitimate and therefore more effective public policy (both national policy and development policy)? This enquiry will naturally be applied to each sub-region (and the European and Andean regions, etc.) but will be driven by the specific situation and context: thus, where the issue which forms the basis of the discourse is not valid, or only partially so, in a given region, our comparative approach will be informed by this and the analyses of the region concerned will be rethought in the terms best suited to tackling governance and legitimacy. This brings us back to one of the fundamental aspects of the Meeting process: its methodology. The IRG, as part of its international mission, is co-ordinating it. However, the Meeting process owes its existence to its partner-organisations: firstly, those who are supporting us throughout the Meeting process, the MAEE and FPH, or working with us, ARGA, then the co-organisers and collaborators in each region, local partners in particular. In this regard, we give further thanks to our colleagues and friends in the African Union, MAEP (French Ministry of Agriculture), the University of Limpopo, UNISA (University of South Africa), SAIIA (South African Institute of International Affairs), Action, IFAS (French Institute for Strategic Analysis), ARGA, UNDP (United Nations Development Programme), and especially to Modus Operandi, without whom the meeting at Polokwane would not have been possible. Finally and above all, the meetings, which punctuate the Meeting process, provide an opportunity for dialogue in three different dimensions. First of all, they are inter-cultural, because we are convinced that, even where they are concerned with a specific region, such reflections cannot be objective without an interchange of viewpoints and representation. Next, they are inter-actors, with the variety of protagonists we have just discussed, because a debate on governance cannot be held without the active participation of all the relevant parties. Lastly, they are inter-disciplinary, since the problem must be addressed from a broad perspective, which encompasses, *inter alia*, social, economic, political, cultural, anthropological, and legal fields. For the IRG, this formula, devised at Bamako and enriched at Polokwane,

constitutes the methodological demands inherent in the very notion of governance.

2. The lessons from Polokwane: legitimacy of power and normative pluralism

2.1 The legitimacy of power is based on a network of sources of legitimacy...

The case of southern Africa, where legality is considered a strong source of legitimacy in the sense that it is considered a framework for the others, is very revealing in that in reality legitimacy exists only as a blending of a plurality of sources. The hypotheses of Bamako were confirmed and deepened through a reading in terms of normative pluralism. The actors did not have a single normative reference; they did not appeal to a single category of authority and did not recognise a single system of legitimacy amongst their values. For a given situation, there are different norms and authorities that are mobilised. The co-existence of diverse sources of legitimacy is shown in terms of how they compete and operate in different settings and hybrid forms. The issue of land broadly illustrates this perspective: the debates showed the diversity of authorities involved in land management. While public law and the constitution envisage the links between these authorities and the law (in this case, public law and so-called customary law[11]), in practice this relationship does not work out in the way the texts anticipated and they are far from clear. The integration of traditional authorities in the legal system does not always go beyond simple co-existence or, indeed concurrence with the 'modern' authorities. The traditional authorities who took part in the colloquium, moreover, called for more trust, co-operation and clarification on the distribution of roles in each category of those involved in land issues. The representative of the provincial house of traditional chiefs in South Africa, furthermore, called for a collective administration to verify that land was being correctly distributed, according to the application of the law and a common interpretation of the law. Concerning values, Professor Emmanuel Tshikwantaba recalled that in matters of land management

(11) See Part Two of these proceedings, which concerns constitutions.

tradition rested on the traditional principle of *Ubuntu;* "we are a collective and we organise ourselves collectively." One should not confuse participative land management, which accords with Western logic, with collective management, which is based on African tradition. All norms which aim to go beyond mere co-existence of the two systems of land management need therefore to take such aspects into account.

2.2 ... that actors articulate according to their material and symbolic expectations.

As has already been suggested, the integration of diverse normative references is achieved on a case-by-case basis according to each actor and the situation in question. It is rare that an actor (person or group) has a single normative reference point. In effect, according to considerations of family, gender, nationality, social or professional experience, religious persuasion, community etc, an actor may simultaneously display different statuses. Furthermore, rarely will a given situation (land issues etc) imply exclusively a single set of norms (the law, religion, tradition etc). This normative pluralism in fact implies that state regulations, and in particular, more globally, regulations founded on a "legal-rational'[12] basis associated with 'modernity' (international and state law) are neither the sole source of norms nor the only regulations at work in a given country. Moreover, state regulations – and how much more so international ones – are only marginally taken into account by the local population, who favour normative systems and the authority attached to other sources of legitimacy (tradition, religion etc). Or rather, they are measured out, as a 'mix and match' by the actor according to their expectations (symbolic or material), their interpretation, the situation, and interactions with other actors (institutions, populations etc). The beliefs and expectations of the actors, and therefore the symbolic dimension of power, are fundamental in actors accepting a source of legitimacy. On this acceptance depends the recognition and utilisation, that is, the mobilisation of that source of legitimacy. Such mobilisation is itself a factor in the efficacy (the

(12) With reference to the works of Max Weber on the three types of authority (legal-rational, charismatic and traditional) which allow a man to exercise legitimate power, the notion of legal-rational is most often used to indicate power, organisations and authorities which are organised primarily in relation to modern Western state law and international law.

genuine existence) of that source. As Dominique Darbon recalled in the synthesis of the first session of the Colloquium: "*What guarantees lasting legitimacy within a society are shared values and vision, more than texts or institutions, whether these are formal, traditional or religious.*"

2.3   Legitimacy is dynamic and temporal

The Polokwane debates emphasised the importance of the values conveyed by different sources of legitimacy. The legitimacy of power is anchored in society, psychology and myth. It is tied to the perceptions and vision that a group has concerning authority and concerning itself at a given moment. Thus it evolves along with social structures and with time. Going beyond acknowledging and being aware of values, the question of the current validity of these values was discussed, given that this influences the mobilisation of sources of legitimacy, because the beliefs, representations and expectations of the actors evolve. Thus during the course of the colloquium Professor Emmanuel Tshikwatamba   proposed going beyond the recognition of the values enshrined in each source of legitimacy, to consider the interpretation of these values and their meaning for the actors: this was what formed the basis of adhesion to and mobilisation of a source of legitimacy and the way it is seen individually and collectively. Legitimacy relates to the idea of what Dominique Darbon called 'sacred history', which itself is subject to evolution. Sources of legitimacy are founded on narratives which actors accept as self-evident. The beliefs, ideas and values that form the basis of these narratives are, for many, foundations of legitimacy. They come to an end when the 'sacred history' underlying political order begins to weaken. An example was given during the colloquium in relation to liberation movements which are increasingly anchoring themselves in a discourse that employs religious symbolism, thereby offering a new legitimacy to those who took part in liberation movements (ANC etc). Can the authorities representing this source of legitimacy survive the obsolescence of the values they are supposed to represent? There was considerable discussion of the case of liberation movements and 'leaders' from this point of view. Could the authority of the latter justify what appears to be their monopolisation of power?

Should their charisma and the recognition of their role and sacrifices during liberation or the struggle against apartheid give them an indefinite right to the exercise of power? The question was raised of how long a source of legitimacy remains as such. "At what point does legitimacy expire?" participants asked themselves. As long as that source of legitimacy is constituted as such in the imaginations of the population, was the response. The traditional chief Lerotholi (from Lesotho) explained it thus: "We (the chiefs) are chiefs because the people want us to be ....the day when they no longer want me, I shall quit."

2.4   Legitimacy and legality: the symbolic dimension of power

In order to endure, legitimacy must be rooted in society and nourished by performance and practice. Power relations adapt and reorganise themselves continuously according to a changing rationale. Equally, they are affected by local variations. Given this, in order to understand the governance of a country it is necessary not only to analyse the power relationships within society, but also those between the state and the different social groups. Here one finds that the interplay between the state and society does not conform to any model, which the majority of the population would recognise. This provides a better understanding of the gulf between international and internal legitimacy when they do not link up constructively. More often than not, norms and institutions which are just a veneer or imported from outside and/ or put in place by an elite that is out of touch with its populations, are not anchored in the beliefs and symbolic expectations of the majority of the population. Therefore these norms and institutions do not fortify the symbolic dimension of power which mobilises a group or society. From this point of view, the debates on land and constitutions stood out at the colloquium. Professor Emmanuel Tshikwatamba showed how a model for land management promoted by the state based on a legal-rational premise similar to the colonial model did not articulate with the communitarian principles of collective land management in that it favoured private or group ownership rather than the principle of *Ubuntu* (collective management). Whilst today's policies tend to favour property, including collective property, the principle of *Ubuntu*, of collective land management, is less about property than about

access to the land. Here we come up against a lack of common understanding of what land management means. How is it possible, not only to manage the variety of property 'rights' (due to the overlapping of diverse sources of legitimacy), but to access multiple and overlapping meanings of land? As far as constitutions are concerned, even where the constitutional texts (South Africa, Namibia etc) make reference to normative categories other than that of 'legal-rational', the symbolic dimension of power as understood by the populations concerned is not clearly integrated. The effectiveness and efficacy of the political power embodied by the constitutions is therefore called into question. Beliefs and representations have an influence on practical outcomes (such as the delivery of basic services), because of their symbolic meaning. Thus institutions are not reducible to their official functions; they depend on the symbols and imagination, which underpin the thought and behaviour of the actors.

2.5 Legitimacy and legality: a relationship that is ambiguous but revealing of the institutionalisation of power

Values that reveal a collective sense and factors which link legitimacy and legality

For Assane Mbaye, the affirmation of a nation's values is a question which at once relates to constitutions and to legitimacy, because a society must recognise itself in the principles and rules by which it is organised. A constitution is not only an instrument for the organisation of power but, equally, a statement of the values, which express the fundamental aspirations of a society. Nevertheless, the debates demonstrated at the same time that legality is a vector for change in notions of the legitimacy of power and that constitutionalism, through the recognition of human rights, helps the evolution of the "sacred history" of liberation towards development. As Professor André Mbata Mangu at Polokwane emphasised, legality does not cover everything derived from legitimacy and, furthermore, formal legitimacy does not cover the whole field of legitimacy. From this, does legality equate to formal legitimacy? Moreover, one might enquire, as Assane Mbaye did, if the constitution and, more generally, legality, constitutes a means

of formalising pre-existing sources of legitimacy or if it is, in itself, a source of legitimacy. If the observation is that there is a lack of fluidity in the relationship between legality and legitimacy, one must not fall into the trap of trying to establish an unambiguous link between nature and form. On the contrary, it is precisely in a multifaceted relationship which reveals itself in different ways that they are animated (in the sense of acquiring a soul) and embed themselves in the collective imagination in a political sense, in short, the process of the institutionalisation of power.

Legitimacy is not confined to legality

The discussions between colleagues from West Africa and colleagues from southern Africa revealed the differences which exist between the Francophone and Anglophone areas. In West Africa a wave of national conferences in the nineties allowed for a participative and inclusive process in the revision/elaboration of constitutional texts. But was that sufficient to infuse the constitutional process with an endogenous character accompanied by political liberation, as happened in the case of southern Africa as a result of national liberation movements? Participants from West Africa explained that in their region their constitutions retained vestiges of imitation and their national constitutions still had an imported character. The question of how taking into account normative pluralism could go beyond simple legalisation of different normative systems and different sources of law was thereby placed at the heart of the colloquium. How can constitutions (and, more globally, legality) reflect the pluralism of the societies that they are supposed to organise? On this point, participants suggested, the process involved in the revision of constitutions was just as important as in their creation, in taking normative pluralism into account. In this respect, too, Francophone and Anglophone participants shared the same concern with regard to reaching the same diagnosis based on different symptoms. The tendency of the executive to carry out unilateral changes to its constitution in West Africa was noted. For southern Africa, the erosion of the boundaries between the parties formed by ex liberation movements and the State is having a direct impact on constitutionalism. The procedures and instruments which

constitutions provided for the control of government and guaranteeing the separation of powers ought to be respected. Citizens should be able to play a role in this constitutional control. Professor André Mbata Mangu reminded participants that constitutional legitimacy could only survive with the support of practice and the nourishment of respect for revisionary procedures.

It would appear, therefore, that reducing the gulf between legality and legitimacy, especially by encouraging constructive interaction, is a precondition for the effectiveness and efficacy of public governance in a country. This had already been one of the conclusions of the Bamako Colloquium. Polokwane provided the opportunity to better understand what is at stake as well as the factors at play and the links between these two dimensions of the same object: political power. Understanding these interactions is the key to enhancing them, and not to do so is to run the risk of the kind of political crisis with which we are all too familiar. It is also to pit the past against the present; like all societies, Africa does not have a choice "between tradition and modernity". Enriched by history and practice, all societies, if they are not to implode, engage in a creative process rooted in their history, their dynamics, and their relations with other societies. Neither the challenges nor the solutions are preordained. They are not, furthermore, always clear; on the contrary, they are characterised by complexity and movement, especially because in a globalized world interactions are accelerating and multiplying. Reality refuses to allow any tendency to approach his complexity in a simplistic way. It obliges us not to reduce everything to its constituent parts (tradition, religion, international law etc), but also not to analyse it as the sum of its parts (tradition + modernity + etc). The effective regulations that a society can deploy to respond to the challenges it faces are designed precisely in the process of hybridisation and intermixing.

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We hope that the structure and content of the proceedings of the colloquium are as faithful as possible to what passed (analyses of sources of legitimacy of power, interaction between the different sources, collective land management). The proceedings are supplemented by

annexes which go further into some issues (the African context of governance, land management in South Africa, the thematic group on constitutions), and complemented by two films made during the colloquium, one of 40 minutes and the other of 8 minutes.

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part one

Sources of Power Legitimacy

Synthesis of the Debate

Power legitimacy, is the result of a mixture of different type of legitimacy. To better understand the governance of one country (referring to the State and societies) it is thus important to identify the sources of legitimacy which are meaningful for people's beliefs about power and which participate to the making of society's shared value and imaginary. In this perspective, the first session of the colloquium aimed at better understanding three sources of power legitimacy, identified as being strongly anchored in the collective imaginary in Southern Africa, namely: liberation struggles, religion and tradition. These three sources of legitimacy have been subdivided into two for the colloquium: Liberation struggle being one and tradition and religion being grouped together. Indirectly it was linked to the fact that tradition and religion are, most of the time, classified under the same category of sources of legitimacy, that is to say, "beliefs". Nevertheless, the debates highlighted Liberation struggles movements are mostly defined by the values (sacrifices, freedom, etc.) they are carrying out in the collective imaginary so that they also somehow fit in the "beliefs" category. Categorizations of legitimacy sources are useful for analysis but reality shows everything is linked and most important are not the categories themselves but their interactions. Regarding the major role, within the sub-region, historically played by the liberation movements, they were the first source of power legitimacy dealt with by the participants.

Liberation movements

Political parties stemming from liberation movements rule four out of the five countries participating in the colloquium. This reveals a specificity of the sub-region, particularly with regards to the institutional framework and power ownership. Liberation movements are a

core historical and sociological phenomenon. "They played a seminal role in the emancipation from authoritarianism or colonial rule" (D. Darbon). It was thus clearly stated that liberation struggles movement and their leaders benefited from an unambiguous and massive support from the population thanks to that historical and political role.

The basis of liberation movements as a source of legitimacy: shared value of freedom, equity, etc.

Decades after liberation struggle, as mentioned by Assane Mbaye, legitimacy of political parties and leaders coming from liberation movement "result from the values inherited by the liberations movements. So the question is how can these values be perpetuated beyond the persons and leaders that brought them?" Furthermore, are these values still founding the legitimacy of the liberation movements and their leaders? In his intervention, Reverend Ngeno Nakamhela describes the partaken experiences in such social movements as an important means of creating shared values: "liberation movements [were] mostly fuelled by [the] aspiration of people". "The leaders of liberation movement risked their life together, among other people, [which created a] sense of solidarity". In Mozambique and Namibia, moreover, references to liberation movements are even embedded in their/the constitution. As Professor André Mbata Mangu pointed out, an article of the Mozambican constitution refers to this 'sacrifice' of liberation fighters. The constitution « even explain[s] that the red colour of the flag represents the blood of those who fought. (…) [it] defines the rights of the descendants of those who died for the cause". In Namibia, there was an amendment, implicitly reminding the context of the struggle. Post-liberation leaders often feel this sacrifice has given them "the right to govern". Two striking examples from Namibia and Zimbabwe were presented. Mutandiri Munjodzi, from Zimbabwe, corroborated that: "The nation is rallied on by a cry of "we liberated you". (..) There is an attempt […] to shape gods and heroes who cannot be challenged because of the sacrifices they made towards the liberation of the country. Furthermore they strongly supported the principles of democracy and contiguity to the spreading of values of individual freedom, equality and human dignity. Those movements, members, and leaders which

took an active part in the liberation struggle rightly draw a considerable amount of respect and popularity they duly deserved".

Are liberation movements, and political parties stemming from them, the same sources of legitimacy? The liberation movement, as a source of legitimacy, is increasingly challenged by the reality of the exercise of political power. Statements were done on their difficulties to transform themselves into political parties and on their tendency to *de facto* become "state parties". There is a strong disappointment in the affirmation of these values within political parties stemming from liberation movements and their translation into public policies. Paul Hoffman talked about "hijacking [of power] by a liberation movement elite." This is a step too far for Roger Southall, who warned for the "danger to confuse the regime established by the current elite with the type of oppression that existed before". Participants agreed however that the transformation from liberation movements to democratic political parties has not been achieved, wondering "where we are going?" since "they failed to go beyond independence" when they "inherited the state, [while] they have no skills to run the state", noticed the participants. Simon Kobedi pointed out the urgent need for counter-powers. In practice, "people's power" and their participation in the political process are undermined to varying extents in the different countries.

These discussions drove the participants to remind that legitimacy is a pragmatic and dynamic process. As synthesized by Professor Dominique Darbon, at this point the debates insisted on the fact that a particular legitimacy does not last forever. "It is based upon mere beliefs and representations. These beliefs and representations make people accept or reject a power". If the gap between the values basing a specific source of legitimacy and the reality is too big, the legitimacy of the political power is compromised. The debates showed a real concern about the state parties and the liberations movements. The question, whether participation in the liberation struggle guarantees, its leaders and movements who fought it, a lifelong right to rule a country and a society, was asked by the participants. A clear answer was given: History cannot buy out political power. Once the struggle is over and the goal of liberation is achieved, liberation movements become ordinary social and political organisations, which, as such, must obey to the common rule of law they contributed to lay down. Leaders and

organisations actively engaged in the liberation struggle played a major role in bringing into being a new and more equal and fair political and constitutional order. Once this new order is established and entrenched in a constitution, as for any other organisation, they must abide by it. They can neither enjoy special political benefits nor demand a right to power. Nevertheless, liberation movements and leaders are still meaningful for people's beliefs about power, even if more and more people discuss the idea that the "holy story" of liberation is still a driver of political legitimacy. But on what is it based on?

During election campaigns, politicians refer to their role in 'the struggle', but when time passes, the amount of people having experienced the struggle decreases. More than that, as Roger Southall reminded us "concerns [of people] have evolved". Mundjozi Mutandiri confirmed this when he explained that development issues are more and more replacing the liberation's one. Are political leaders able to renew or reinvent their discourse and legitimacy base? There is a risk that the dominant party gains exclusive ownership of the ideals of the struggle and political opponents are being accused of not being loyal to those ideals. As explained by Nozipho Kwenaite: "Liberation movement have appropriated the space to speak for everyone. [...] They do not allow criticisms outside of the movement". "People are vilipended if they don't belong to the liberation movement". On her part, Pauline Dempers refers to the "risk of having a system trying to survive on the legitimacy that carried it to power". Reverend Ngeno Nakamhela also mentioned: "a risk of holding a new generation hostage of the liberation area (...) [while] loyalty to freedom fighters is not their motivation, they want a secure life." For Roger Southall "it is important to challenge the monopoly of legitimacy" of liberation movements. He confirmed: "we often talk about liberation movements as a political religion, (..) [the] ANC [is] often seen as a broad Church. "Liberation movements have to be secularized, and desanctified". Here the religious grammar is rewriting the holy story of Liberation movement. In any case, beyond the historical heritage of liberation struggles, Southern Africa's political legitimacy is also rooted in longer-term sources, religion and tradition being identified as the most frequently observed in the region.

1. Religion

Religion is currently a major source of power legitimacy in Africa as a whole and in Southern Africa in particular. Religion has also played a major role during the liberation struggle both to delegitimate the apartheid power and to mobilise and organise civil society organisations. Experiences in nearby countries (Mozambique, Zimbabwe, Namibia) but also all over African countries confirm this status. During the debates, religions were said to be a major asset to legitimate the power but also to provide basis to contest a power if it no longer act in conformity with the values it promotes.

1.1   Religion as a positive factor to increase political legitimacy: uses and abuses

For reverend Ngeno Nakamhela, in the years of the struggle against minority rule, liberation and religious movements were coherent with their message. Churches were highly politicised and were an important support for the liberation movement. Reverend Ngeno Nakamhela explained the positive role they played in creating social cohesion by providing a value base, shared by the entire population. He further added: "what counts is not the institutional ritual but how it establishes a face-to-face dialogue. The legitimacy of the religious leader derives from his actual role in the community more than any religious institution". For him there is continuity between the positive role churches played in the past and can play in current day politics, but he is critical about the way religion is used for political goals and the limited political space for religious leaders.

During the debates it was stated that this source of legitimacy might as well act against a constitutional and democratic political power be it through extremist religious position (mix of religion and politics can be terrible and lead to fundamentalism) or religion instrumentalisation. These are indeed less positive effects of linking religion and politics. While Europe has secularised over the last century, an inverse trend is observable in Southern Africa. What are the implications of the formal and informal links between religion and the political sphere? Taking the case of liberation movements, R. Southall explained, that

"liberation movements talk about themselves in religious terms, they are secular only formally". "They have historical missions", for that reason "they claim the right to rule". They are "charismatic leaders" as it is "widely used by journalists". Charisma as defined by Weber is the gift of grace; "the leaders are very close to God"; they call themselves "Father of the nation". "Mixed governments" as "a combination of religious and political […] is dangerous" as it can lead to fundamentalism. Camille Kuyu responds that "Many politicians try to instrumentalise religious movements in order to strengthen their own legitimacy". He sees this as a negative trend. This is the case of liberation movement as it was discussed in the first part of this session. Roger Southall insisted on the fact that "secularisation is not deeply rooted" and there is "tension between religion and political parties stemming from liberation movements" as there is between the church and the state".

1.2 Religion as a substitute for the state, to satisfy people's expectations and needs.

The broad word of religion gathers a wide range of different faiths, denominations and understandings that may contribute to social and political unrest, and to conflicts among citizens. In the discussion, participants shared analyses of the increasing importance of new religious (Christian) movements in Southern Africa. Different voices agreed that the increasing popularity of new religious movements and religious leaders can be explained as better corresponding to the needs of the population. They provide new spaces for values and social norms creation where the state is lacking. Religious institutions are subject to recent competition from new religious movements. Camille Kuyu explained that "in Congo, the religions that possess authority are not the institutionalized religions (main monotheisms) which are rejected by the population. (…) New religious movements like Pentecotism have real positions of power. They provide space for the emergence of new forms of sociability and they produce norms. As such, they are very important for rebuilding Congo". "People find in these religious environments solutions to their problems (social, health etc.)". "The pastor represents a popular authority, more than a simple authority based on the institutional ritual". While particularly popular in the

Democratic Republic of Congo, new religious movements were also visible in the vicinity of the colloquium venue. Limpopo is home to the headquarters of the Zion Christ Church, the largest African initiated Church in Southern Africa and a place of yearly pilgrimage for thousands of believers. Roger Southall's assumption was that religions are more popular than constitutions because they better satisfy people's needs than the state.

2. Tradition

Tradition, more precisely tradition and modernity, was a core issue analysed during the colloquium of Bamako-Mali (2007). Tradition was thus identified as a major source of legitimacy being a strong driver of shared value and imaginary making. As reminded by Professor Dominique Darbon, the notion of tradition refers to a complex range of potentially widely different types of beliefs, social and political organisations.

2.1 The basis of tradition as a source of legitimacy

In the Colloquium, Chief Lerotholi from Lesotho explicitly asked to be called Morena instead of "chief". By insisting on using a term from an African language rather than the English "chief", used under colonisation and apartheid, he brought the sociological context of traditional leadership to attention. He started his presentation with a strong: "I'm the chief because I'm the first son of my father" and "we are here because the people want us to be here ..." its legitimacy is thus unquestionable since it has it source in the people. He later continued with: "The day the people no longer want me to be there, I will be gone". He also explained Chiefs live "among" the people, they rule, carry out value of collectivism ("I am not another from my people") and their role in building unity ("animals and land belong to the chief, what belongs to the chief belong to the people").

In Southern Africa the role of traditions and traditional leaders and organisations were stressed not only by traditional leaders themselves but by other participants as well, underlying both their inclusion within

the institutional organisation, their role among the society and the importance of the traditional regulation in these societies. Traditions appear to be an asset on which traditional leaders can build a social role, contribute to the ruling to parts of the society, and participate in the shaping of public policies through their own organisations and capacity of lobby. They are meaningful for a considerable amount of the population particularly in rural areas and at local level and have been given by law a number of powers regarding the particular social group they are involved with.

Although Chiefs are partly integrated in the modern legal system, Roger Southall pointed out that "there is a tension between constitutionalism and the African traditional authority". These tensions can be distilled from Morena Lerotholi's expressed dissatisfaction with the limitation of his power under the constitution. He argued that: "Chiefs should directly have a seat in the Senate and not be elected". He followed up earlier comments with "Chiefs should be allowed to arrest the ones who commit crimes, without a mandate. Preventing that system obliges the government to hire more policemen and not to rely on chiefs for judiciary matters".

Manene Tabane builds on another domain of tension, previously touched upon by Morena Lerotholi: the confrontation between moral traditional values and the rules and rights ensured by the constitution. The principle of equality, at the basis of a "one man, one vote" system, is in contradiction with societies where rights and responsibilities follow hierarchical patterns. This becomes clear in Morena Lerotholi's claim that: "Chiefs will not want to submit themselves to the election process". Other issues of contention between traditional and constitutional values are laws regulating women's, children's and gay's rights. In cases of a contradiction between constitutional and traditional values, the constitution overrules other norm-making mechanisms. The legitimacy of the constitution comes to question however (see next chapter).

<p style="text-align:center">****</p>

Liberation movements, tradition and religion are thus three important sources of legitimacy affecting both society's imaginary and

practice of power. They are coexisting through competing, completing, mixing or hybridization interactions. These diverse sources of legitimacy are present in any people and this, in various proportions, depending on its status (gender, family, social and professional situation, etc.) and the way it will be used to satisfy material or symbolic expectations. On the other side, the power, to be legitimate, has to take into account these different types of legitimacy and furthermore to reflect them. The following other two sessions of the colloquium were precisely dedicated on such analysis with a special focus on Constitutions (which are also a source of legitimacy) and Land management.

Legitimacy and Legality of Liberation Movements In Southern Africa

By Pauline Dempers
Breaking the Wall of Silence-Namibia

The content of my paper is informed by my own experience, and some books that I read in my life time. I had an opportunity to listen to some scholars like Prof. Henning Melber, Dr. Diescho, and Prof. Du Pisani, etc.

I believe in change and agree that change is inevitable. I trust that the contributions made today and during the deliberations will add value and will stimulate debate around these questions. The world is structured in a way that conditions and limits peoples minds. And I may be speaking outside the boundaries or overstepping some boundaries but I want us to ask questions by starting from the beginning.

The legitimacy and legality of liberation movements must be questioned from the beginning. It is also important to understand the purpose and the principle upon which liberation struggles were waged and why liberation movements existed. It is important to further inter-rogate the purpose for which governments are formed and perhaps go back to ancient history and the lives of humans before governments were formed.

1. Start from the beginning

Foreign domination and colonization gave rise to the liberation movements and it was a just cause for self-determination and asserting the rights of the legitimate inhabitants of these colonized territories. All Southern African countries are free and declared as independent and claim to be democratic or practicing participatory democracy and multi-party systems. One of the yardsticks that democratization and legitimacy are measured with are elections. The question that comes to my mind is whether elections produce legitimate governments.

The legitimacy of governments is based on being democratically elected representatives of the majority of the people. Again, the question is, what constitutes the majority? Is it merely the number of people who participate in elections? If so, is it a fair process of measuring and practicing democracy? It is for this reason that the notion of democracy remains contested territory in the region.

The social transformation in Southern Africa can best be characterized as a transition from controlled change to change of control, (power from the white hand to the black hand with no intention of change). The result is a new ruling political elite operating from commanding heights, whose foundations rest upon selective narratives and memories of the liberation. These create a self-invented tradition to establish an exclusive post-colonial legitimacy under the sole authority of one particular agency of social forces (Kriger 1995, Weber 1998 and Melber 2002). The mystification of the liberators plays an essential role in these fabrications.

As I mentioned earlier, let us further interrogate legitimacy by starting from the beginning. The peace agreement of 1992 in Mozambique brought an end to almost two decades of very bloody civil war. However, Mozambican authorities did not develop any specific policy to deal with abuses and crimes that had been perpetrated during the civil war. Instead, victims of these abuses were urged to forgive and forget the past in the name of peace building and national reconciliation. The question remains, to what extent did it help Mozambique to come to terms with the past? I had the opportunity to visit the Sofala Province with the ex-combatants conference in 2005. I was told that

some RENAMO supporters are still in the bush and have decided to stay there. Can the concept of forgive and forget work?

Neither did Namibia, my country of birth, put a policy in place to deal with atrocities committed during the liberation struggle. The voices of survivors of atrocities committed are suppressed and are often threatened by saying that 'we still have the Bazookas', labelled as imperialists, or people who are fostering and embracing imperialist ideals, or are referred to as 'forces of the dark disturbing the hard won peace in the country'. Where does that leave the survivors, and more so Namibians that may not necessarily subscribe to SWAPO, when it claims to be the sole liberator and therefore the legitimate governor of the country? Can this notion help to develop a credible multi-party system?

If majority rule is based on numbers and accepted as such, is the yardstick that we use to measure participation and democracy sophisticated enough? Does the name "liberation movement" guarantee a lifelong license to rule? Namibia has gone to the length of declaring the first president of the republic of Namibia as the founding father, a practice that is common in Africa. My concern is not that it is a practice by Africans, but with the implications it has on a nation. According to the world's most trusted dictionary, the English Oxford dictionary, a founder is a person who founds an institution or settlement. Tell me, where does that leave the forefathers and mothers who resisted German colonial rule? Simply, where does it leave the rest of Namibians who participated in the liberation struggle? If it is in honour of the contributions and sacrifices made towards the liberation struggle and independence of the country, why does it single out one individual?

Zimbabwe is not different or better from Namibia as far as human rights abuses are concerned. Matabeleland and recent developments are a testimony to that. The Zimbabwean situation reminds me of the "Hitler policies" that were designed to improve the lives of the Germans, whereby the businesses owned by Jewish people were closed down and Germans were promised that Hitler would take the land and give it to Germans. These policies brought more misery not only to the Germans, but to the world. The hold that ZANU-PF has is the politics of former times, that ZANU-PF had driven the British out of Zimbabwe and that MDC will bring the British back. In a similar situation in

Namibia, SWAPO had forced the "Kaspirs"[1] out of Namibia and they were the only ones capable of keeping the "Apartheid system" outside the boundaries of Namibia. Did the liberation movements transform politics or is it a reverse oppression whereby the benefits are enjoyed by few powerful people? What does the future hold in such systems?

2. The role played by external actors

It is important to realize and understand the role played by external forces when we talk about the legitimacy and legality of liberation movements. I would like to refer to Namibia as an example. The role played by the United Nations: A peace plan was designed to end the Apartheid rule in Namibia in 1978. It was finally adopted as the UN Security Council Resolution 435 of 1978, which formed the basis for the peaceful solution of the conflict. The implementation of this plan was delayed, mainly due to South Africa's intransigence, as well as the political myopia of the SWAPO's leadership abroad.

It is important to state that South Africa has always had a two-pronged strategy on Namibia. While agreeing to go along with the peaceful negotiation for Namibia's independence, it was simultaneously devising neo-colonial political institutions for the country. One example of this is the Turnhalle Alliance in 1978. South Africa tried to give it a semblance of legitimacy by bringing the Alliance to power through elections. However, internal opposition and the international community's refusal to recognize these institutions frustrated South Africa's efforts.

In the 1960s SWAPO was recognized, alongside other national liberation movements in Southern Africa, by the Organization of African Unity (OAU). This was followed by the UN's recognition of 1973, which selected SWAPO as the "sole and authentic representative of the Namibian people" (Report to the Namibian People – Historical Account of the SWAPO Spy-drama 1979 by SWAPO ex-detainees). The legitimacy and recognition pronounced by the UN make it extremely difficult for other revolutionary organized groups to grow and to

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(1) Kaspirs are heavy armored vehicles used during the liberation war by South African Apartheid Regime that was also used to destroy the agriculture fields of the masses.

meaningfully contribute to the liberation struggle. It has given SWAPO leverage above the rest over the Namibian people.

Again, the recent publication of Cedric Thornberry in 2004, entitled: "A Nation is born" reveals the political deal between SWAPO and the UN at the expense of Namibians. My personal experience with the UNHCR confirms that indeed there were politically motivated deals, at the expense of the people, which entrench and endorse the claim of legitimacy. The UN representative said to us in a meeting shortly after our release from the dungeons that " we have come this far with SWAPO and cannot part from SWAPO". This was a very oppressive and disappointing statement coming from the institutions we thought would protect our rights as survivors and victims.

The question now, as we go back to the beginning, is, given their track record of human rights violations, did SWAPO warrant being recognized as a legitimate ruling party in independent Namibia? If it is a compromise for the implementation of resolution 435, how does it help today's Namibia? What are the future implications with unresolved conflicts of the past, the growing strength of SWAPO in the face of poverty, the growing political elite, and self-enrichment schemes by the powerful?

The most striking phenomenon in terms of political development since independence is the constant gain and consolidation of political power and control by the former liberation movement. From election to election during the first fifteen years, it managed to add further strength to its dominant role. SWAPO had originally failed to obtain the hoped for two-thirds majority vote in the elections for the Constituent Assembly in November 1989. At the national elections in December 1994, SWAPO obtained almost the same number of votes as in 1989, while the total number of votes dropped significantly.

As a result the party obtained sole control over the law-making process through a two-thirds majority in parliament. It has maintained and consolidated its two-thirds majority during the decade since then. This can be described as a tendency towards a dominant one party state under increasingly autocratic rule. For du Toit (1996, p.59), SWAPO is an electorally dominant party. Not surprisingly, no meaningful opposition party could firmly establish itself as a relevant political counter-

weight to be considered as a serous challenge to the political hegemony of the former liberation movement. (Henning Melber 2007).

Based on its reputation as the liberating force and in the absence of serious political alternatives, SWAPO managed to entrench firm political dominance by means of obtaining a continuously higher proportion of votes in a largely legitimate way. The far-reaching mandate encouraged the perception that the government is supposed to serve the party and that the state is the property of the government (Melber 2006).

Critical voices are labelled as unpatriotic elements. Loyalty to Namibia is equated with loyalty to SWAPO. A culture of silence has since then become a constitutive part of Namibia's political realities.

3. Purpose of Governments

Looking at the realities of liberation movements and their transition, transformation or justification of legitimacy, it is important that we pause a bit and look at the purpose of having a government in a given society.

Government is said to be an organization which is a governing authority of a political unit. It is an apparatus through which a governing body functions and exercises authority. Again, if one looks at the origin of the government, as explained by David Christian, it says: for many thousand of years, humans lived in small, relatively non-hierarchical and mostly self-sufficient communities. However, the human ability to precisely communicate abstract, learned information allowed humans to become more efficient, and that allowed for ever increasing population densities. More knowledge has become the basis of power. David Christian explains how this resulted in states with laws and governments.

4. Fundamental purpose of Governments

Is the maintenance of basic security and public order. The philosopher Thomas Hobbes argues that people, as rational animals, saw submission to a sovereign government as preferable to anarchy. People

in a community create and submit to government for the purpose of establishing for themselves safety and public order.

On the other hand, governments' involvement in a national economy has more than just a purpose of stabilizing it for the benefit of the people. Often members of the government design economic policies for their own benefit.

5. Support for democracy

Democratic government can be seen as the entity for a sovereign people to establish the type of society, laws and national objectives that are desired collectively. A government so created and maintained will tend to be quite friendly toward those who created it and maintain it.

In recent times, arguments have moved from state security to human security. It is an attempt to provide a more holistic and comprehensive approach to the world's challenges, and its implementation relies heavily on the will of governments to adopt the appropriate agenda and policies.

Governments can be friends and sometimes enemies of their own people. It exalts some of us and oppresses others. In the region we talk about participatory democracy and representative democracy.

Participatory democracy

Places emphasis on broad participation and strive to create opportunities for all members of a political group to make meaningful contributions to decision making and seeks to broaden the range of people who access such an opportunity.

Some scholars argue for refocusing the term participatory democracy on community-based activity within the domain of civil society, based on the belief that a strong non-governmental public sphere is a precondition for the emergence of a strong liberal democracy. The scholars tend to stress the value of a separation between the realm of civil society and the formal political realm.

Representative democracy

Is a form of government founded on the principle of the people's representatives elected to represent the people and act on their behalf (Victorian electronic democracy glossary July 28, 2005).

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Mass spontaneous action has more often than not been appropriated by political organizations for their own credit. It is true that political organizations have at times come in at later stages to give direction to such mass actions. This should not be construed to mean that such spontaneous action was not the initiative of the mass of our people but of some "super brains" in the political organizations. This misinterpretation of historical events not only twists facts but also amounts to theft of history.

As long as the instruments and institutions designed to promote and protect the rights of people are designed in a way that suppresses the people, as long as the systems are designed on political understandings that undermine the basic rights of the ordinary people, and as long as the processes of accountability are designed to be voluntary, (e.g. Africa Peer Review Mechanism APRM), the region will continue to have controversies over power and confusion will continue for the remainder of human history.

I would like to leave you with a quote from Dag Hammerskoljd, second Secretary General of the UN and a Swedish diplomat, "It's when all play safe that we create a world of utmost insecurity". May his legacy live on.

Liberation Heritage
A challenge to Democracy?

By Mundjozi Mutandiri
National Constitutional Assembly-Zimbabwe

In 1994 the door of colonialism was closed in Africa by the dismantling of the South African apartheid regime and the coming into power of a democratically elected government recognized by international law. Those liberation movements had completed a necessary step to national sovereignty and democratic rule. We say it was a necessary step, since there could be no democracy under colonialism. The nature of colonialism itself was one characterized by subjugation, oppression, racial discrimination and injustice. So by its very nature no such state under these conditions could move towards democracy. So, with the overthrow of such colonial regimes, the challenge for these liberation movements was that of a social transformation from a military structure to a social civic structure. As with their counterparts in North Africa, the challenge faced by these liberation movements was to transform themselves into political parties. Political parties with a capacity to run state institutions, political parties militarily organised with a challenge to reorganize themselves into civic political parties-social movements.

In laying the constants for critically analyzing liberation struggle heritage as a source of legitimacy of power for liberation movements in Southern Africa, it is crucial that we state here that the main goal of the liberation struggle was de-racialisation and the right to self-determination. Franz Fanon in his manifesto 'The Wretched of the Earth'[1], captures this phenomenon quite well; "they mobilize people

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(1) Fanon, F.*The Wretched of the Earth* Presence Africaine. 1963 (Trans. Philcox,R.).

with slogans of independence and for the rest leave it to future events. When they are asked about the economic program of the state, they are clamouring for the nature of the regime they propose to install, they are incapable of replying precisely because they are completely ignorant of the economy of their own country. This economy has always developed outside the limits of their knowledge."

Due to the euphoria of independence the people do not look at what the future holds. That excitement blinds all, the ideals of the liberation struggles clearly articulated in political party manifestos (usually done by an individual who was in exile during the struggle), do not have a vehicle to make them become a reality. The liberation heroes, understandably, assert that what is of importance at this moment is the attainment of state power. What happens thereafter can always be taken care of.

This in the context of the southern Africa region brings us to what Franz Fanon referred to as "an underdeveloped bourgeoisie taking state power". The worrying thing is that these "elites" are 'schemers and net-workers", neither industrialists nor financiers. They do not have an idea on the day of assuming power of where they will take the country to economically.

It is important to see that the independence celebrations are marked by 'we are equal' remarks. The nation is rallied by a cry of "we liberated you". It is our belief that what ever happens at this early stage of nationhood has greater significance to the future of the country. Usually, there is an attempt at this early stage to shape gods and heroes who cannot be challenged because of the sacrifices they made for the liberation of the country. These stages appear to be the stage where the source of legitimacy of power is laid. This prototype can be followed in many of the countries in the region.

1. First few years of independence, inheriting the state

A historical background to the first few years of the exercise of state power by liberation movements at this stage would help us understand the building of a hegemony which will protect power but which will eventually crumble as people realise that they are not at all inde-

pendent. One analyst once said that liberation without democracy and freedom is not liberation at all.

Suffice to say that it should be noted that liberation movements, having adopted military structures to address the social justice question, have the challenge of re-constituting themselves into social movements once more. At this juncture the movement inherits a state for which they do not command a base. Thus the challenge here is to consolidate grass roots support. In consolidating that base they have to make use of their military structures since at this point there has been no transformation. In using the military structures to consolidate the base they obviously use violent means. This explains why we have witnessed state-sanctioned violence in the years following independence in most countries. In Zimbabwe for example we had the Youth Brigade unleashing violence, the 5th Brigade massacres in Matebeleleland and the Midlands Province. All these acts were meant to consolidate the party's support base. In South Africa, we witnessed the train bombings and other forms of violence, which have remained innate today in the South African society.

Like what has been seen in other parts of the continent after the attainment of power, the first and immediate challenge facing the new governments is which ideology to adopt in order to address the social justice questions. For the southern region of Africa many of the liberation movements assumed socialism, communism and what others have termed social democratic ideology. In Zimbabwe for example it was communism with an emphasis on improving services like education, hospitals and other essential services with very little emphasis on industrialization.

These "schemers and net-workers" took up all the business deals and they demanded nationalization of many of the industries not for national gains, but personal gains. Nationalism to most of the comrades in the liberation movements meant black ownership- taking over those advantages that were in the hands of the colonial elites and putting them in the hands of the natives. The elite comrades now move to Sandton and Borrowdale suburbs with the elites of the colonial regime.

The perception of politics in these new political parties is clear testimony of their shortsighted lack of democratic awareness and forms

of neo-patrimonial systems. In these early stages, early signs of intolerance of diverging views are clearly seen. Any voices of dissent are taken to be those of enemies.. Political opposition in reality is thwarted, in this case only South Africa can be exonerated. In Zimbabwe, history will tell us that ZAPU was ruthlessly dealt with. This culminated in the Gukuruhandi massacres of 1983-1987. The government of national unity that had been adopted was quickly aborted with the dropping of Josiah Chinamano and Joshua Nkomo from that new government.

There is a clear indication that the "nationalist" at this moment does not entertain any opposition. For example, in Zambia and Zimbabwe a one state policy was adopted after independence. The arguments put forward to justify these are interesting. Mugabe argued that "we are one people - why should we have many political parties, why should we be divided unnecessarily?". This we believe is a pointer to the understanding of democracy by these liberators. To them, colonialism is past, everybody else has completed his task, the militant "war veterans" should now fall back into the ordinary citizenry; they have completed their task. They are only called on for functions like independence celebrations, to remind people that the leadership is still popular and commands a lot of grass root support.

At these early stages of independence there are clear tendencies to autocratic rule and politically motivated social and material favours. The politicians' proclivity for self-enrichment with the help of a sinecure-capitalism goes with the exercise of complete control to secure the continuance of their rule. Accordingly, the term 'national interest' means solely what they say it means. Based on the political leaders' discernment, individuals and groups are allowed to participate in, or are excluded from, national issues. Such selective mechanisms of the exercise and retention of power have little or nothing to do with democratic principles, but are entrenchment of power.

The new governments are characterized by personalised power- there is a tendency to build the party around an individual, (in Zimbabwe it was Robert Mugabe, in Namibia Sam Nujoma, in Mozambique Joachim Chissano and the list is endless), given the lack of institutionalised good governance and democracy, centralised command and control structures. This is true in most of these countries where the president becomes the head of every national institution,

the chancellor of all state universities, the commander in chief of the army, to name just a few. All these factors were detrimental to internal political stability as has/is being witnessed in Zimbabwe, Zambia, and Malawi.

It should be noted that at this crucial stage of building a working democracy, organisations that are supposed to stand as vanguards of such are so excited that they abandon their role of being watch dogs. The independence euphoria engulfs every one. The popularity of the liberation movements is so charming that the party forms alliance partnerships with labour movements and students. Civic society is not critical of the government at this stage. Justifiably the position is so because every one is hopeful that their independence can and will be realised in its fullness one day. There seems at this stage to be an unwritten consensus that the movement needs time. There is a call for patience. As seen ten to twenty years after independence, voices of discontent become louder. The alliance partners start to treat their comrades with suspicion, students start demanding better facilities, demonstrations against government policies become common. Worth noting is that at this time the government has borrowed to the extent that they can not borrow any more, they have mortgaged most of their resources and those from whom have been borrowed, (IMF, World Bank) are now demanding their money back.

2. Transition from military organisations to social political parties

We highlighted before the challenges faced by liberation movements. Key was the transformation from military movement to a social movement. With the violent pre independence structures, how discipline will be instilled in the party without threatening the fabric of the party is an issue of concern. Internal political bickering /struggles threaten the incumbent who has to resort to military means of controlling the party. The incumbent forms a working relationship with the army and other security forces. The uniformed forces chiefs form part of the top brass of the party; they now have access to business deals under 'black empowerment'. Preserving the party is the same as protecting the state at this point because there is no clear distinction

between the two. Interestingly, at this stage, no one seems to be concerned about these abuses of state institutions. Uniformed forces chiefs and senior civil servants fail to differentiate the party from government and from the state. Party slogans are nothing surprising at a state function. Leadership renewal questions start to arise with no one seeming to be able to lead the party except the incumbent, who has the support of the military. Jostling for power threatens to destabilize the party. This, coupled with the consolidation process that we highlighted earlier on, will at one stage come to hound the movement.

It should also be noted that corruption at this stage is rampant within the structures of the party and the state. Party bosses who happen to be senior civil servants abuse their privileges, they start looting state coffers, not for starting industries or any other businesses. The loot is consumed in women and beer. In South Africa we had the tip of the iceberg in the arms cache, in Zimbabwe we had many scandals, but one that comes to mind quickly is the Willowgate Scandal. Every other country has had their experience with high-level corruption at the highest level of the state.

At these early stages we believe that the strategists of the movements start to see that their hegemony can be challenged. There is no solution to the problems that will be rocking the party and the state. That is the time one starts hearing of constitutional amendments to increase the term of the state president. It's important to note that usually party constitutions of these movements do not have term limits.

3. Liberation heritage-key campaign message

As is being seen in most African countries and specifically Zimbabwe in southern Africa, the hegemony built in the initial phases of independence will start to wear off as the masses start to see that their hopes are mere dreams. Due to the fact that these comrades who inherited the state were economically powerless, consequently they failed to grow the economy as expected by the masses. Now unemployment is rampant, and service delivery and other social questions are not dealt with to the satisfaction of the population. The state is now characterized by high inflation rates, infrastructure deterioration, and a high cost of living.

The first signs of trouble are now clearly there for all to see. Things are beginning to fall apart. The movement changes language. The pre-independence traitors, enemies, and imperialists are back. The government tries to portray that it is under attack from enemies of real black empowerment.

This prompts an outcry from the labour movements, students and the general population, who start expressing their displeasure at the way the country is progressing. Past mistakes of the movement are now brought to the fore. Economic policies implemented in the past are now questioned at a much more public level. It is at this stage that civic society, labour movements and other groups re-organise and start asking hard questions of the regime. Accountability and transparency are demanded like never before. Issues of public participation, respect for human rights, democratic values, and better living wages form the backbone of the rallying points of the labour movements and civic society. This language has slipped from the vocabulary of the ruling elites a long time back. The state is forced to react by imposing stringent measures to silence dissent.

Opposition political parties now gain support especially from the youth who are disgruntled. Elections start to be serious national events. There is now a genuine need by the electorate to participate in voting. Campaign rallies become serious events. The liberation movement develops a campaign message hitched to ideas of the liberation struggle. Opposition parties are labelled puppets and agents of re-colonisation. The campaign message zeroes in on reminding the masses how they were liberated. Very little is said about national development.

Disgruntlement among comrades who had vied to take over from the incumbent increases with each passing day. At this stage if they defect from the movement they are labelled traitors as well, notwithstanding their sacrifices during the liberation struggles. The army officials come in handy in buttressing the legacy of the liberation struggle. The masses are told that they owe their liberation to the movement and as such their loyalty should always be to the movement. Economic challenges are brushed aside as secondary, what is critical is to defend our" independence and sovereignty".

Liberation movements especially in the region have been quick to call for African solutions to African problems. But of particular

importance to note is how quick they are to discredit African comrades who dare to go against them. The Zimbabwean government, for example, has been at pains to castigate the Zambian President Levy Mwanawasa after his "sinking titanic" remarks. The African solution notion has brought about NEPAD. Its main goals are development and sustainability, but also with an emphasis on peace and security as well as the promotion of democratic values. There was a review mechanism (APRW) put in place to check if countries are moving towards realization of the NEPAD goals. It's interesting to note that only South Africa, Lesotho and Mozambique in the SADC region have voluntarily offered themselves to the review mechanism.

4. Prognosis for the future

Fanon argues that "the national government if it wants to be national ought to be governed by the people and for the people, for the outcasts and by the outcasts. No leader however valuable he may be can substitute himself for the popular will and the national government……" The challenge today is to improve society in favour of more justice, equality and humanity. The politics in southern Africa are beginning to shift. Campaigns therefore ought to be centred on such issues. The importance of the involvement of the very ordinary in national issues cannot be overemphasized.

We want to state that in our view the southern Africa region is at a decisive moment politically. The Zimbabwean crisis threatens to destabilize the region if not properly handled by the SADC leadership. In our view this is the first test of its kind: how long are liberation movements prepared to go on protecting other liberation movements even when they have become very unpopular in their respective countries?

The value of elections as a source of legitimacy is under intense test, especially for the region. Are elections there to endorse liberation movements remaining in power? If liberation movements lose an election are they willing to hand over power? The June 27 Presidential runoff in Zimbabwe provides us with the answers. How far has the region progressed in terms of attaining international norms of democracy? If an election is rigged, what will the region do? To us these questions

will play a big role in determining the direction that the region takes post June 27.

Coup plots are unknown in this part of the region and it remains to be seen if the region will accept such unorthodox means of attaining power. If they do not accept this, then what action are they ready to take? The future is not promising, with analysts already predicting the first coup of the region in Zimbabwe.

In our view there is but one source of legitimacy of power which should be pursued after liberation, the election. We believe that there has to be a people centred framework which espouses how such elections should be held in a manner that is free and fair. This can only be done through a people driven democratic constitution, a document which must reflect the history, aspirations and vision of the nation. Thus the biggest challenge in addressing the legitimacy question is to ensure that countries do not just have legal documents which are taken to be constitutions. There has to be legitimacy in the legality of such documents. This can only be achieved when people feel that they own the constitution and that such laws resonate with the morality of the society. Certainly such an election process should be based on developmental politics. What will it offer to the people? Thus the ability of political parties to empower people and to be able to sustain themselves independent of the state could also be an aid to source power legitimacy.

5. Recommendations

It is our underlying opinion that the empowerment of youth and women's organizations, and civic society, to be able to effectively carry out their duties of strengthening the citizen, is the means to addressing the power legitimacy question. This should include massive democracy and empowerment education to the ordinary citizens, schools and colleges among others. We also recommend that liberation movements be engaged in debates and programs concerning these issues. We are further recommending the empowerment of regional bodies such as SADC and AU to ensure that these bodies do not just become talking shops but that they have the capacity to address issues affecting member countries. We eagerly wait for a time when these regional bodies will

be in a position to demand explanations from member states as well as taking decisive action if a member state fails to abide by the principle of such bodies.

Constitutions: Coexistence, Acknowledgement or Hybridization of Different Sources of Legitimacy?

Synthesis of the Debate

> *"The elite that brought about the independence of our country were much more influenced by the western thinking, by the primacy of legality and the need to have constitutions in order to suppress what they saw as potential Pandora's box: factionalism caused by religion or tribalism. (…) Also this leadership came to the left wing or Marxist …. of liberation movement which downplay the role of religion and tradition in the so called new society they wanted to build therefore there is a lot emphasis on legality and constitution rather than recovering tradition and religion. Although, as it was pointed out in the workshop tradition and religion are important but they sort of like create a constitutional box".*
>
> *Miguel De Brito*
> *(Quoted from the Colloquium)*

It was the inclusive and endogenous nature of the constitutional processes prevalent in southern Africa, which, for participants of the symposium at Bamako, Mali (January 2007) marked out the sub-region as the obvious next staging point in their "African tour" of discussions and proposals on governance in Africa. These processes are renowned not only for being open and inclusive but also for their results: home-grown constitutions, which reflect the pluralism of the societies they frame.

This session, dedicated to an analysis of constitutions, reviewed the diversity of constitutions currently in existence in southern Africa, so as to gain an understanding of their own legitimacy and also their ability to encourage positive interaction between various co-existing sources of legitimacy within the societies they are charged with regulating.

How were these constitutions able to give expression to the diversity of authorities, and the wide variety of norms and values disseminated by the different sources of legitimacy of power, as touched upon in the first session? Continuing this frame of thought, the issue was raised as to whether constitutions are the source of these different legitimacies, or merely represent a medium for recognising them. How did these texts translate in practice? What prevented them in the main from being applied and respected by the relevant populations?

Building upon work carried out in the "thematic group on constitutions"[1], running alongside the "African Meeting process", the Polokwane symposium placed constitutions squarely at the centre of the debate. This session was particularly helpful in clarifying the wide range of notions and perceptions of the role national constitutions play within this sub-region, and, for purposes of comparison, within West Africa – indeed, this was the subject of lively exchanges between francophone participants (delegates from West Africa having participated in the Bamako symposium) and their English and Portuguese-speaking counterparts.

Two main lines emerged from this session: firstly, an affirmation that the constitution should be adhered to – on a consensual basis in principle – as a source of legitimacy of power; and secondly, an acknowledgement that this is clearly not happening in practice, which in turn calls for an analysis of the way in which constitutional legitimacy is rooted within society.

1. A relatively general adherence to the constitutional norm as a source of legitimacy of political power

The discussions and first-hand accounts, as well as the written contributions collated for this symposium, all make clear the crucial

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(1) This group came to be formed as a result of the November 2005 forum in Addis Abeba (jointly organised by the Commission of the African Union and the Alliance to Refound Governance in Africa), which included the formation of an inter-African research group on modes of governance in Africa as part of its action plan. The group is multidisciplinary and is open to university researchers but also to traditionalists. It formally came into being in West Africa at a 2008 workshop held in Lomé, which asked: "What options for constitutions in Africa?" The group aims to extend its reach across other regions of Africa. It defines its function as contributing to the continent's intellectual autonomy and its goal as contributing to the construction of constitutional models, which represent the reality of Africa, particularly as regards values and institutions. It is run by the Alliance to Refound Governance in Africa.

importance of the constitution-as-object, when seeking to understand southern Africa's political and social systems. Whilst the constitution guarantees a set of fundamental norms and a certain institutional structure, it also, more importantly, represents the existence of a consensus within southern African societies, which is grouped around shared values and aspirations. For a large number of the contributors to this symposium, the constitution is a virtual embodiment of the "social contract" upon which the countries within this sub-region are based, and as such, has been almost unanimously recognised over the course of these debates as the primary source of political legitimacy in the countries at issue here. Discussions on the reality and importance of regionalised reviews of constitutionality have illustrated its significance, particularly with respect to the rest of the African continent - indeed the debates between our southern African and West African colleagues were immensely productive from this perspective (see the write up of Assane Mbaye's contribution).

How can we understand the symbolic strength of the constitution-as-object, which a majority of this symposium's participants was at pains to stress?

• Numerous southern African countries perceive constitutions to be the result of inclusive, participatory and open processes, of which the 1993 Constitution of the Republic of South Africa is doubtless the finest example. As Paul Hoffman reminded us, it was the culmination of a process lasting nigh-on seven years, which gave voice to an enormous breadth of interests (two million people participated in its creation). According to him, this is why its legitimacy is now profoundly respected by the various actors within South African society, whether they be part of the population at large or even the political class. This symbolic strength associated with participatory and inclusive processes also existed in West Africa – as Assane Mbaye reminded us during his re-examination of the role of the "National Conferences" in drafting constitutions in West Africa after the wave of democratisation in the early nineties. Discussions showed, however, that this procedural legitimacy has been weakened and maybe even called into question once more by the various redrafting processes being utilised at present. In Senegal for example, most of the moves to redraft the constitution were initiated unilaterally by the executive.

• Southern Africa's post-liberation or post-apartheid attempts at drafting constitutions were set within a political context which was closely bound up with the national liberation movements – or, in the case of South Africa, with the struggle against apartheid. These movements and struggles loom large in the collective imagination as symbols of a re-appropriation of the population's own destiny and the advent of a political system, which was closer to peoples' aspirations. The existence of home-grown constitutions derived from national processes is thus a major source of legitimacy, in contrast to the experiences of many West African participants, who deplored the overly-"imported" nature of their region's national constitutions.

• Finally, the significant penetration of the "legal culture" into southern African countries also appears to be a crucial factor with regard to the legitimacy of the constitutions in their current form. And as Dominique Darbon reported, the extent to which legal norms predominate in the midst of such a wide range of local contexts is unmatched elsewhere in Africa. As Mr De Brito reminded us, legal normativity, particularly in its constitutional form, is also a way of warding off risks such as factionalism, whilst disrespect for human rights could stem from immoderate practices linked to diverse sources of legitimacy.

The exchange of opinions and experiences throughout the symposium has only served to confirm a strong attachment to the symbol of the constitution, as a transcendental source of legitimacy for political power in the sub-region. Nevertheless the passionate, almost ideological way in which certain participants have spoken about constitutionalism, as well as the anxieties expressed by a majority as to the actual effectiveness of the constitutional norm shows that there is a significant gap between the reality of an elite group and that of most of the population. The issue at the heart of constitutionalism has thus been laid bare: can we consider southern Africa as characterised by having constitutions which are not rooted within a culture of constitutionalism?

2. Constitutions without constitutionalism?

2.1 The existence of a text versus its actual implementation – a disconnect:

Over the course of the debates it became clear that the crux of the matter, in concrete terms, was how an acknowledged legitimacy for constitutions in theory connected with the reality of implementing what is currently a widely challenged constitutionalism in practice. Dr Hastings Winston Opinya Okoth-Ogendo's phrase: "constitution without constitutionalism", taken up by Professor André Mbata Mangu, designates the widening gulf between a founding symbol of post-liberation or post-apartheid societies, and the extent to which it has been implemented and respected.

Pauline Dempers' contribution on this subject was enlightening: "The issue today isn't whether constitutions exist or not, but whether they are put into practice by decision-makers". Governments themselves appear to be one of the prime instigators of these challenges to constitutional implementation in the majority of countries in the region. The weakening, not only of the judiciary's independence in favour of the executive, but more generally of the principle of the separation of powers, together with the blurring of the boundaries between a governing party, such as the ANC, and the state as a whole – all of this serves to undermine the ability of constitutions to govern and regulate the various branches of state. Mr Hoffman was thus moved to call for increased controls, notably on the part of actors within civil society, upon states themselves practising constitutionalism. The South African constitution provides judicial means for controlling government activity, but it is becoming more and more difficult to make use of these. This necessity for control, a point which André Mbata also returned to, takes us back to a fundamental principle: the legitimacy of the constitution-as-object is not an eternal given, but needs to be supported in practice, and constantly nurtured through transparent procedures for its revision and a strict respect for the principles emanating from it. The professor added that constitutional legitimacy was a "dynamic", "political" process, which could be harmed by applying constitutionalism in a certain way. This view was corroborated by

Assane Mbaye, who explained that it is precisely this weakness in the way in which constitutionalism is applied, which is greatly undermining constitutional legitimacy in West Africa: "Although the constitution should be used as a power-curbing tool, West African judges all too rarely interpret it in this way and are thus striking a blow at the usefulness and legitimacy of our constitutions." Senegal is an example here of just how frequently constitutions are being unilaterally amended by governments, with the aim of adapting a country's legal framework to suit electoral and political circumstances in the here and now.

2.2 An affirmed constitutional legality, but a constitutional legitimacy in need of reinforcement:

André Mbata Mangu re-examined in more general terms the population's understanding of and respect for the constitution. If the constitutional processes of certain countries – notably South Africa – were more open and inclusive than those in most other African countries, does this mean that the populations of those countries now adequately believe in and respect their constitutions, can identify with them sufficiently, and feel some proper sense of attachment to them? This line of interrogation largely reverts to that which Assane Mbaye proposed, the latter writing that: "This is a thorny issue, verging on the taboo - for if the constitution is not respected and if modern constitutionalism is not making its influence felt, could this not be due, in part, to the values which they disseminate and which form their basis?" Any legitimacy attributed to an entity of a norm is based upon the beliefs, perceptions and expectations of its subjects. By analysing these, we might succeed in measuring the assertion that the populations in this region unanimously adhere to constitutional norms in practice. Professor André Mbata Mangu used the example of Zimbabwe as a clear illustration of the dangers of a disconnect between the constitution and the people upon which it is based. The transition from the "colonial" constitution, which had been imposed by the British Empire, to a home-grown constitution is not sufficient in itself formally to establish its legitimacy. The polarisation of political life and of the application of power around the party-state is also a powerful medium for disconnecting constitutions and populations.

2.3   Increased sociological rootedness and improved constitutional practices:

The participants analysed the causes and processes at the root of this discrepancy between the symbolic force accorded to constitutions and what happens in practice. This led to their identifying various courses of action, which could help strengthen the adherence of the population to constitutional norms:

Constitutions are historical and political objects:

Assane Mbaye's contributions, together with those of other participants who did not come from southern Africa, put this powerful adherence to the constitutional norm, which is deeply embedded within this sub-region's political imagination, into an initial perspective. Maurice Engueleguele thus laid stress on the constitution's highly political dimension, which generally reveals the balance of powers existing within a country at the time it was drafted, as well as the political context, and asked: "Why are we unable to envisage the constitution as not only a legal, but also a political tool?" According to Engueleguele, every constitution represents above all else the result of a political settlement between the various powers in existence at a given period. He went on to explain that, even where constitutions have inclusive drafting processes, this is not sufficient to make them inviolable objects. And if the procedures for revision are not themselves inclusive, then constitutions lose their legitimacy. This is exactly what Professor André Mbata Mangu reminded us when he described the 1993 Constitution of the Republic of South Africa as the result of a subtle compromise between the apartheid government and the liberation movements. Various participants called for vigilance therefore, against the risk of the "constitutional fetishism", which Maurice Engueleguele had denounced. This was the approach notably taken by Professor Dominique Darbon, who dwelt on the existence of a form of "holy story" at the very root of constitutional processes, and on the impossibility of keeping the constitution-as-object uniquely within the legal-rational domain. In support of his argument he reminded us that constitutionalism had first emerged in late 18th century-Europe as a form of ideology, which

sought to contest the monarchy's divine right to rule and, more generally, absolute power. Constitutionalism cannot therefore be understood in isolation from its historic and socio-cultural roots.

When constitutional processes are understood in this way, it is possible to take a dynamic approach to them. One is also prompted to consider constitutions from the perspective of the societies they are supposed to embody and to pay closer attention to the context, founding and unifying myths, and particular evolution of each constitution.

Constitutional normativity has the authority to reflect social pluralism and therefore to take account of the wide range of sources of legitimacy:

Key to the problem of constitutional legitimacy, is thus whether it is able to reflect the wide range of sources of legitimacy co-existing at the heart of every society (and which were the focus of discussions during the first session: the legitimacy of the religious norm and of traditional authority; the historic legitimacy of national liberation movements and their heroes, etc.). For, as Assane Mbaye reminded us, the declaration of a nation's values constitutes one of the meeting points between the constitution and the requirement for legitimacy. "A state's constitution should reflect its social diversity". But does referring to other sources of legitimacy within the context of constitutions suffice in itself to ensure that the constitution effectively reflects the collective imagination born out of social pluralism?

Several participants raised this question of embedding formal "references" to a diversity of sources of legitimacy within constitutions from the region, with each reference based on normative authorities and systems. André Mbata Mangu referred here to the constitutional role played by the traditional chieftainship in Lesotho, and the presence of these chieftains in Zimbabwe's official Assemblies. He also highlighted the pronounced mark left by national liberation movements on the national constitutions, particularly evident within the Zimbabwean and Namibian constitutions. On a more general note and referring to the issue of traditional authorities Assane Mbaye asked the following question: by acknowledging norms or even values derived from sources of power legitimacy other than the constitutional source is one according

them a source of legitimacy, or simply formalising a legitimacy which is actually rooted in traditional beliefs and religions?

For all that, does this "official" integration, this "legalisation" or this "formalisation" give constitutions the right to be accepted by populations as the primary normative reference? Do all the actors within a country regard the constitution and, more broadly, state normativity as the common rule governing their behaviour; as the social and cultural framework for their thoughts and actions? (Eberhard 1997). Chief Lerotholi reminded us in this respect that: "We did not become new human beings with the advent of new constitutions. We still regard ourselves as "traditional" peoples, guided by a certain number of cultural practices. A gap is opening up between what the constitution is proposing and what populations consider to be their priorities." These priorities may be derived from value judgements, which are totally different to those propounded by the constitution. Some traditional South African chieftains for example, have declared themselves extremely uncomfortable with constitutional provisions banning the death penalty, for example, or dealing with issues such as gay rights.

"The law can be considered as formalised legitimacy, but not every outcome of legitimacy falls as a matter of course within the domain of legality" – as André Mbata Mangu reminded us. The tendency, when faced with *de facto* judicial pluralism, is to acknowledge the existence of other legal orders (traditional, religious etc.), but only those recognised by the state, according to Professor Camille Kuyu. Furthermore, this formalisation, or legalisation of legitimacy only very rarely takes into account the underlying values embodied by these other sources of legitimacy and the other poles of development of the norm (given that the state does not in fact constitute the sole source of normative power). In short, rather than incarnating societies' dynamism, it may sometimes ossify their structures and regulations. Hybridizing underlying normative values strengthens the vitality of such institutionalisation in instances where restrictive judicial pluralism tends to mummify or even folklorise them. Professor Dominique Darbon returned to this issue in his analysis of the extent to which local practices are genuinely coupled with constitutional norms: *"What happens if a majority of the population takes tradition as its primary point of reference, effectively marginalising the constitution as a form of regulation? Should*

customary law therefore be included within the constitution? Which should be changed: the constitution or customary law?" Ross Herbert raised this same question when he wondered what would make a "good" constitution: *"What indeed is a soundly drafted constitution? It is a constitution capable of understanding the way in which the population behaves".*

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The presentations and discussions, which have taken place during this session, have served to bring out three general issues with regard both to the legitimacy of constitutional processes and to constitutions. Firstly: how can constitutions improve the way in which internationally-recognised core collective values interact structurally with each society's specific modes of regulation? Secondly: how can any evolution on the part of such modes of regulation be taken into account? And thirdly: how can we ensure that neither the legitimacy nor the effective implementation of the constitutional norms is undermined by constitutional practices themselves?

More specifically: these discussions have given some indication of the strong commitment on the part of the sub-region's actors to the constitution-as-object, both as a source and as a medium of legitimacy. In most countries within the sub-region, constitutional processes have historically emerged from a participatory and inclusive dynamic prompted by national processes of reconciliation – with the result that they are both innovative and highly political in nature. They have spawned constitutional texts, which are internationally regarded as attempts to take account of the social pluralism of the societies in question. However, these discussions brought out the discrepancy between this constitutional reference and the everyday practices of populations. A majority of people within these populations do not currently regard the constitution, and the legal-rational normativity to which it gives rise (public law etc.), as the source of regulation structuring their everyday practices. Tradition and/or religion continue to be called upon as substitutes for or sometimes in competition with the legal-rational norm.

The discussions on legal pluralism opened up a range of new perspectives on this. If the legitimacy of power cannot be founded merely upon a reference to a single source of legitimacy (international legitimacy, legal legitimacy, rational legitimacy, etc.), then neither can it be confused with a simple superposition of the different sources of legitimacy of power. Indeed, the question of the legitimacy of power can only be resolved through some sort of medley-effect; perhaps this "constitutional box" of Mr De Brito. There is a need for mixing, for hybridization – that is, for the emergence of a new normativity, which is more than the simple sum of (or to be specific: the simple reference to) the different sources of legitimacy. Legitimate governance requires in effect a creative quest, which must be rooted in an analysis of how the various sources of legitimacy interact in practice – whether that be confrontation, hybridization etc. As Dominique Darbon reminded us in his summary of the first session: "governance is not simply a matter of one (normative) order prevailing over the others, or of different orders co-existing; there must also be debate and follow-up, with respect to the impact of their hybridization". Retaining this outlook, we moved on to our third session, a forum for analysing these practices, on the subject of land management.

Constitutions and Legitimacy of Power in Southern Africa

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1. Background

Since the 1980s and following the failure of the structural adjustment programmes (SAPs), which were supported by the Bretton Woods institutions, "governance" has come to be a catchall term, a fashionable buzzword in political, economic, social, and scientist discourse.

Due to its adoption by international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF), and the most developed countries that finance them, governance has been put at the heart of any developmental strategy or policy. It has replaced structural adjustment programmes as a new form of conditionality for aid and a criterion for leadership assessment.

The popularisation of "governance", alongside market globalisation, has also resulted into its regionalisation and domestication in Africa although it cannot be said that traditional Africa totally ignored the concept.

The Constitutive Act of the African Union (AU) provides that the objectives of the AU are inter alia to promote democratic principles and institutions, popular participation and good governance.[1] The

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(1) AU Constitutive Act (Adopted in Lomé, Togo, in July 2000 and brought into force in May 2001), Art 3 (g), (h), (k), (n).

principles of the AU also include respect for democratic principles, human rights, the rule of law, and good governance.[2]

The twin objectives of the New Partnership for Africa's Development (NEPAD), which was launched in July 2002, are the eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance.[3] Later on, countries participating in the NEPAD adopted a Declaration on Democracy, Political, Economic and Corporate Governance[4] that provides for the African Peer-Review Mechanism (APRM) as NEPAD's lynchpin.[5]

This Declaration is the main instrument on which the work of the APRM is based. If taken seriously, it should contribute to reinforcing state capacity and leadership legitimacy in Africa.

In support of democracy and the democratic process, African leaders undertook to:

• Ensure that their national constitutions reflect the democratic ethos and provide for demonstrably accountable governance;
• Promote political participation, thus providing for all citizens to participate in the political process in a free and fair political environment;
• Enforce strict adherence to the position of the African Union on unconstitutional changes of government and other decisions of our continental organisation aimed at promoting democracy, good governance, peace and security; and
• Strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies and provide the necessary resources and capacity to conduct elections which are free, fair and credible.[6]

The NEPAD Declaration on Governance, which was adopted during the first AU Summit in Durban, South Africa, spells out the institutions and processes adopted to guide peer reviews, based on mutually agreed

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(2) *Idem.* Article 4 (h), (l), (m), (n), (0), (p).
(3) Mbata Mangu, André. "The Changing Human Rights Landscape in Africa: Organisation of African Unity. African Union. New Partnership for Africa's Development and the African Court". *Netherlands Quarterly of Human Rights.* Vol 23 No3 2005380. p.389. Doc AHG/235 (XXXVIII, Annex I, paragraph 5).
(4) Hereinafter the DDPECG.
(5) Mbata Mangu, André. *op. cit.* p.380. pp.388-389.
(6) DDECG, paragraph 13.

codes and standards of democracy, political, economic and corporate governance.[7]

Out of twenty-seven (27) African countries that have joined the APRM between 2003 and September 2007, seven (7) are Southern African countries, namely Angola, Lesotho, Malawi, Mauritius, Mozambique, South Africa, and Zambia. The peer review of both South Africa and Algeria was conducted at the 7th Summit of the Committee of Heads of State and Government participating in the APRM (APR Forum) which was held on 1 July 2007 in Accra, Ghana. South Africa and Algeria then joined Ghana, Rwanda, and Kenya, that had already been peer reviewed, and became the first countries to be peer reviewed in their respective sub-regions, namely Southern Africa and North Africa. The "domestication" of good governance at both the regional, sub-regional and national level is evidence that, like democracy that is tied to it, far from being foreign to the continent and its people, good governance also belongs to Africa and is feasible in Africa.

Governance and leadership legitimacy have increasingly attracted the attention of policy makers, civil society organisations, development agencies, political leaders, and social scientists. Institutes and centres have been created to discuss and promote good governance. On the African continent, the Council for Development of Social Science Research in Africa (CODESRIA), the largest gathering of African social scientists, established an institute on democratic governance in 1992.

National and international meetings have been organised on governance and leadership matters.

The Polokwane 2008 Conference, co-organised and supported by the Institute for Research and Debate on Governance (IRG), the Alliance to Refound Governance in Africa, the University of South Africa (UNISA), the University of Limpopo (UNILIMPO), the French Ministry of Foreign and European Affairs, the French Institute of South Africa, the United Nations Development Programme (UNDP), the South African Institute of International Affairs (SAIIA), Modus Operandi and the Charles Léopold Mayer Foundation brings to Southern Africa the debate and exchanges started in Addis Ababa and continued in Bamako to promote good governance and leadership in Africa in general and in Southern Africa in particular.

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(7) Mbata Mangu, André. *op. cit.* p.391.

Against this background, this paper reflects on governance and the legitimacy of power in the light of the constitutions of the Southern African countries[8] represented at the Conference to find out the extent to which they embody or reconcile the liberation struggle and traditions or religions that have been identified as the two major sources of legitimacy of power in the sub-region. It should also reflect on how the constitution can help reinforce good governance and leadership legitimacy in these countries.

The paper intends addressing a number of issues relevant to the theme of the Conference. It will deal with governance and legitimacy, their respective meaning, forms, and the relationship between them. It will also reflect on leadership, especially political leadership, its meaning and importance, the legitimacy of power and the sources of this legitimacy (liberation struggle, and traditions and religion) in Southern Africa. Furthermore, making a particular case of the Constitution of South Africa that is celebrated as one of the most advanced constitutions in the world, the paper will examine the constitutions of Southern African countries, their main features, their effectiveness or enforceability, the legitimacy of these constitutions, and the relationship between these constitutions and other sources of legitimacy of power, which impacts on the quality of governance in Southern Africa. With the Constitution proclaimed the supreme law of the land in the sub-region, the paper will end with a brief conclusion that will stress the importance of constitutional legitimacy as a new and paramount source of legitimacy of political leadership that is much needed to improve governance in Southern Africa.

2. Governance and Legitimacy

Although they are not synonymous and governance may and often does exist without legitimacy of power, there is a close relationship between the two concepts. Good governance tends to favour democratic

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(8) It is quite unfortunate that Angola, Botswana, Malawi, Swaziland, and Zambia are not represented or to be discussed during the Conference, despite the fact that they also belong to Southern Africa. If Botswana is generally celebrated as one of the best cases of good governance and democracy in Africa, the country is confronted with a number of governance issues that need to be addressed. The same goes for Angola, Malawi and Zambia. Governance challenges are even much greater in Swaziland, a country which is struggling with the transformation from an authoritarian monarchy to a constitutional and democratic one.

governance and such governance implies legitimacy of power. No "good governance" policy or programme would ever be successful in the long run should the power to implement them be lacking in terms of legitimacy.

2.1 Governance and Forms of Governance

According to Hyden, at its modern origin, the language of governance was typically applied by the World Bank and the IMF to serve their narrow purposes.[9] It was a donor "conditionality" imposed on underdeveloped countries. In its 1989 report on the prospects for development in Sub-Saharan Africa, the World Bank defined governance with reference to "the exercise of political power to manage a nation's affairs".[10] Governance was narrowly understood to refer to management and particularly to economic and financial management.

When it was conceived, governance did not even refer to "good governance". It was only in a paper presented at a World Bank-sponsored conference on development economics in 1992 that Boeninger suggested that governance was the same as "good government".[11] But still, it was narrowly understood.

The definition of "governance" was later extended beyond the managerial, technical and economic approach to become more holistic. Long before the March 2005 Paris Declaration,[12] African leaders adopted the NEPAD Declaration referred to earlier that not only stressed good political, economic, social and corporate governance but also linked it to democracy, thereby highlighting the closeness of the relationship between good governance and legitimacy of power.

Good governance implies or requires transparency, equity, justice, promotion of and respect for human rights - whether civil, political, economic, social and cultural - promotion of the rule of law, decentralisation, sound economic policies, open, free and fair elections, popular

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(9) Hyden, G. "Governance and the Reconstruction of Political Order". In Joseph, R. (ed). *State, Conflict, and Democracy in Africa.* Boulder & London: Lynne Rienner Publishers. 1999. p.184.
(10) Idem.
(11) Boeninger, E. "Governance and Development: Issues of Governance". *Proceedings of the World Bank Annual Conference on Development Economics.* Washington, DC: World Bank. 1992. pp. 24-38.
(12) It advanced an integrated and holistic definition of governance taking into account its political, economic, social and cultural aspects.

participation, and peace. Accordingly, to African leaders, good governance can be political, economic, social and corporate and also requires legitimacy of power or democracy.

2.2 Legitimacy of Power and Forms of Legitimacy

There does not seem to be a consensual definition of legitimacy. Englebert, for instance, held that "a state is legitimate when its structures have evolved endogenously to its own society and there is some level of historical continuity to its institutions."[13]

According to Englebert, new African states lack legitimacy because they are not the indigenous creations of local history.[14] Non-legitimate states are non-European and non-North American states.[15] Englebert's conception of legitimacy is therefore arbitrary and Eurocentric.

Kalevi Holsti distinguished between vertical and horizontal legitimacy. Vertical legitimacy is an estimate of the strength of the relationship "between society and political institutions."[16] It is a crucial dimension of overall state legitimacy.[17] On the other hand, horizontal legitimacy relates to the agreement within society on what constitutes the polity - the politically defined community that underlies the state. It establishes a link between the population and the territory of a state.[18]

As far as we are concerned, legitimacy entails the acceptance by the people of those institutions that seem to correspond to and promote the values of the society. Legitimacy refers to the acceptance of governmental leadership by those who are governed. A government whose acceptance or legitimacy is contested is likely to resort to authoritarianism, intimidation, or manipulation, and to exercise power rather than to seek authority.[19] The consequence is frustration, anger,

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(13) Englebert, P. *State Legitimacy and Development in Africa*. Boulder & London: Lynne Rienner Publishers. 2000. 4, p.173.
(14) *Idem*. 4, p.74.
(15) *Idem*. p.131, p.176.
(16) Holsti, Kalevi J. *The State, War, and the State of War*. Cambridge: Cambridge University Press. 1996. p.97; Englebert. *op. cit*. p.7.
(17) Englebert. *op. cit*. p.8.
(18) Holsti. *op. cit*. p.97; Englebert. *op. cit*. p.8.
(19) Conteh-Morgan, E. "The Crisis of Legitimacy, Representation, and State Hegemony", in Kaiser, P.J. & Okumu, F. Wafula (eds) *Democratic Transitions in East Africa*. Ashgate. 2004. p. 164.

and even aggression on the part of those who feel permanently locked out of available social opportunities.[20]

According to Conteh-Morgan, a party or a government can be considered legitimate only if there is widespread acceptance that it is widely representative, or is dedicated to realising a set of overriding common goals that adequately benefit the entire populace.[21] Englebert's contention that a legitimate government need not be just, democratic, inclusive, popular or otherwise accountable to its citizens, but only indigenous,[22] is controversial since there is a close relationship between state legitimacy and state capacity or developmental capacity.

One may distinguish between international or foreign, and national or domestic legitimacy of African governments. The former relates to compliance or promotion of values and interests of the international community or those of some foreign states, while the latter refers to the acceptance of the government by its own people. During the first decades of independence, African governments were more interested in international and foreign legitimacy than in domestic legitimacy, as their life and survival mainly depended on the first.

Arguably, increasing state capacity in Africa would require governments to be preoccupied first with national legitimacy and interests and not the opposite. It is perhaps here that the South African political motto of Batho Pele (people first) should become the first principle of governance, as it would also strengthen leadership legitimacy.

3. Leadership, Political Leadership and Leadership Legitimacy in Africa

A great deal has been written on leadership in general.[23] Few books have been written on leadership in Africa in particular[24] and still fewer by African scholars.

(20) *Idem.* p.166.
(21) *Idem.* p.165.
(22) Englebert. *op. cit.* p.4.
(23) Blondel, J. *World Leaders*. London & Los Angeles. Calif.: Sage. 1980; Brecher, M. *Political Leadership in India*. New York, Washington-London: Praeger. 1969-1968; Elgie, R., *Political Leadership in Liberal Democracies*, MacMillan Press 1995; Edinger, L. "Editor's Introduction," in Edinger, L. (ed). *Political Leadership in Industrialized Societies*. John Wiley & Sons, 1967; Sarason, Seymour B. *Political Leadership and Educational Failure*. San Francisco: Jossey-Bass Publishers. 1998.
(24) Le Vine, V. *Political Leadership in Africa*. The Hoover Institution Studies, Standford University. 1967; Cartwright, J. *Political Leadership in Africa*. Croom Helm Ltd. 1993.

Probably terrified by the brutal nature of political leadership in most African countries, African social scientists have shied away from the debate on leadership on their continent. In Africa, as elsewhere, Blondel argues, one reason why political leadership has not been analysed is the fear which it has provoked and still provokes among generations of thinkers.[25] As Hobbes would have put it, political leadership is a Leviathan, a frightening beast, which it is perhaps more urgent to tame or to charm than to dissect.[26]

The Polokwane Conference, which has benefited from the contribution of various partners, including the University of Limpopo where I started my South African academic career as a Lecturer, and the University of South Africa to which I currently belong, brings to the fore the issue of legitimacy of power or leadership legitimacy in a fascinating and courageous debate on governance, which is hardly encouraged by Southern African leaders.

Like other social science concepts such as democracy and constitutionalism, leadership is an essentially contested concept.[27] There are many definitions of leadership. Elgie undertook a review of the literature on political leadership and listed at least eight definitions of this concept.[28] Faced with so many definitions of leadership, Paige, Burns or Kellerman operated without any definition, despite being concerned with the problem of political leadership.[29] Although leadership is central to politics and government, its definition is elusive.[30]

According to Blondel, leadership is as old as mankind. It is everywhere, and inescapable. Wherever there is a group, there is always a form of leadership.[31]

Some scholars define leadership as a process of human interaction in which some individuals exert, or attempt to exert, a determining influence upon others[32] or a process by which one individual consistently

(25) Blondel, J. *Comparative Government: An Introduction.* Prentice Hall & Harvester Wheatsheaf. 1995. p.301.
(26) Blondel, J. *Political Leadership.* London: Sage Publications. 1987. p.3.
(27) Elgie. *op. cit.* p.2.
(28) *Idem.* p.3.
(29) Blondel *Political Leadership. op. cit.* p.4; Elgie. *op. cit.* p.2.
(30) Elcock, H. *Political Leadership.* Edward Elgard: Cheltenham. 2001. p.3; Cartwright. *op. cit.* p.19.
(31) Blondel *Political Leadership. op. cit.* ix.
(32) Tucker, R. *Politics as Leadership.* Columbia: University of Missouri Press. 1981. p.11.

exerts more impact than others on the nature and direction of group activity.[33]

In Edinger's view, "Leadership is a position within a society which is defined by the ability of the incumbent to guide and structure the collective behaviour patterns of some or all of its members. It is at all times relational, interpersonal, and is based upon inequality of influence between the leader as the influencing agent and the followers as the objects of his efforts to cue their behaviour so that it will conform to his personal objectives."[34]

Of all forms of leadership, however, political leadership, particularly in a nation-state, occupies a special position because it is vastly more visible and, ostensibly at least, more important.[35] Many questions about political leadership refer to its meaning and its importance or role in society.[36]

According to Blondel, political leadership is a phenomenon of power, because it entails the ability of the one or few who are at the top to make others do a number of things (positively or negatively) that they would not do or at least might not have done.[37]

Hah and Bartol also define political leadership as "the mobilisation and direction, by a person or persons using essentially non-coercive means, of other persons within a society to act in patterned and coherent ways that cause (or prevent) change in the authoritative allocation of values within that society.[38]

In Blondel's view, (national) leadership is "the power exercised by an individual (or, in some cases, two or a few individuals acting jointly) to push members of the polity towards action in a particular direction."[39] It is a form of power, a special form of power, admittedly, since it is exercised by one individual over a large group. It is nevertheless accepted for a number of reasons, ranging from "natural" recognition by, to pressure and even compulsion on, those who are led

(33) Kellerman, B. "Leadership as a Political Act" in Kellerman, B. (ed). *Leadership: Multidisciplinary Perspectives*. Englewood Cliffs, New Jersey: Prentice-Hall. 1984. p.70.
(34) Edinger. *op. cit.* p.15.
(35) Blondel *Political Leadership. op. cit.* ix.
(36) Elcock. *op. cit.* pp.3-19; Blondel *Political Leadership. op. cit.* pp.1-9.
(37) Blondel *Political Leadership. op. cit.* pp.4-5.
(38) Hah, Chong-Do & Bartol, Frederick C. "Political Leadership as a Causative Phenomenon: Some Recent Analyses" in *World Politics*. Vol 36. No 1. 1983. pp.119-120.
(39) Blondel *World Leaders. op. cit.* pp.11-15; *Idem. Comparative Government. op. cit.* p.290; *Idem. Political Leadership. op. cit.* p.5.

and who are thus induced to act in the direction which the leader suggests.[40] Blondel argues that leadership does not just refer to any power, but to influential power exercised on society and that affects ostensibly the destiny of mankind.[41]

Cartwright points out that leadership is better defined as government by persuasion rather than force.[42] The essence of leadership is the ability to persuade others to comply voluntarily with one's wishes. Leadership involves voluntary compliance by those over whom it is exercised.

It is the ability to obtain non-coerced, voluntary compliance, which enables followers to obtain goals which they share with the leader.[43] This is more related to leadership legitimacy than leadership itself; hence, his distinction between leaders and office-bearers or rulers.[44] Unfortunately, in many African countries, leadership has been and still remains power by force used against the people, as it was under colonialism, rather than power by persuasion or by conviction of the people themselves.

There are several forms and types of political leadership depending on the scope of its influence, on its exercise or style, on the relationship between leaders and the people, or on its achievement. Accordingly, political leadership may be national or international,[45] regional or sub-regional, good or bad, democratic or authoritarian, legitimate or non-legitimate, nationally or externally imposed. Political leadership in post-colonial Africa has been generally authoritarian, non-legitimate or based on an erroneous conception of legitimacy as the acceptance by the international community of foreign powers. It is also interesting to see how some African national leaders have been struggling to extend their leadership on the sub-regional and regional levels.

According to Edinger, "leaders are persons who exercise control over the behaviour of others so as to move them in a desired direction."[46] Unlike leadership, which is an abstraction, leaders are individuals and

(40) Blondel. *Comparative Government. op. cit.* p.290.
(41) Idem.
(42) Cartwright. *op. cit.* pp.285-297.
(43) *Idem.* p.19, p.21.
(44) Blondel. *Comparative Government. op. cit.* p.290.
(45) Blondel. *Political Leadership. op. cit.* ix.
(46) Edinger, L. "A Preface to Studies in Political Leadership" in Gabriel Sheffer (ed). *Innovative Leadership in International Politics.* Albany: State University of New York Press. 1993. p.6; Elgie. *op. cit.* p.3, p.4; Kellerman. *op. cit.* p.71.

they are real human beings, with their emotions, cognitions, predispositions, ambitions, styles of action, characters, strengths, weaknesses, and personalities that make each leader unique.[47]

Since leadership appears to be a formidable power that can affect mankind, whose conditions deserve amelioration, it is clearly valuable, indeed imperative, to see how this power can help to bring about a better life for all in our societies.

As Blondel observes:

Political leadership appears to be one of the clearest ways in which men and women can be induced to work jointly for the improvement of their lot; leadership seems able, by virtue of what it is, both to bring citizens together in a concerted effort and to do so over time by gradual achievements aimed at a common goal.[48]

It can be one powerful means of leading to collective action and result in development of the whole society.[49] Leadership is critical for the improvement of the positive capacity of the state. As demonstrated by many scholars, it is also critical for the establishment of democracy and for democratic consolidation. In Huntington's view, "democracy will spread in the world to the extent that those who exercise power in the world and individual countries want it to spread."[50]

According to Clapham and Wiseman:

Democratic consolidation is most likely to take place when a new leadership emerges, seeking to organise politics in a different way from those adopted by discredited parties and leaders in the past, but within the context of non-violent opposition and the acceptance of basic institutions.[51]

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(47) Elgie. *op. cit.* pp.9-12.
(48) Blondel *Political Leadership. op. cit.* p.4.
(49) Idem.
(50) Huntington, S. *The third wave: democratization in the late twentieth century.* Norman: University of Oklahoma Press. 1991. p.316.
(51) Clapham, C. & Wiseman, J.A. "Conclusion: assessing the prospects for the consolidation of democracy in Africa" in Wiseman, J.A. (ed). *Democracy and Political Change in Sub-Saharan Africa.* London & New York: Routledge. 1995. p.166.

In Wiseman's view, "key decisions taken by leaders at key points in the process have a great impact in enhancing or weakening the prospects of democracy."[52]

Reflecting on democracy in India, Krishna held:

The genuine commitment to a liberal democratic policy by the first generations of leaders, especially the first Prime Minister Jawaharlal Nehru ...must be regarded as the key [factor] in the emergence and persistence of democracy in India.[53]

As James Manor elaborated:

Nehru might ...have sought a radical centralization of power in his own hands, at the expenses of the party and of formal institutions. He might have employed populist slogans and programs as a substitute ...for such institutions. Plenty of other leaders in Africa and Asia did so and they and their countries often paid a heavy price for it. He chose not to and as a consequence the liberal representative order took root and acquired enough substance to endure into the 1970s and 1980s.[54]

As Wiseman further put it:

The characteristics of individual leaders are extremely relevant in determining the political outcomes and this holds true in relation to democratization as it does to any other political developments...The evidence from the relatively limited number of examples of cases where democracy has survived for long periods suggests that the question of political leadership was extremely important. The role of Seretse Khama (Botswana), Dawda Jawara (The Gambia), and Sir Woogsagun Rangoolam (Mauritius) in sustaining democratic political systems

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(52) Wiseman, J.A. *The New Struggle for Democracy in Africa*. Avebury. 1996. p.165.
(53) Kishna, S. "Constitutionalism, Democracy, and Political Culture in India" in Franklin, D.P. & Baun, M.J. (eds). *Political Culture and Constitutionalism. A Comparative Approach*. Armonk, New York, London: M.E. Sharpe. 1994. p.166.
(54) *Idem*. pp.170-171.

during periods when democracy was on the wane in Africa was of a crucial importance.[55]

Therefore, political leadership does matter.[56] Cartwright has demonstrated how, in Nyerere's Tanzania and Kwame Nkrumah's Ghana, for instance, a leader's influence could have a considerable effect on what happens to a state.[57] This has been recently done by Roger Southall and others in their study of *Leadership Change and Former presidents in African politics.*[58]

Hence the importance of reflecting on political leadership and assessing how far, and under what conditions, leadership is likely to be good and uplift the living conditions of the people; how a legitimate leadership may emerge and consolidate and what to do to ensure that there is peaceful life after the exercise of power both for the leaders themselves and for the people they once led. However, the quality of leadership is closely related to its legitimacy and is influenced by the sources of this legitimacy.

As stressed earlier, and probably on the basis of the liberation struggle in countries such as Mozambique, Namibia, South Africa, and Zimbabwe and in view of the role played by traditions and religions in the sub-region in general and in countries such as Lesotho and Swaziland in particular, liberation struggle, and traditions and religions were identified as the main sources of legitimacy of power in Southern Africa. With the exception of Swaziland, each Southern African country has adopted a constitution as a basis of the legitimacy of power. It is therefore worth investigating how the different Southern African constitutions have been influenced by these two sources of legitimacy and how they approached them.

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(55) Wiseman, J.A. *op. cit.* p.186.
(56) Blondel. *Political Leadership. op. cit.* pp.80-81; *Idem. Comparative Government. op. cit.* pp.300-301.
(57) Cartwright. *op. cit.* pp.1-2, p.6.
(58) Southall, R. & Melber, H. (eds). *Legacies of Power. Leadership and Former Presidents in African Politics.* Nordiska Afrikainstitutet and HSRC. 2006.

4. Constitutions, Legitimacy of Power and Sources of Legitimacy in Southern Africa

4.1 Main and Common Features of Constitutions in Southern Africa

Despite their different historical, political, economic and social backgrounds, Southern African countries adopted constitutions with some common features.

First, these constitutions are the expression of the development of constitutionalism in these countries where the first constitutions were adopted shortly before independence. The current constitutions therefore dramatically differ from the constitutions at independence. Except for countries such as Mozambique, Namibia, South Africa and Zimbabwe, where a liberation struggle took place, the first constitutions were imposed by the former colonial power – Britain and Mozambique – or by the United Nations (in the case of Namibia), while the current constitutions appear to be home-grown constitutions. They aim at establishing a democratic regime[59] based on good governance, respect for human rights[60] and the promotion of the rule of law.[61]

Moreover, they are supreme and prevail over other pieces of legislation. Any other law that is inconsistent with the Constitution is void to the extent of the inconsistency.[62] These are entrenched constitutions that cannot be amended easily and require substantial majorities in the Houses (Senate and National Assembly) or even a referendum to be amended.[63] They contain a comprehensive Bill of Rights and are

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(59) See Sect 1 of the Constitution of Lesotho that provides that Lesotho shall be a democratic kingdom; Art 1 (1) & (2) of the Constitution of Namibia; Arts 1 & 2 of the Constitution of the Republic of Mozambique.

(60) See Chapter 3 of the Constitution of Namibia; Chapter 3 of the Constitution of Zimbabwe; Title III of the Constitution of the Republic of Mozambique ; Chapter 2 of the Constitution of Botswana (Amendment) Act No 18 of 1997.

(61) See Art 3 of the Constitution of the Republic of Mozambique; Art 1 (1) & (6) of the Constitution of the Republic of Namibia.

(62) See Section 2 of the Constitution of Lesotho; Sect 3 of the Constitution of Zimbabwe; Art 1 (2) of the Constitution of Zambia; Sect 2 of the Constitution of South Africa; Art 2, 4 & 38 of the Constitution of the Republic of Mozambique; Art 1(6) of the Constitution of the Republic of Namibia.

(63) See Sect 85 of the Constitution of Lesotho; Arts 291-296 of the Constitution of the Republic of Mozambique; Arts 131 & 132 of the Constitution of the Republic of Namibia; Sect 89 of the Constitution of Botswana Act of 1997.

to be enforced by an independent judiciary.[64] Furthermore, these constitutions are written and provide for an independent judiciary to enforce them.

Finally, these constitutions have become the new and major sources of legitimacy of power as compared to the liberation struggle and to traditions and religions.

4.2 Constitutions and Other Sources of Legitimacy of Power in Southern Africa

Undoubtedly, the constitutions of Southern African countries have been influenced by the struggle for liberation through liberation movements and also by traditions and religions.

Influence of Liberation Struggle as a Source of Legitimacy of Power in Southern Africa

Unlike in Lesotho, people in Namibia, Mozambique, South Africa, and Zimbabwe embarked on a protracted and violent struggle for liberation from the colonial or apartheid rule. This was not typical of Southern Africa.

The liberation struggle took place in other African countries such as Angola, Algeria, Guinea-Bissau, and Cape Verde where the colonial masters refused or delayed independence.

Even in French-speaking Africa, where France preferred to keep its former colonies within the framework of "community" while retaining many powers of sovereignty instead of granting them immediate and total independence, or in Belgian Congo, a liberation struggle took place under the leadership of nationalist leaders.

The main difference with Southern Africa lies in the extremely brutal violence of the colonial or the apartheid regime, which also called for a more violent struggle for liberation with liberation movements that ultimately led their people to independence and subsequently acceded to power. On independence, these liberation movements were transformed into political parties as the new system promoted legal

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(64) Title 3 of the Constitution of the Republic of Mozambique; Chapter 2 of the Constitution of the Republic of South Africa ; Chapter 6 of the Constitution of Botswana Act (No 18) of 1997.

and political pluralism. The legitimacy of this leadership was based on the fact that the new leaders participated in the liberation struggle and led their people to independence.

Arguably, no constitution in Southern Africa stresses the liberation struggle more than the Constitution of Mozambique. The Mozambican Constitution is probably the one that most highlights the liberation struggle. Reference to the armed struggle for national liberation is made in the very first provisions of the Mozambican Constitution.[65]

The Constitution also provides that the Republic of Mozambique shall esteem the heroic struggle and old-age resistance of the Mozambican struggle against foreign domination.[66] It shall acknowledge and esteem the sacrifices made by those who gave their lives to the national liberation struggle and to the defence of the country's sovereignty and democracy. The state shall ensure the special protection of those who were disabled in the national liberation struggle, as well as the orphans and other dependants of those who died in this cause and a law should and has been enacted to determine their rights.[67] Moreover, the state shall ensure special protection to those who were disabled during the armed conflict that ended with the signing of the General Peace Agreement in 1992, as well as to the orphans and other direct dependents. The State shall likewise protect those who have been disabled in the performance of public service or a humanitarian act.[68] In its African policy, the Republic of Mozambique shall be in solidarity with the struggle of the people and states of Africa, for unity, freedom, dignity and the right to economic and social progress. It shall seek to strengthen relations with countries engaged in the consolidation of their national independence, democracy and the recovery of the use and control of their natural wealth for their respective peoples.[69]

The Republic of Mozambique shall also support and be in solidarity with the struggles of peoples for their national liberation and for democracy. It shall grant asylum to foreigners persecuted on the grounds

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(65) Constitution of the Republic of Mozambique, Preamble.
(66) Art. 14.
(67) Art. 15.
(68) Art. 16.
(69) Art. 19 (1) & (2).

of their struggle for national liberation, for democracy, for peace and for the protection of human rights.[70]

Red as a colour of the national flag of the Republic of Mozambique represents the centuries of resistance to colonialism, the armed national liberation struggle and defence of sovereignty.[71] All the above provisions express the influence of the liberation struggle as a source of legitimacy of power in the Republic of Mozambique. However, the main source of legitimacy of power in Mozambique as a democratic state[72] is not the liberation struggle, but the Constitution, which proclaims that sovereignty is vested in the people.[73] The people elect the President[74] and the members of the Assembly of the Republic (National Assembly).[75]

The second Southern African Constitution to emphasise the liberation struggle is the Constitution of Namibia. The Preamble to the Namibian Constitution recognises that the rights of the people of Namibia had for long been denied by colonialism, racism and apartheid.[76] It also celebrates the victory of the people of Namibia in their struggle against colonialism, racism and apartheid.[77]

The Namibian people therefore adopted the Constitution as the fundamental law of their sovereign and independent Republic.[78] Unlike the Constitution of Mozambique, it did not refer to the liberation struggle or to the benefits accrued to those who made sacrifices during the struggle.

However, although other Southern African countries such as South Africa and Zimbabwe also went through a liberation struggle, there is no reference to liberation struggle in the constitutions of these two countries. This may be attributed to the fact that the 1993 Constitution of the Republic of South Africa (the interim Constitution) was mainly the result of a political compromise between the apartheid government and the liberation movements and the first Constitution of Zimbabwe was enacted by Britain, the former colonial power.

(70) Constitution of the Republic of Mozambique, Art. 20 (1) & (2).
(71) Art. 297.
(72) Art. 1.
(73) Art. 2.
(74) Art. 17.
(75) Arts 168 & 169.
(76) Constitution of the Republic of Namibia, Preamble, paragraph 4.
(77) *Idem.* paragraph 5.
(78) *Idem.* paragraph 6.

The Constitution of Namibia, like the constitutions of other Southern African countries, has established new rules and become a new source of legitimacy of power. It provides for elections,[79] but the liberation struggle still plays a role as a source of legitimacy of power. This explains why SWAPO, like ANC, ZANU-PF, and FROLIMO were voted in and maintained in power in Namibia, South Africa, Zimbabwe, and Mozambique respectively. The people granted them legitimacy as per right for their participation in the liberation struggle.

As during the early years of independence when the nationalist leaders were elected to take over from the colonial masters, the leaders of these former liberation movements also came to believe that they were entitled to rule and even to rule forever because the people owed them their liberation and independence.

In Namibia, as in Mozambique and in South Africa, the liberation struggle still plays an important role as a source of legitimacy of power and mainly justified the First Amendment to the Namibian Constitution[80] in terms of which the first President of Namibia was entitled to hold office as President for three terms,[81] while the Constitution provided that the President could be re-elected only once.[82] This was mainly to pay tribute to the SWAPO leader, President Sam Nujoma.

However, as for the legitimacy of nationalist leaders on and after independence, which was based on their participation in the struggle for independence or against apartheid, the liberation struggle as a source of legitimacy of power in Southern Africa is a provisional one. It is set to decline.

We now have learnt from history that it cannot hold for more than a quarter a century. As far as Southern Africa is concerned, this already happened in countries such as Zambia and Malawi, where independence and fathers of the nation' such as Kenneth Kaunda and Dr Kayibanda failed into disgrace and ended up losing their historic "legitimacy" as leaders to the point of being voted out of power by the same people to whose liberation they contributed.

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(79) The Constitution of Namibia proclaims that "all power shall vest in the people" (Art 1(2)); the President is elected for five years by direct, universal and equal suffrage for not more than two terms (Arts 28 & 29). The members of the National Assembly (Arts 45-49) and those of the National Council (Arts 68-70) are also elected.

(80) Namibian Constitution First Amendment Act. 1998. Government gazette. 24 December 1998.

(81) *Idem.* Sect. 1.

(82) Constitution of Namibia, Art. 29 (3).

The most recent case in point relates to the March 2008 parliamentary elections in Zimbabwe where freedom fighters and veterans of the war of independence under the banner of ZANU-PF lost to the opposition of the Movement for Democratic Change (MDC) despite repeated claims that they brought independence to Zimbabwe and the MDC leaders were only imperialist and former colonial masters' "puppets". The Zimbabwean people refused to buy into this claim of legitimacy based on the participation in the liberation struggle.

They are also unlikely to buy into it after President Mugabe, the father of independence himself, failed to win the presidential election and came second after Mr Tsvangirai, the MDC leader.

Arguably, President Mugabe is likely to lose during the run-off presidential election to be organised on 27 June 2008 if this election is free and fair, deprived of violence, intimidation, corruption and vote-rigging. The result of the Zimbabwean March 2008 presidential election should serve as a strong message to freedom fighters still ruling in Mozambique (FROLIMO), Namibia (SWAPO), and South Africa (ANC) who would better find other sources of legitimacy rather than rely on the liberation struggle which has proved a temporary and fragile source of legitimacy on the African continent.

Despite their major contribution to the struggle and the respect and gratitude that they deserve from the people they helped to free from colonial or apartheid rule, their days in power are definitely numbered and the question is not whether they will or will not be voted out of power, but when.

They are likely to survive if they abide by the Constitution and deliver on their promises of a better life for all after defeating the apartheid regime and bringing independence to their peoples. This would be a much stronger source of legitimacy of power.

Arguably, people do not eat democracy or freedom and it is not that "starving people do not need democracy," as some contended.[83] However, what Mahatma Ghandi once said recently found illustration in South Africa: "an empty stomach is not a good political adviser."[84] Delivery and good governance, and not participation in the liberation

(83) See Mbata Mangu, André. *The Road to Constitutionalism and Democracy in Post-colonial Africa: The Case of the Democratic Republic of Congo.* LLD Thesis, Pretoria: UNISA. 2002. p.194.
(84) Quoted by Amissah, A. "Constitutionalism and Law in Africa", in Ronen D (eds). *Democracy and Pluralism in Africa.* Boulder: Lynne Rienner Publishers. 1986. p.41.

struggle, are needed to command legitimacy for many decades after independence or the collapse of apartheid. In Africa as elsewhere, people are ready to celebrate, to chant and to dance for their leaders... But once the leaders have failed them or fallen, they hardly cry for them and are rather quick to acclaim new "Moses" likely to lead them to the "Promised Land" where they would enjoy not only political freedom, but all possible social and economic rights.

Influence of tradition and religion as Sources of Legitimacy of Power in Southern Africa

In Southern Africa, as elsewhere, including in Britain and Portugal, the former colonial powers, traditions and religion also constitute a source of legitimacy of power at the national, provincial or local level of government. People trust and support their leaders because of tradition and religions; they are believed to be there in the name of tradition and power emanates from God.

At both the national and the provincial and local levels of government, tradition and religion are recognised as a source of legitimacy of power in many Southern African countries. Customary law is also recognised as law.

South Africa is a case where more than the liberation struggle, traditions and religions are considered by the Constitution as a source of legitimacy.

A house of traditional leaders was established as a public body. Traditional leadership is recognised by law.[85] South Africa also has a host of Kings who are paid by the state. These unelected leaders still enjoy legitimacy under a Constitution that has been acclaimed as one of the most progressive and democratic on earth. This serves as evidence that traditions and religion still hold as a source of legitimacy of power. On the other hand, the fact that the Constitution recognises such traditional leadership while proclaiming that power belongs to the people who exercise it through elections also testifies to the

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(85) See the *Traditional Leadership and Governance Framework Act* of 2003 and the *Communal Land Rights Act* of 2004, which have clarified the role and functions and formalised the relationship between traditional leaders and the official governance structures in South Africa. Also see the Constitution of Botswana Act (No 18), 1997. Part 3 of this Constitution provides for the House of Chiefs (Sects 77-85).

survival of traditions and religion as a source of legitimacy of power under the Constitution. The APRM Country Review Mission to South Africa found that there was a widespread acceptance that traditional leadership is not incompatible with modern governance structures and enjoys legitimacy under the Constitution. [86]

Traditions and religion as sources of legitimacy of power are much more pronounced in a constitutional monarchy such as Lesotho, in an authoritarian one like Swaziland, in a democratic Republic such as Botswana or in a country like Zimbabwe where ZANU-PF freedom fighters have not performed better than the former colonial masters.

The Constitution of Lesotho,[87] which came into operation on 2 April 1993, provides that Lesotho is a sovereign democratic kingdom[88] and the Constitution is the supreme law of Lesotho.[89]

The King is a constitutional monarch and Head of State.[90] The Oath of Office of King or Regent[91] provides that he should observe the provisions of the Constitution and all other laws of Lesotho. If he fails to do that, he may be deposed by a resolution of the National Assembly of the Senate.[92] The succession to the throne of Lesotho is based on the customary law of Lesotho. The King or Regent is appointed by the College of Chiefs.[93] The Constitution provides for twenty-two (22) offices of Principal Chief[94] and for a College of Chiefs,[95] who appoint and may dismiss the King or the Regent.[96]

The 22 Principal Chiefs are also members of the Senate of Lesotho.[97] One of these Principal Chiefs, nominated by the College of Chiefs, sits on the Council of State provided by the Constitution to advise the King.[98]

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(86) APRM *Country Review Report* and the *National Programme of Action of the Republic of South Africa*. July 2007. paragraph 150.
(87) Third Amendment to the *Constitution Act* of 1997 of the Lesotho Constitution of 1993. *Lesotho Government Gazette Extraordinary.* Vol. XXXVIII. No 35. Tuesday, 16 March 1993.
(88) Constitution of Lesotho, Sect 1(1).
(89) Constitution of Lesotho, Sect 2.
(90) *Idem.* Sect 44.
(91) *Idem.* Sect 51, Schedule 1.
(92) *Idem.* Sect 53.
(93) *Idem.* Sects 45 & 46.
(94) *Idem.* Sect 103, Schedule 2.
(95) *Idem.* Sect 104, 45 & 46.
(96) *Idem.* Sects 45 &46.
(97) *Idem.* Sect 55.
(98) *Idem.* Sect. 95.

Even in Mozambique, Namibia, South Africa and Zimbabwe where liberation struggles took place and where tradition and religion are also important, the Constitution is the supreme law of the Republic and the primary source of legitimacy of power, and not liberation struggle, traditions or religions.[99]

Apart from Swaziland, which is not a constitutional monarchy and is not on the agenda of the Conference, Lesotho provides a case where traditions and religion have played the most important role as a source of legitimacy of power even though this influence now derives from their endorsement by the Constitution as the supreme law of the land and therefore the primary source of legitimacy of power.

Elsewhere, in a country like Zimbabwe,[100] liberation struggle has not prevailed over traditions and religion as a source of legitimacy. The Constitution of Zimbabwe only refers to traditions in its miscellaneous provisions.[101] It provides for Chiefs to preside over the tribes-people in Zimbabwe. These Chiefs are appointed by the President in accordance with an Act of Parliament.[102] In appointing a Chief, the President shall give due consideration to the customary principles of succession of the tribes-people over which the Chief will preside and may provide for the appointment of deputy Chiefs and acting Chiefs.[103] There shall be a Council of Chiefs, which will consist of Chiefs elected by the Chiefs from each of the various areas of Communal Land.

An Act of Parliament may provide for the establishment of twenty (20) or more Councils of Chiefs for separate areas of Communal Land.[104] The Constitution also provides that the Senate, which together with the House of Assembly, constitute Parliament, should consist of sixty-six (66) members, eight (8) of whom should be Chiefs representing each of the provinces, other than the metropolitan provinces, and elected according to the Electoral Law.[105] The Constitution provides for the

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(99) See Art. 2(4) of the Constitution of Mozambique, Art 1(6) of the Constitution of Namibia, Sect. 1 & 3 of the Constitution of the Republic of South Africa, Sect. 3 of the Constitution of Zimbabwe.
(100) Constitution of Zimbabwe as amended at 1st February 2007, Consolidation (including Constitution of Zimbabwe Amendment Act (No 17). 2005).
(101) *Idem.* Chapter 12, Part 1.
(102) *Idem.* Sect 111(1).
(103) *Idem.* Sect 111(2).
(104) Constitution of Zimbabwe, Sect 111(3).
(105) *Idem.* Sect 34 (1) (c).

election of the President, most of the members of Parliament and the Senators.[106]

Even freedom fighters and Chiefs have to be elected. However, even in this case, the legitimacy of these Chiefs comes more from the Constitution and the Electoral Law than from the liberation struggle or from tradition and religion.

Despite the importance of liberation struggle and tradition and religion, these sources of legitimacy have only survived and owe their strength to the Constitution. The Constitution as the supreme law of the land has also become the major source of legitimacy of power and embodies a new social contract between the people and their leaders. Its own strength rests on its legitimacy.

4.3   Legitimacy of the Constitutions in Southern Africa

As pointed out earlier, good governance, especially good political governance requires constitutions that are legitimate. But how legitimate are the constitutions of Southern African countries? The main assumption is that home-grown constitutions tend to be more legitimate than borrowed or imposed constitutions, though they may also be illegitimate.

Okoth-Ogendo lamented over "Constitutions without constitutionalism" in Africa, as countries tended to adopt or change constitutions that hardly comply with the principle of constitutionalism that requires the limitation on the powers of the government, the existence of a constitution that is legitimate and the protection of human rights. In Okoth-Ogendo's words, this is an African paradox whose primary elements are the commitment to the idea of the Constitution, and rejection of the classic notion of constitutionalism.[107]

Issa Shivji also noted that "although we have had great use, if not reverence, for the documents called constitutions, there has been little regard for the constitutional principle or constitutionalism."[108]

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(106) *Idem.* Sects 28 (2), 43 (1), 38, and 58.
(107) Okoth-Ogendo, H.W.O. "Constitutions without Constitutionalism: Reflections on An African Political Paradox" in Shivji, I.G. (ed). *State and Constitutionalism: An African Debate on Democracy*. Harare: SAPES. 1991.
(108) Shivji, I.G. "Contradictory Class Perspectives in the Debate on Democracy" in Shivji. *op. cit.* p.254.

According to Rosenfeld, "Not all constitutions conform to the demands of constitutionalism.[109]

In Andrews' words:

> Tyrants, whether individual or collective, find that Constitutions are convenient screens behind which they can dissimulate their despotism... Provisions that seem to be restraints can be employed to rationalize the arbitrary use of power. Apart from these slim limitations, Constitutions can perform other pseudo-constitutional functions in despotic States... They may contribute to the stability of these regimes and guide political action through the channels desired by the despots by explicit description of the machinery of government.[110]

According to Mojekwu, a written constitution, like those we find in most Southern African countries, may proclaim lofty ideals as its objectives, but ultimately turn into a dictatorship.[111]

Three major tests must be passed by a Constitution to comply with constitutionalism.[112] According to Nwabueze, "the crucial test is whether the constitution, if any, imposes limitation upon the powers of the government."[113] The second test is the test of legitimacy, not external legitimacy, which would derive from acceptance by the international community or some of its most powerful members, but mainly internal or domestic legitimacy, implying acceptance by the people. The third important test is the protection, promotion and enforcement of human and peoples' rights.[114]

A legitimate constitution must emanate from the people. It must first purport to serve the interests of the people and not those of the leaders who long to remain in power. It must express the will of the people and not of the government. Moreover, the people must be

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(109) Rosenfeld, M. "Modern Constitutionalism as Interplay between Identity and Diversity" in Rosenfled, M. (ed). *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives.* Durham & London: Duke University Press. 1994. p.3.

(110) Andrews, W.G. *Constitutions and Constitutionalism.* New Jersey, Princeton: D. Van Nostrand Company. 1968. p. 23.

(111) Mojekwu, C.C. "Nigerian Constitutionalism" in Pennock, J.R. & Chapman, J.W. (eds). *Constitutionalism.* New York: New York University Press. 1979. p.164.

(112) Mbata Mangu, André. *The Road to Constitutionalism and Democracy in Post-colonial Africa: The case of the Democratic Republic of Congo.* LLD Thesis, Pretoria: University of South Africa. 2002. pp.168-171.

(113) Nwabueze, B.O. *Constitutionalism in the Emergent States.* London: C.Hurt & CO. 1973. p.2.

(114) Mbata Mangu, André. *op. cit.* pp.168-170.

involved in the process of its drafting and adoption and should not be caught by surprise by a document foreign to them which they are only requested to adopt by a "yes" vote, as happened in a number of cases.

According to Nwabueze:

A Constitution should be generally understood by the people and be acceptable by them. A Constitution cannot hope to command the loyalty, respect and confidence of the people otherwise and to achieve this understanding and acceptance, a Constitution needs to be put through a process of popularization, with a view to generating public interest in it and an attitude that everybody has a stake in it, that it is a common property of all.[115]

Nwabueze further contended:

The people must be made to identify themselves with the Constitution. Without this sense of identification, of attachment and involvement, a Constitution would always remain a remote, artificial object, with no more real existence than the paper on which it is written.[116]

In Nwabueze's view, "A Constitution need not necessarily have been enacted by the people to have legitimacy... What is important is that the people should be involved in the process of its making."[117]

This was echoed by another Nigerian scholar, Ihonvbere, when he insisted on popular participation in the Constitution-making process and held that the people should not only have access thereto, but also understand and claim ownership of the constitution.[118]

Against this background, how legitimate are the constitutions of Southern African countries? Nowhere was the constitution adopted by referendum. In most cases, it was the product of people's representatives in Parliament or enacted by the ruling party. What is then the test of legitimacy?

(115) Nwabueze. *op. cit.* pp.24-25.
(116) *Idem.* p.25.
(117) *Idem.* p.27.
(118) Ihonvbere, J.O. *Towards a New Constitutionalism in Africa*. London: CDD Occasional papers Series No 4. 2000. p.10, p.15.

Legitimacy varies from one state to another. The first Constitution of Namibia, which was enacted by the UN, could claim more of an external or international legitimacy than a domestic one. Even in this case, its legitimacy had its source in the liberation struggle led by the liberation movement – SWAPO – that adopted this Constitution. The legitimacy of the Constitutions of Mozambique and South Africa, which were not adopted by referendum, also lay in the liberation struggle and in the liberation struggle led by those who enacted them.

The first Constitution of Zimbabwe,[119] as a British Constitution imposed on the Zimbabwean people in exchange for independence, was hardly legitimate. The Constitution which replaced it, and was adopted by ZANU-PF, could therefore be said to have the liberation struggle as a source of its legitimacy based on the role played by a Parliament that was composed of elected freedom fighters within ZANU. As for the Constitution of Lesotho, it posed no problem of legitimacy, as it is an expression of the customary public law of Lesotho and qualifies as a home-grown constitution.

The legitimacy of the constitution is a complex issue. Legitimacy is not given or achieved once and for all. It is dynamic and so is politics itself. A constitution which started as home-grown and legitimate can in the process lose its legitimacy. Inversely, a constitution or a power, which was not legitimate at the outset, can with time gain in terms of legitimacy. Accordingly, for good governance, leaders should work to strengthen the legitimacy of their power.

For instance, the Constitution of Mozambique and that of Lesotho have gained in terms of legitimacy while the Constitution of Zimbabwe has progressively lost its relative legitimacy as evidenced by many claims of constitutional change in that country. The Constitution of Namibia has also been struggling to maintain its legitimacy that has been suffering from the tendency of SWAPO, the former liberation movement, to behave as a state party and a source of legitimacy of power instead of the people. Even in South Africa, events post the ANC Polokwane Conference have proved that the legitimacy of Constitution is likely to suffer further with the ANC adopting the same attitude as the ZANU-PF and behaving as a party state, and democracy in South

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(119) The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom).

Africa transforming into a 'partycracy' where parties, in fact one party, the ANC and its partners, govern and not the people.

Nevertheless, South Africa can consider herself fortunate to have institutions such as an independent judiciary led by the Constitutional Court to ensure that some legitimacy is preserved.

However, consistent attacks on the independence and impartiality of the judiciary, whether these attacks emanate from the ruling party and its agents or from some members of the judiciary, are likely to affect the legitimacy of the South African Constitution. Popular discontent about floor-crossing that allowed the members of the National Assembly to change parties after having been elected on a ticket of a particular party and yet retain their seats in Parliament is also evidence that people do not identify themselves with some provisions of the Constitution. During the peer-review of South Africa under the APRM, the African Peer-Review (APR) Panel found that floor-crossing had adverse effects on the long-term development, vitality, vibrancy and sustainability of multiparty constitutional democracy in a post-apartheid South Africa and recommended that South Africa address these effects.[120]

Despite this, except for Zimbabwe where the MDC has been demanding constitutional change, the overwhelming majority of the people still appear to be satisfied with the constitutions that therefore seem to be legitimate in Lesotho, Mozambique, Namibia, and South Africa. This is not because these constitutions are "home-grown".

A constitution can be home-grown as a product of leaders who inherited from the past colonial or apartheid masters and do not feel they have relinquish power but still fail to command legitimacy. This is the case of the current ZANU-PF Constitution of Zimbabwe where the majority of the people no longer identify themselves with the Constitution that has over time become foreign to them or imposed on them by the ruling party. Inversely, the popular condemnation and outcry following coups d'Etat, attempted coups d'Etat, violations or attempts to violate the Constitution in Lesotho, Mozambique, Namibia and South Africa clearly demonstrates that the constitutions of these Southern African countries still remain legitimate although the legitimacy cannot be seen to be cast in stone. This is because the people have come to consider

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(120) APRM. *Country Review Report* and the *National Programme of Action* of the Republic of South Africa. *op. cit.* paragraphs 135-136, 152.

that the Constitution, which proclaims that the power belongs to the people who exercise it through referendum or elections, and which sets up the rules and principles governing the access and exercise of such power, is the main and even exclusive source of legitimacy.

Other sources of legitimacy claimed to be specific to Southern Africa, namely liberation struggle, and tradition and religion, only count when endorsed by the constitution or in line with its rules and principles. Only power acquired and exercised according to the constitution is legitimate and good governance as holistically understood in the current African context under the African Union, namely political, economic, social, and corporate governance is likely to consolidate the legitimacy of power.

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The liberation struggle and traditions or religion were identified as sources of legitimacy of power in Southern Africa. As such, they continue to play an important role in legitimising power in Southern African countries although such influence varies from one country to another. The influence of the liberation struggle is particularly pronounced in countries such as Mozambique, Namibia, South Africa and Zimbabwe, where African leaders embarked on liberation movements against the colonial or the apartheid regime, as much as traditions continue to be important in these countries and even more in countries such as Lesotho and Swaziland that are traditional monarchies. However, traditions or religion, like the liberation struggle, remain informal sources of legitimacy that have lost much of their influence with the adoption of written and entrenched constitutions, which have been proclaimed supreme laws throughout Southern Africa.

Accordingly, the constitution - and not liberation struggle, tradition or religion – is the official and primary source of legitimacy of power across Southern Africa. The supremacy of the constitution does not imply that the liberation struggle, traditions and religion no longer play any role, but only that they have been subject to it as the supreme law. In some cases, the liberation struggle and tradition as sources of legitimacy of power have been embedded or reconciled in the Constitution. The Constitutions of Namibia, Zimbabwe, and

particularly that of Mozambique contain a number of provisions that relate to and enhance the liberation struggle as a source of legitimacy of power, but a subsidiary one as compared to constitutional legitimacy. All Southern Africa countries, including Lesotho and South Africa, also recognise the role of traditions and customary law as a source of legitimacy through the institution of Houses and councils of Chiefs.

As times goes on and new generations of citizens are born while those of freedom fighters and war veterans go down in history, the liberation struggle has been shrinking as a source of legitimacy of power and tends to become a remote source that hardly appeals to new generations that never experienced colonialism or apartheid.

The defeat of ZANU-PF at the March 2008 elections in Zimbabwe has been presented as a wake-up call to all others liberation movements still in power in Southern Africa and a reminder that people no longer take the liberation struggle seriously as a source of legitimacy of power. As compared to the liberation struggle, traditions or religion are likely to survive much longer as a source of legitimacy, especially at the local level of government, not only because traditions find it hard to die, but also because of their constitutional recognition. However, the importance of the constitution as a source of legitimacy of power also depends on its wide acceptance by the people or on its own legitimacy. Leadership legitimacy in modern states mainly rests on the legitimacy of the constitutions.

An investigation into the constitutions of Southern African countries leads to the conclusion that despite being home-grown, the constitutions of a number of these countries are still confronted with the problem of legitimacy especially where constitutions have survived without constitutionalism.

Good governance in Southern Africa, understood in its holistic sense as political, economic, social and corporate governance under the Constitutive Act of the African Union and its New Partnership for Africa's Development, requires the development and respect for constitutionalism, which entails limitation of powers, respect for the rule of law and promotion of human rights, not only individual and collective, but also civil, political, economic, social and cultural rights. Therefore, good governance and legitimacy are interrelated and mutually reinforcing. Good governance reinforces the legitimacy of power

and legitimate leaders are likely to embark on good governance and such governance is favoured by the Constitution. As pointed out earlier, contrary to the earlier discourse on governance, good governance is necessarily democratic governance in the African context.

Despite the fact that their record may sound better than that of African countries in Eastern, Western and Central Africa, many Southern African countries are confronted with challenges related to governance. The peer-review of South Africa still acclaimed as the model or one of the few models of good governance in the sub-region has unfortunately led to the conclusion that much still needs to be achieved despite progress that has been made since the collapse of apartheid. Recent attacks on the independence of the judiciary established to enforce the Constitution allude to a threat to constitutional legitimacy.

In December 2007, the ANC held its conference on the campus of the University of Limpopo. Some resolutions adopted during the Polokwane Conference and decisions made by the new ANC leadership attracted adverse comments from many observers for whom South Africa had entered a new era of uncertainty, with gloomy prospects for democracy and constitutionalism. Hopefully, this Conference, which takes place on the same campus, will send a message reminding the people and the leaders of the sub-region that decades after the end of apartheid and colonialism in Southern Africa, the liberation struggle and traditions, in spite of being embedded therein, have been replaced by the Constitution as the main source of legitimacy of power. Such legitimacy will only be reinforced by good and democratic governance based on the promotion and respect for constitutionalism broadly understood as implying limitation of power, respect for the rule of law, and promotion and respect for all human rights.

Constitutionalism in South Africa

By Paul HOFFMAN
Centre for Constitutional Rights

I have been asked to address you on the degree to which our new society is founded on, and operates according to, constitutionalism.

The process of negotiating the national accord, which underlies the Constitution was a long, arduous, and thorough one. It involved political parties representing substantial majorities in all our communities. Ours is a home-grown and thoroughly indigenous product of which all South Africans justly deserve to be proud.

South Africa is now a teenaged constitutional democracy, and, as so often happens with teenagers, problems do occur. It is important for constitutionalism that these problems are appropriately addressed so that the pimples and late nights do not develop into more serious problems.

Constitutionalism defined.

In my discussion today I would like to embrace the three tests of constitutionalism propounded by Professor Mangu of UNISA. They are:

• Firstly, does the Constitution impose limitations upon the powers of the government?
• Secondly, does the Constitution enjoy domestic legitimacy, in the sense that it is accepted by the people?
• Thirdly, does it protect, promote and enforce human and peoples' rights?

1. Limitation of Government Powers.

The Constitution places limitations on the powers of the government by:
• Making the supremacy of the Constitution and the rule of law founding provisions;
• Establishing an independent judiciary whose judgments and orders bind all organs of state;
• Separating power between the Executive, the Legislature and the Judiciary; and by
• Establishing independent state institutions supporting democracy.

Our new society was undoubtedly founded on the principle of the supremacy of the Constitution and the rule of law. Section 1 of the Founding Provisions of the Constitution entrenches the supremacy of the Constitution and the rule of law and Section 2 determines that any 'conduct inconsistent with the Constitution is invalid', and that the obligations imposed by the Constitution must be fulfilled.

The ANC has committed itself to "the fundamental provisions of the basic law of the land", which it states in its Strategy and Tactics documents accords with its own vision of a democratic and just society. However, it stresses that its commitment to the Constitution should be viewed "within the context of correcting the historical injustices of apartheid". In other words, the ANC interprets the Constitution within the framework of its own National Democratic Revolution - whose central proposition is the elimination of what it regards as the continuing inequalities arising from apartheid.

The independent judiciary represents the most important limitation on the power of government. The judiciary is answerable only to the law and the Constitution. The requirements of section 2 of the Constitution in effect mean that all conduct by anyone and all legislation emanating from whatsoever source can be scrutinized on the basis of its compatibility or consistency with the standards of the Constitution and, if found wanting, can be struck down as invalid.

In general, the Government accepts and implements the decisions of the courts - even where they conflict with its policies. However, there

are numerous examples of the failure of government departments - particularly in less developed provinces - to carry out court orders.

There are also some serious concerns regarding moves to "transform" the judiciary. A constitutional amendment and a batch of bills containing amending legislation aimed at making the judiciary "more responsive to the aspirations of the people" (earlier called "the masses") were first gazetted in December 2005. After a huge outcry in which all living Chief Justices participated, they were withdrawn in July 2006. However, at its Polokwane conference last December, the ANC once again called for the implementation of far-reaching reforms of the judiciary before the end of the present government's term of office. The reforms would include:

• The establishment of the Constitutional Court as the single apex court - thus removing the status of the Supreme Court of Appeal as the final arbiter of all non-constitutional issues;

• A warning that the courts should not unduly encroach on areas that are the "responsibility of other arms of the state" (thus limiting their power to require government to take practical steps to assure constitutional rights through the provision of anti-retroviral drugs and basic housing?);

• Transfer to the Minister of Justice ultimate responsibility for "the administration of courts, including any allocation of resources, financial management and policy matters"; and

• The establishment of "a single rule-making mechanism for all courts, in terms of which rules drawn up by the Rules Board would be subject to the approval of the Minister and Parliament.

Another limitation of the power of government is the separation of powers. However, the reality is that the borders dividing the executive and the legislature are becoming increasingly blurred. Parliament is firmly under the control of the executive and of the ruling movement and often fails to carry out its oversight duties in the manner envisaged by the Constitution. As Andrew Feinstein recently pointed out, this was particularly the case with regard to the manner in which it dealt with questions arising from the notorious arms deal.

The Government is also encroaching into areas of civil society that should be the preserve of the citizens involved. In terms of the recent

legislation, the Minister of Health will now appoint the board of the association that represents the medical profession. The members of the association will not have the ability to do so themselves. Recent policy proposals on the legal profession would give the Minister of Justice similar powers with regard to the proposed professional body representing attorneys and advocates.

The lines between the ruling movement and the State are becoming increasingly indistinct. The Polokwane conference adopted a resolution requiring "all senior deployed cadres in various centers of power" (presumably including the public service and the security forces?) "to go through political classes to understand the vision, programme and ethos of the movement." The incoming NEC was instructed "to give strategic leadership to cadres deployed in the state and to improve capacity to hold cadres deployed accountable".

In addition to the checks and balances inherent in the separation of powers, Chapter Nine of the constitution creates a phalanx of institutions to uphold constitutional democracy. The most important of these are the Human Rights Commission, the Public Protector and the Auditor-General. All are enjoined to act impartially and to perform their functions without fear, favour or prejudice. Jointly and severally they constitute a means of limiting the exercise of power by government, of holding it to account and of dealing with improprieties as they arise.

However, some of these institutions are under pressure. Although the HRC often plays a constructive and independent role in the protection of fundamental rights, the Public Protector is perceived to be executive minded and crippled by inefficiency. The Auditor-General has been accused by Andrew Feinstein of permitting government interference with regard to the arms scandal. In addition, the Asmal Commission last year recommended the abolition of several of the other institutions involved - including the Pan South African Languages Board and the Commission for the Protection of Cultural, Religious and Linguistic Minorities.

The most serious erosion of the powers of the independent institutions has, however, centred on the Polokwane resolution to dissolve the National Prosecution Authority's Directorate of Special Operations - otherwise known as the 'Scorpions'. It will soon be argued in court

that this decision is illegal for want of compliance with the require-ments of rationality in all government actions; unconstitutional for its emasculation of the NPA; unreasonable because it would disband a highly successful crime-fighting unit; unfair because the labour rights of individual Scorpions would be violated; and unresponsive to the needs of the people at a time when crime is rampant in the country.

The challenge that the abolition of the Scorpions poses to consti-tutionalism cannot be over-stressed. The fear is that if the unit is dis-banded, the government itself will be left with the final decision as to who should, and who should not be prosecuted. This would constitute a major restriction of the ability of our constitutional dispensation to limit the power of the Government.

2. Domestic legitimacy of the Constitution

Internal features of the Constitution which ensure domestic legiti-macy include provision for:
• Regular elections
• Freedom of expression
• Freedom of political activity, the rights to assemble, protest, and to picket.

There can be little doubt that our Constitutional dispensation en-joys domestic legitimacy and acceptance by the people. We measure this legitimacy in free and regular elections presided over by an in-dependent Electoral Commission. We have free and outspoken media with no limitation on the expression of political opinion. There is no limitation on the ability of people to organize, form political parties, to assemble, or to protest publicly.

There are, however, some reasons for concern:

The Polokwane conference resolved that the media should "con-tribute towards the building of a new society and be accountable for its actions". It also expressed the belief that the arts and culture should serve the purposes of its National Democratic Revolution" and that the media needed to "take on a specific responsibility in this regard."

The resolution on the media warned that "the right to freedom of expression should not be elevated above other equally important rights

such as the right to privacy and more important rights and values such as human dignity". It called ominously for an investigation into the establishment of a Media Appeals Tribunal to "strengthen, complement and support the current self-regulatory institutions".

It is also disturbing that the ANC does not view itself as a political party 'in the bourgeois sense' but as a revolutionary liberation movement with an uncompleted mandate. It describes itself as a "hegemonic organization" that is not just the "leader of itself, nor just of its supporters". It believes that "History has bequeathed on it the mission to lead South African society as a whole in the quest for a truly non-racial, non-sexist and democratic nation."

In constitutional democracies it is the voters and not history that give parties the mandate to govern.

3. The protection, promotion and enforcement of human and peoples' rights.

In terms of section 7 (2) of the Constitution, the state is obliged to respect, protect, promote and fulfil the rights contained in the Bill of Rights. On paper therefore, it can be said that our constitutional dispensation complies with the third test of constitutionalism.

Unfortunately, this has not been the experience of many South Africans. Whether the deficiencies arise from lack of capacity or resources, or from inadequate policies and administration, is a question for a more political debate. However, there is little doubt that our people do not, in practice, enjoy many of the key rights guaranteed by the Constitution:

• According to the UNDP we are the 12th most unequal society in the world - despite the assurance of our right to equality. And we have been getting more unequal since 1994;

• Our right to life is seriously threatened by rampant crime and the murders of more than 250 000 people since 1994;

• The right to choose a trade, occupation or profession is undermined by the reality that almost 40% of black South Africans are unemployed;

• Our property rights are at this very moment under unprecedented threat arising from the new Expropriation Bill;

• Our right to health care has been seriously prejudiced by a failure to provide adequate medical services and by the late response to the HIV pandemic;

• The rights of children are abused on a daily basis by violence, rape and exploitation;

• We have failed dismally to ensure the right to education. According to recent estimates, only 42 000 of the 1.19 million children who entered the school system in 1995 and who matriculated last year, were functionally literate and ready for proper university education; and

• The constitutional assurance that all languages would enjoy parity of esteem is just not being realized - not only for Afrikaans-speaking South Africans but by speakers of all our other indigenous languages as well.

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It is apparent that while the structures of the South African Constitution remain in place and theoretically comply with the three tests posited, there is much work to be done before it can be said that constitutionalism has taken root and is flourishing in South Africa. While the courts and the press remain free and independent there is still hope that this can be achieved.

Fortunately, it is not only politicians who determine the fate of nations. Religious and traditional groupings, civil society organizations, the business sector and the international community, all have a role to play in promoting constitutionalism in South Africa. While the politicians are at least paying lip service to the values of the Constitution and to the rule of law it is incumbent upon all persons of goodwill to join in promoting the Constitution as the best means available for achieving a prosperous and peaceful future for all who live in this lovely land.

Challenges of Land Management: a Laboratory of Normative Pluralism

Synthesis of the Debate

The question is not "how to change the value or, are the values changing, but what is the value judgment [underlying] it, and which is attached to those practices by African people" (Dr. Emmanuel Tshikwatamba)

The third session of the Colloquium was dedicated to the concrete analyses of the articulations of the diverse sources of legitimacy through the land management issue. As a matter of fact, during the first and the second session participants analysed the very nature and type of three (four with constitutions) sources of legitimacy. Session two, indeed, had already opened the discussions on the coexistence and the articulation of different types of legitimacy due to the very particular nature of constitutions, being at the same time a source of legitimacy by themselves and a driver of articulation of the diverse sources of legitimacy.

In order to better understand and discuss the reality, a field trip was organized in the afternoon before session 3. This field trip aimed at meeting some of the authorities in charge of land management in the area of Polokwane, in this case, the Chief and the Mayor of the Municipality of Polokwane. As a matter of fact, because of last minute shift in the order of the agenda, (the group was asked to meet firstly the traditional authorities and secondly the Mayor), it was impossible to hold the expecting meeting in the City Hall, as the group was too late, still attending the meeting, and following the protocol in the traditional office (*kraal*). This was an opportunity for the participants to experiment GaMothiba's Traditional governance.

Both events, the field trip and session 3, underlined that in spite of the apparent consensus on the modern legitimacy (through recognition and integration within state regulation) of tradition and traditional leadership, its concrete linkage with the so-called modern authorities is not so easy. Reality is characterized by: a lack of trust and common understanding on the roles of municipalities and tradition; a lack of

common interpretation of the rules governing land management; contradictions and policy shifts on land management and its under utilisation because of skills shortage, resource, state subsidies, corruption, etc. Practical reflections on the functionality of the current institutional environment in South Africa joined considerations on historic and prospective modes of land management. Participants brought in critiques of regional land administration methodologies. We were reminded that land is an asset, and was a source of conflict even before colonisation when tribes fought over grazing lands. Participants showed that even the Scramble for Africa was about land. It was further presented that land was dispossessed from the indigenous people by colonisers and it became one of the sources of the armed struggles in some of the African countries. The confiscation process differed from country to country, from legislation to war. The discussion around the current situation on land management within the sub-region highlighted its diversity from one country to another.

Land management all over the world and particularly in Africa, is both a very sensitive issue and a fantastic laboratory of legal pluralism. What are the roles of authorities and sets of norms regarding land management for each source of legitimacy? Is there coexistence, hybridization and/or embeddedness of different sources of legitimacy? Land management is a symbolic field where different actors claim different sources of legitimacy, develop different logics, and where the questions of access, ownership and entitlement are particularly sensitive because they reflect differences between values and representation in which these practices are rooted. All this tension appeared in the colloquium when, for instance, the participants pointed out the existing gap between an often over-abundant legislation, originating in the historic mission of liberation movements to gain access to land, and its implementation. Analyzing more concretely the public management of land rapidly shows that coexistence and articulations between these different regulation systems are not so easy since they are rooted in values and interests that might not converge or complement each other.

1. The context of a non easy coexistence of the diverse sets of norms.

The difference between private property and economic targets on the one hand, and the collective use of land on the other, were core issues discussed during this session. Situating current land reform in controversies in the history of colonial dispossession, Dr. Emmanuel Tshikwatamba contended that contemporary government has continued these practices through adoption of western rational-legal governance structures which are driving current land policies and use of power. The creation of hierarchical ownership structures privileging title holding over other rights to land, he asserts, has nullified access to multi-level overlapping land use rights which had evolved to better administer the totality of community needs with regard to land. Dr. Emmanuel Tshikwatamba argues that the corporate ownership models now being promoted do not adequately embody the communitarian principles of collective management by focusing only on group ownership rather than truly reflecting the *Ubuntu* ideology. He pointed out a difference between cultural conceptions of ownership and identity stemming from traditional forms of regulation: "According to collectivism, the other is no other than me, it is harmony. In modern societies, the other is not me". While a chief would say, "I am not different from my people and there is no difference between my and their land", these concepts pose difficulty in a juridical framework oriented towards private ownership. In a response to critics who have seen Afrocentric land tenure as analogous to forceful restoration of land, Tshikwatamba rejects forceful repossession of land as a colonial, non-customary practice, instead advocating redistribution through the legitimate exercise of customary powers.

Kgoši Makgeru, discussing current land reform initiatives including the Communal Land Rights Act (CLRA) and the Land Management Bill in South Africa, noted that only limited land is held by indigenous communities. He reported that current instruments restrict bargaining rights against powerful mining interests and are still inadequate to equalize opportunity of land use. In his remarks, Phillan Zamchiya addressed the land privatization process in the region, which has been closely linked with redistribution planning. High expectations for large-

scale redistribution in Namibia, Zimbabwe and South Africa at the time of independence have been met with slow, small-scale initiatives, as governments facing daunting degrees of land inequity prioritized the health of land markets and ownership rights. He raised concerns about the reinvigoration of titling by De Soto's popular formalization of property rights programs, and the possibility of large-scale foreclosures and distress sales. Challenging the utility of such capital formation programs, Phillan Zamchiya noted the impracticably high costs of titling and surveying, and questioned the benefit of titling for the poor, whose livelihood strategies are frequently reliant on common land. He cited the example of Kenya, which since initiating titling programs in the 1950s has seen increased land ownership by those with access to the political system; decreased land rights for those who rely on the social system, including women; and increases in landlessness, land disputes and speculation.

In this context, the debates also highlighted the tendency for some actors to wish traditional regulation to have more importance in land management. The traditional chiefs asked for more formal power as they are convinced that their greater proximity to the population enables them to be more efficient. From this perspective, some of the participants insisted on the importance of taking into account the deeply rooted tradition of the collective and participatory management of land in southern Africa. Some of them directly expressed the value of traditional management of land because the land has always been the property of the people and that the traditional leaders presided over the land on behalf of the people. From this perspective, Emmanuel Tshikwatamba argues for participatory land management within a larger communitarian approach and for a revitalization of customary governance of land.

2. The need for more cooperation between the diverse authorities: which articulations?

The debates clearly brought out and expressed the more general issue of the necessity of a concrete cooperation between the state and the traditional regulation system and authorities, and this, despite the existing gap between the values each one represents. Emmanuel

Tshikwatamba and Kgoši Makgeru shared views on the need for cooperation between traditional leaders and elected officials, in consideration of their now interrelated roles in the custodianship of land and the distribution of resources for economic development, going further to recommend knowledge transfer from traditional leaders to guide governance and land management reforms. Several initiatives were mentioned as being good examples of what can be done in order to better link up diverse authorities.

Kgoši Makgeru advocated collective land management to permit effective collaboration by the array of actors and governmental departments now charged with land administration. Currently the Departments of Land Affairs, Agriculture, Provincial and Local Governance, and Housing are all charged with working together with local municipalities and traditional councils. From a vantage point of view, the perspective of a traditional leader active in Provincial-level activities, on the dysfunctions of the current system, is illuminating: in the absence of common understanding and clear definition of the roles of these stakeholders, communities are not beneficiaries, and a better collaboration is possible. He attributed delays in the implementation of CLRA to its low legislative priority, despite strong support among traditional leaders. Nevertheless, rather than the retreat of the state from the local, he spoke of the possibility of collective management not at the community level, but among the administrative stakeholders. Reflecting his access to the solidarity of traditional leaders in the region, he observed that these communities see themselves, rather than the state, as the legitimate owners of the land, but currently lack the capacity to act on an equal footing with the central government. Because municipalities serve to distribute resources over areas effectively governed by traditional leaders, a common vision on development strategy has become essential. He observed that reconciliation of traditional identities and cultural practices with the new Constitution will take time, yet remains a bright prospect for effective local governance.

Phillan Zamchiya explained why for him CLRA could be a move for South Africa to secure rights for the poor, providing space for traditional leaders to serve on Land Administration Committees, as well as safeguards for those who do not want their land rights mediated by traditional leaders. Some examples have to be taken within the

sub-region. Notably in Botswana and Lesotho, where they have used variants of land administration boards to avoid personal allocation to individuals by chiefs, while maintaining many principles of customary tenure. Botswana's locally elected land boards have increased the information available to the state about land in rural areas without the costs of large-scale surveying, and have contributed significantly to rural land planning through customary tenure systems. Lesotho's popularly elected land advisory boards provide an advisory function to chiefs, intended to echo traditional community roles. In both systems, freehold is unavailable in the areas served by the boards, and does not conflict with privatization scheme.

Emmanuel Tshikwatamba emphasized the redistributive properties of a prototypical African land tenure system, finding improved management, greater socio-economic stability, and adaptability in a communitarian system, which permits 'multiple access' possibilities for members. Through creative empowerment, flexibility, and shared accountability, group identity is enhanced, with customary allocation of land bearing longer-term benefit for the larger community than a single-period exchange of money between individuals. He argues for a more democratic reading of the tenets of traditional leadership, expanding notions of power beyond control and coercion to creative and mutually-determined empowerment and argues for the value of a spiritual leadership better aligned with the economic and social realities of the population. He sees the establishment of the Provincial Houses of Traditional Leaders as positive national-level recognition of the traditional land governance mechanisms, a challenge to chronic de-legitimization of unelected leaders by proponents of electoral democracy.

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From this session dedicated to land management came out the need for "further examination of African management principles (...), rather than cosmetic inclusion of these concepts in a framework of western principles" (Dr. Tshikwatamba). From this point of view, analysis of the third session confirmed that of the session on Constitutions. But, during this last session, an additional step was reached in the comprehension of the hybridization process of sources of legitimacy. One

main issue is that it is not only the values represented by one source of legitimacy that has to be taken into account, but the "value judgment underlying (*the practice of this source of legitimacy*) it, and which is attached to those practices by African people" (Dr. Tshikwatamba). These symbolic expectations of people are part of the drivers of hybridization dynamics.

The Culture of Collectivism on Land Acquisition and Administration Modernity Challenges and Legitimization of Power

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This paper interrogates the African culture of collectivism on land acquisition and administration as well as the legitimization of power. The challenges of modernity are denoted for comparative reasons. The paper moves from the premise that collectivism has been and is still a way of living in African culture and this cultural orientation impacts on every aspect of the African people including the land. The land question has always been contested in Africa since the dawn of colonialism and the paper narrates the dynamics involved. Contemporary African practices that do not conform to the collectivist cultural orientation in question are contaminated by various historical and inter mixture of variables. The traditional system of governance and management through chieftainship is commendable for the stability it created from one generation to the other. It is contended that the traditional system administered the land question more effectively than modern and democratic governments.

1. Background

Collectivism, also known as the communitarian approach to land management, has been an African practice for decades. The disappearance of collective management of land ownership and distribution is traceable to the dawn of colonialism and imperialistic conquest of the traditional African system of governance. The introduction of modern governance also contributed of the disappearance of collectivism on the land question. In the centre of the collectivism orientation, the traditional system of governance through chieftainship is prevalent. There are valuable lessons still to be learned from the traditional system of land governance and management. Maylam (1986:i) observes that African systems of governance are perceived as peripheral and belonging only outside the main theatre of modern economy, appearing rarely on the central stage and even then considered hindrances to the modern government system. In the case of traditional chieftainship, modern governments positioned the traditional system at the periphery and diluted its operations. To this end, modern governments are required to re-orientate their approaches and incorporate African philosophies in order to relate differently with Africa as a continent and Africans around the globe. A greater understanding and appreciation of African heritage and the transfer of collectivist knowledge of governance and management is required. (Mbigi, 1997: ix). The African renaissance should serve as a vehicle of advancing an understanding of African practices that have been compressed by western cultures and translate them meaningfully. The attestation of these sentiments are expressed by Normann *et al* (1996:1) in stating that human service practitioners are yet to find practice paradigms consistent with African practices, for example on land ownership and distribution. Undoubtedly, issues of appropriate, indigenous land management practices require extensive exploration. The promotion of collective governance and management of land issues is appropriately indigenous and is part of an African knowledge resource. The value question and perceptions play an important role when an African practice such as collective management is to be resuscitated. The argument is not about changing values or whether values do change or not, but the value judgment attached to this practice by Africans themselves.

2. Colonial-Modern Democratic Approaches

In the context of South Africa, the arrival of the Dutch in the 1650's was responsible first and foremost for the dispossession of land of the indigenous people or the land in the custodianship of chieftainship. Buthelezi (1995:2) informs us that the history of European colonization is one of conquest, plunder and dispossession and exploitation of the indigenous African population. Dispossession was one typical tool of primitive land acquisition used by European colonizers of South Africa, which precipitated more than two centuries of anti-colonial wars by the African people and their chieftainship leadership in defense of land and political independence. It is not only the land that was taken from the indigenous population but also livestock i.e. cattle, sheep and goats. The land could not have been disposed of excluding the livestock, because it is the grazing field for these *animal beings*. Van Aswegen (1990:22) informs us that when the Dutch East Indian Company (DEIC) established a refreshment station in the Cape South Africa, they were already aware of the large indigenous cattle herds. The land was not only taken, but privatized in the hands of the colonial elites who thereafter constructed modern defensive system against victims of land dispossession. Reconnaissance expeditions of 1884 and 1835 reported that the African land was fertile and largely uninhabited in that much of the interior was depopulated by a series of wars among African chiefdoms in the Southern African region. The truth of these reports, many of them from missionaries, has been argued at length by historians. The depopulation theory as advanced by missionaries is arguably unreliable and is exaggerated in every account. The historical inaccuracies, that tend to strengthen the trekkers' claim that the land which they occupied was uninhabited and belonged to no one, are false from the African perspective. (Readers Digest Association of South Africa, 1992: 114). The contentious issue is not whether the land was occupied or not but that the disposed land belonged to indigenous African people. The substantial argument has always been that colonizers of Africa did not come from Europe with land but with machine guns that were used to inspire terror in the African population.

By the end of the 19th century, nine-tenths of the African territory had been subjected to complete imperialistic control. The Southern

Nguni's who had borne the brunt of colonial wars were dispossessed of their land resources and silenced for good. The Zulus were finally conquered by British imperialists in 1887. In the North, the Pedi's and the Venda's fought and resisted both the British and the Boer colonial forces as the struggle intensified before succumbing to the military superior colonists. The Southern Sotho's fought gallantly for their land before their incorporation into the British protectorate. Beyond the Limpopo, the Matebele and the Shona were vanquished in 1886. Importantly, colonial invaders waged these wars in order to take the land from the indigenous people and to consolidate territorial control. Africans fought back in defense of their land under chieftainship with little success due to less sophisticated machinery as compared to the ones used by their colonial counterpart. The land dispossession strategy applied by colonial regimes followed the same pattern in all African states that were colonized. The Zimbabwean war of liberation (1965-1979) for example was inspired by the land question. The South African struggle was underlined by urban demands, mostly couched in terms of "freedom". But in both countries, the overwhelming population majorities are land dispossessed as a result of settler colonial conquest. South Africa does not have liberation war veterans in the Zimbabwean sense, but it has a rural landless populace which is mobilized around the pace and direction of land reform. South Africa's land politics are also shaped by the white land-owners' class violence against farm workers and labour tenants (Mngxitama, 2000:7).

The colonial regime's dispossession approach was legislated for and statutory frameworks were instituted to legalize the dispossession approach. The Natives' Land of 1913 was an Act by the South African legislature aimed at regulating the acquisition of land by "natives". The Act formed an important part of the colonial system to legalize the dispossession approach. The Act created a system of land tenure that legally deprived the majority of South Africa's inhabitants of the right to own land and this had major socio-economic repercussions. The effects of the Land Act of 1913 are still visible in a democratic South Africa, needless to mention that the South African experience of land dispossession is an African experience. In an effort to completely destroy the indigenous traditional structures that had been built up in the African society, and to impose imperialism with an unnerving

totality, the colonialists were not satisfied merely with holding a people in their grip and emptying the Native's indigenous resources of all form and content (Biko, 1978: 25), they turned to privatization of land after dispossession. References can be made to notices in colonial farms denoting that "trespassers will be prosecuted". The rightful owners of the land were later regarded as trespassers as an additional security measure of self-defense on the part of colonial regimes.

The traditional leaders or the chieftainship system of governance was not only dispossessed of land by colonial governments, but by the introduction of modern governments as well. Modern governments shifted from traditional value-laden practices of land acquisition and administration and follow colonial patterns. It can be interpreted that traditional leadership and indigenous people suffered a double blow on land issues in that their land was disposed of firstly by colonial regime and secondly by modern governments. The administrative patterns that have developed in Africa since independence, for all their variations, possess certain features common to their colonial masters. The rules of the political game that these colonial regimes devised usually attained a modicum of coherence, even if they generally diverged from rational–legal organizational precepts. The decision-making procedures of the colonial regimes tended to be restrictive to African values if not insular, and so does modern governance. Political centres in Africa have, therefore, coalesced around differently designed pacts of domination established by relatively small colonial groups. The fact that colonialism became the domestic source of land policies does not imply that they were necessarily the strong *foci* of activity. Their record in this regard has depended on how management of social relations has been imposed on African people. Although in other African countries, colonialism diminished decades ago, the on-going effects on the minds of the people are tremendous (Chazan, *et al*, 1992:168-1), both on modern and democratic governance.

The democratic government in South Africa, however, acknowledged the traditional system of land governance (interpretatively) where applicable, thereby establishing the House of the Traditional Leaders. Although the various Houses of Traditional Leaders are provincially established, their mandates are not exclusively land based in that other non-land related issues could be handled through this

system (Constitution of the Republic of South Africa). Democratic governments are modern governments as well but the emphasis is in their democratic formation making them different from non-democratic modern governments. The recognition of traditional leaders in the constitution in terms of section 211 (1) is a commendable dispensation; a traditional authority that observes a system of customary law is expected to function subject to applicable legislation of customary law. The courts are also expected to apply customary law when such a law is applicable, subject to the Constitution. The role of traditional leadership is determined by national legislation. With these constitutional provisions, traditional leaders may exercise their original role pertaining to land administration through further *evolution*, if not *repetitive evolution*.

3. Collectivisms and Communal land

The core of the African indigenous community was for example the family and it was apparently the custom of the original people of South Africa to form larger family units by integrating married male children patrilinearly with parents. One of the attributes of the indigenous African community's organisational arrangement was the fusion of the family units to form a clan. From the Dutch sources of the 17th and the 18th centuries, as well as the anthropological studies about the indigenous African communities, it is clear that the clan played an extremely important role in African history. Each clan had its own organisation, with a captain as the head to provide guidance to the community. A tendency existed for the indigenous Africans to form larger social and political ethnic groups by joining several clans under a chiefdom who was accepted by all as a leader. The leader of such an ethnic group probably acquired his position of authority by virtue of the fact that he was the head of a powerful family and also on the basis of the family relationship with the clans that join the ethnic group. From this scenario of family cohesion, clan, larger clan and community, the culture of collectivism and the communitarian approach of land ownership developed with chieftainship providing leadership. The chieftainship was/is hereditary and the elder son was/is the successor after the death of his father and this was legitimately accepted (Van Aswegen,1990:

22). In view of the fact that the community consisted of the larger clan from the clan that emanated from the family, Oosthuizen (1985:92) contends that collective land management (own emphasis) contended herein is founded upon the unique understanding that the isolation of man from the land of his birth is anomalous. It manifests itself among African expression(s) such as: *"the fact that I am I (referring to chiefs and their prefects) and not the other ;(referring to subjects) and that the other is another and not me (referring to both the chiefs and the subjects)* is not acceptable*, I am only because we are, and since we are, therefore I am."* In this context, the land is not *owned* by chiefs or traditional leaders, but chiefs are merely *custodians* of land on behalf of their people due to the collectivism approach. It is not about "them" as traditional leaders, but about their people. Their people are not the "others" but part of themselves. Their people and "them" as traditional leaders are in a state of unison, and land disputes are prevented by the collectivism approach of living that forms part of their cultural orientation. Collectivism is closely related to the theoretical framework of the Moral Code of the Builder of Communisms (1961: 2) that articulates that *"one is for all and all is for one",* it thereby further promotes mutual assistance, human relations and respect, i.e., "*man is to man a friend and a brother or a sister"*. In this vein, Grant (1957:47) refers to collectivism as any philosophy or system that considers any kind of group such as class, nation, race, and society or state, as more important than individuals.

Collective management can therefore be defined as an African value-laden practice of land ownership, in this case by the collective body of chieftainship or clan or extended family arrangement for the benefit of all within the spirit of *Ubuntu*. Papp (1984:460) reckons, in attestation of what is mentioned above, that the collective body can be a tribe, a chieftainship, a clan, a village, and/or an extended family. It is the basis for a social contract that stems from, but transcends, the narrow confines of the nuclear family to the extended kinship network of the community. The administration of land is placed within the chieftainship jurisdiction not from an ownership perspective but from a custodian perspective. The question of ownership and custodianship is essential in the context of the argument advanced. Colonial and modern governments owned the land privately, but traditional leaders

owned the land on behalf of the people. This is based on the *Ubuntu* concept. There is no equivalent term in the English literature that closely translates the concept of U*buntu*, although every African ethnic grouping refers to this notion (Tshikwatamba, 2002:14)). According to Christie *et al* (1994:113), the concept of U*buntu* is uniquely African and central to the Afrocentric management approach. The South African Department of Education (2001:15-16) denotes that *Ubuntu* is rather a human dignity and further endorses that it has a particularly important place in the African value system and that it emanates from African mores. *Ubuntu* entails that an individual who is part of the collective should be afforded unconditional respect and right to be heard, irrespective of his/her social status. In the context of the *land* issue, a new arrival in the jurisdictional area of the chieftainship could be granted a portion of the *land* to plough and cultivate it. Where necessary, some stocks could also be provided to feed the family of the new arrival in the area as a part of *Ubuntu* form of hospitality. In this case, the land is not sold but given for cultivation. The fact that it is not sold implies that it is not owned but is held on according to the custodian principle. Mbigi (1997:2) literally translates *Ubuntu* as collective personhood and morality. In this vein, the disjunction of collective management from *Ubuntu* concerning land ownership compromises its originality as both collective management and *Ubuntu,* provide images of *supportiveness*, *cooperation* and *solidarity.* These principles were not manifested during the colonial reign and modern government did not fully incorporate them either. Collective management is not synonymous to the group model of formal settlement on specific land, as recently manifested through body corporate ownership of land in modern established villages. Dye (1978: 23) contends that the exposition of the group model is that the elite owners of land play an important role in the success of the model. In a collective management setting, harmonious relations of individuals are bonded by *Ubuntu,* and land ownership is communitarian.

The implications of African collectivism and communal land practices are that in a collective management environment, members of the community are connected through chains of humanity and do operate as a *family o*f a specific community in a specific land demarcation. In essence, it implies that the "We" prevails over the "I" on land

administration. Should the "I" *happen* to carry out a specific engagement without the mandate of the "We", the "I" accounts to the collective. The friction of "them" and "us" on land administration is non-existent as both "them" and "us" are incorporated into "all of us" that forms part of the collective. If "them" exists, that should be another part of the collective in their unique way of conducting land administration, and can't be interpreted as disintegration from *this* collective body. Kreitner and Kinicki (2001: 112) articulate that individualistic cultures are attributed of "I" and "me" while collectivist cultures are attributed of "we" and "us". The unitary South African democratic dispensation circumscribed South Africa into nine provinces as an exemplary point of reference. This circumscription established the provincial *collective entities* respectively. This arrangement differs from the Land Act of 1913 that racially balkanised the land question on a racial basis. In the provincial dispensation, the democratic government incorporated the land issue in its approach within fairness and justice principles. There is a visible movement from isolation to integration, and this culminated into the integration of the traditional system of leadership into local government dispensation. During the transitional phase of local authority, the traditional leaders boasted of their land ownership rights of a custodian nature in relation to the elected local political office bearers. The elected local political office bearers boasted of their legitimate state of existence, which could provide resources for local economic development in the chieftainship land. With these contestational approaches, integration became necessary to bring about developments within the land owned by traditional leaders; thus the legitimacy question on land questions is achieved through compromises, consolidation and synthesis.

In colonial and modern governance, potential conflicts are inevitable on land issues as they have been in the past. Barber and Barratt (1990:3) bring the analogy of the South African apartheid framework that separated the country into homelands. It can be interpreted that apartheid promoted private ownership of land attributed by conflictual relations between those who belong to the "central land" and "peripheral land". Those who belong to the peripheral land conflicted against the immediate political authority imposed on them, while those in the central land were pressurized by different forces to bring about

change. According to Papp (1984:460), western conceptions have little relevance to African cultures. The argument advanced in this paper is that the promotion of collective management provides value-adding *lessons* adaptable to a modern system of land ownership.

4. Modern Government's Land Related Challenges

There are tremendous challenges of modern land acquisition and administration which have become inherent and unavoidable to modern governments. Informal settlements are, for example, negative results of modern administration of land. Historical underpinnings demonstrate no archaeological evidence of informal settlements where the traditional system of land acquisition and administration prevailed. Informal settlements persist despite modern government's targeted provision of low cost housing. *Slow delivery* on the new government's subsidized low cost housing is often put forward as the cause of informal settlement. Informal settlement, even if it is based on *illegal occupation* of land is recognized as an affordable and more immediate accessible solution to the housing deficit. (Huchzermeyer & Karam, 2006:19). It is fundamentally contended, however, that *slow delivery* of low cost housing is not the cause of housing deficits, but the manner in which the land question is administered by modern and democratic governments. Furthermore, it is argued that during the traditional system of land acquisition and administration and where the system still prevails, informal settlement did not and does not exists due to effectiveness of the traditional system of land acquisition and administration through the custodianship system of chieftainship. There is no such thing as *illegal occupation* of the land by the local people under the chieftainship system of land acquisition and administration. The traditional approach to land ownership provides sustainable benefits, conversely to modern governments approach. The benefits in question are not without some degree of limited challenges, but comparatively with modern governments, sustainable benefits are maximized under the traditional system more than in modern governments.

The table below depicts the challenges and benefits as contended:

Table 5.1 Modern Governments Challenges and Benefits

Modernity Challenges	Benefits of Traditional Land Ownership
Control of land cascades from the top	Control of land is shared
The authoritative figure is accountable	Accountability is shared
Leadership is based on power and position	Traditional Leadership is based on nurturing and community support
Dependability and rigidity is emphasized on land ownership	Traditional system of land ownership continuously emphasizes flexibility
Sales and trade offs are exclusive means of land ownership	Multiple access to land are created
Lack of sustainable approach for empowerment	Traditional leadership assumes creative and innovative approach to empowerment
Assumes a stable land ownership environment	Assumes constant change for adaptation

(Adapted from the Pacific Institute, 1988:2000)

Figure 5.1 demonstrates the challenges of modernity on land acquisition and administration. Conversely, the benefits of traditional ownership are also indicated for comparison reasons. The Modernity approach demonstrates vertical dimensions (perpendicular to the horizon) of land acquisition and administration, while the traditional system demonstrates the horizontal emphasis. The greater challenges of modern governments are that related conflicts and other challenges are adjudicated from the top hierarchical corridors of power in that only the designated authority is accountable due to lack of shared accountability associated with traditional methods of land acquisition and administration. According to Lever (1979: 3), modern governments (own emphasis) can best be understood as hierarchically structured. Shared accountability associated with the traditional system is sustained through the decentralization strategy of chieftainship

prefects (Indunas), thus accountability is not centralized but shared across and within the layers of community interactions. Although Venter (1989:10) informed us that blacks in rural areas form a traditional relationship under a local *tribal* chief and have an extended *hierarchy* of *tribal* chieftainship; the correct reference should be *ethnic* chieftainship rather than *tribal* chieftainship. In addition, the practice does not translate into *hierarchy of*, but *collectivism* of the traditional leadership. The white counterparts in urban areas and in designated farms jurisdictions have no exposure to the traditional system of chieftainship and their approach to the system is abstract and academic. In modern governments, one's primary sense of responsibility and loyalty is to the line of command as charted in the top structure of governance and management. In the context of the traditional system of governance, the sense of responsibility and loyalty is to the community itself, thus enhancing collectivisms and a communitarian approach to land acquisition and administration. Dependability and rigidity is common, thus being a major challenge of modern governments in land ownership attributed of sales of land and trade off as exclusive method of land redistribution. Multiple accesses to land are created through the traditional system of governance and administration and access goes beyond sales through pricing. The traditional system of land acquisition and administration does creatively provide access to land at no cost or at the lowest costs rather than at exorbitant costs associated with modern governments. The land redistribution through the traditional system of chieftainship provides larger portions of land than modern governments provides because the traditional system provides the land to accommodate subsistence farming for self-sustenance. Modern governments' approach to land acquisition and administration lacks sustenance for self-empowerment. Where the land is provided at no cost, the custodianship principle prevails. Where the custodianship principle prevails, compensation of land can be made by the recipient of land after many years, when the recipient is able to make *payments*. The question of *payments* should be understood contextually, since it is not *payment* in the traditional sense involving finances, but it is more of a *contribution* to the custodianship system to sustain the system for the benefits of *others* and *all* within the communitarian approach. The traditional system of chieftainship on land acquisition and

administration mobilizes itself without the involvement of financial institutions. Modern governments collaborate closely with financial institutions, making the land more exorbitant and not easily accessed, culminating in informal settlements.

5. Attributes of Collective Management of Land Ownership

The below depicted Figure 5.1 shows the Emmanditsh Collective Management Model of land ownership, an epistemological device with attributes that contribute to an accountable, transparent, effective and efficient land administration and ownership. The model is interactive and conscious of the need for collective efforts in land ownership through the traditional system inherited over times and ages.
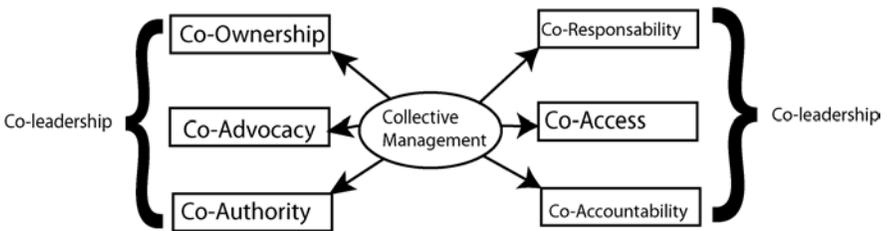
Figure 5.1 : Emmanditsh Collective Management Model on Land Ownership

From this model, the traditional system creates and adopts co-ownership of land, co-advocacy on land issues, co-authority on land distribution, co-responsibility on land administration, co-access of all, co-accountability of the traditional chieftainship with chief prefects as an attribute of collective land management and administration. *Co-leadership* of chieftainship with the local people provides reinforcement as endorsed by the establishment of chieftaincy prefects (Indunas) across the community. *Co-leadership* promotes *objective* versus *subjective* responsibility and accountability. The subjectivity question is inevitable where modern and post-modern governments reign. In order to promote these attributes, other attributes such as co-advocacy of land and co-access to land information are necessary

to achieve empowerment objectives. The New Lexicon Webster's Dictionary of the English Language-Encyclopaedic Edition explains that the prefix "co-" elaborates joint efforts, something that is carried out in the efforts of togetherness. Collective land management and ownership therefore provide synergetic relations between the community and traditional leadership. It can be deduced from this model that collectivism tends to share common goals and exercise stronger group identity, more group accountability and more communication. As argued above, the group identity is however dissimilar from the modern government group model as contended above. Blanchard (1982:109-110) promotes the question of *successful* and *effective* leadership, whether it is traditional or democratic leadership. It is contended that collective traditional management provides *effective* co-leadership that brings *success* to land acquisition and administration. To this end, under collective management, *successful* co-leadership is more of an *end*, while effective core leadership is the *means*. Land related conflicts within the community are addressed by chieftainship prefects (Indunas) rather than adjudicated from the top. The style of interaction is directed towards land *accomplishment* rather than *command,* while shedding of responsibility is emphasized. (Burns and Stalker, 1961:13).

6. Legitimacy Question

The system of chieftainship leadership is hereditary and the *leaders* in question are regarded as born *leaders* and are revered as such. The land question as well has always been hereditary in certain modern and traditional communities in that it would be inherited from one generation to the other, being passed over from one to the next generation. Modern governments tend to endorse the notion that any system of governance that is not elected is illegitimate. The traditional theories of leadership endorse the notion that leaders are born in certain circumstances and communities and not necessarily made or elected. The theory in question, also known as the "great person theory" of leadership implies that some individuals are born with certain traits that allow them to emerge out of any situation or period of history to become leaders. The argument evolved into what

is contemporarily known as the trait theory of leadership. The trait approach is concerned mainly with identifying the personality traits of a leader, of a chieftainship leadership in this case. With considerable amount of dissatisfaction with the "great person theory" and the fact that leaders are born, researchers switched their emphasis from the individual leader to the group that is being led. In addition to the leader and the group, the *situation* began to receive increased attention in leadership theory. The *situation* approach was initially called *Zeitgeist*, a German word for *"spirit of the time"* (Luthans, 2002:579). With these theoretical frameworks, the traditional system of governance and management through chieftainship and its impacts on land acquisition and administration is undoubtedly *legitimate*. In the context of the "group and the "led" emphasis approach, shifting from traditional leaders as individuals to the group that is being led, the chieftainship traditional system of leadership continues to remain *legitimate* in that the people living under the contended system of governance do at the most not stage revolutionary and protest marches against the system seeking for alternative democratic or modern system of governance. In respect to land acquisition and administration, the traditional systems of governance, analysed from the perspectives of the communities that are being led, have comparatively governed and managed the land issue to the satisfaction of various formations within the community and the community in large. From the formal to informal settlement, it is contended that modern and democratic governments are often protested against more than occurs in the chieftainship traditional system of governance and management. Du Pisani (2000:62) informs us that with the formation of black political parties at the beginning of the 1960's in Namibia, the politics of resistance and protest (own emphasis) became elevated to a higher place. The situational approach and analysis endorses the legitimacy question of chieftainship leadership in that it is in the "spirit of the *time*" (*Zeitgeist)*, of the historical *times* immemorial, when the chieftainship leadership system prevailed before colonial and imperial conquest of indigenous land, and still prevails in contemporary *times*. With these arguments, the chieftainship traditional system of governance is legitimate and justifiable.

The traditional leadership system is *legitimate* in that traditional born *leaders* are *leaders* in the excellent meaning of *leadership*,

sounded by the international and global renowned theories of leadership as contended. *Tradition* is the basis for *legitimacy* in traditional leadership and it comprises the whole range of inherited cultures and ways of life; a people's history, moral, and social values, and the traditional institutions which survive to serve cultural values. Traditional leaders derive their power from *custom* and not so much from *tradition*. *Custom* and not *tradition* serves as the basis for traditional leadership and its hereditary system. Although *customs* are closely intertwined with *tradition*, they are generally more flexible than tradition and more useful in facilitating change. *Custom* therefore is a source of *legitimacy* and it is recorded that there is no distinction between *invented* and or *real* customs. *Traditional* Leaders are not *traditional leaders* in the true sense of the word, but are *Customary* Leaders. In contemporary societies, there is little *tradition* about the *traditional* leaders (Keulder (2000:152). For this reason, it is easier to make a distinction between invented tradition, traditions that are claimed to have existed since time immemorial, yet historical evidences proving the opposite and "*traditional traditions*" (own emphasis), that are cited by Gerth and Mills, (1946: 78) from the work of Max Weber as the authority of the eternal yesterday, i.e. of the mores sanctified through the unimaginably ancient recognition and habitual orientation to conform.

The legitimacy of chieftainship traditional system of governance and management is not only premised on the abovementioned emphasis, but also on how power has been and is exercised in these institutions, specifically on land acquisition and administration. The nature and scope of power, its functions and acceptability by modern governments in relation to the chieftainship traditional system of governance and management, particularly in the land question, requires extensive analysis. In the main, personal power in African communities and the traditional system bubbles up from the bottom and is bestowed upon the leader through the will of the people, thus endorsing the legitimacy question based on the group of people *led* by the leadership. Conversely, in modern and post-modern societies, power is hierarchically positioned. This reflects material power vis-à-vis other forms of power in the organization that promotes disequilibrium in social relationships (Koopman, 1994:70). From the work of Wouter (1995: 23), forms of power that could be associated with collective management of

land acquisition and administration (own emphasis) are: p*ower-with*, which leads to partnership, equality, collaboration, and inclusivity culminating if not influenced by the collectivist culture as contended; p*ower-for,* which leads to empowerment and development of human capacity as contended within the ambit of custodianship of the land; p*ower-to-be,* which is the personal basis for power that permits the creation of personal meanings, values and dignity**;** *power-within,* which is the inner energy that makes African communities appreciate their collectivized chieftainship traditional system of land acquisition and administration, p*ower to-*which is the creative and spiritual energy that enables African communities to act when the land is invaded as it has been during colonial era. It is provided that the land removed from indigenous communities was taken while Africans, as indigenous owners of the land, were waging battles to defend the land. Modern government experienced these legitimate power dynamics to be the losses of power, in view of the hierarchical positions based method of operation (Harvard Business Review, 1991:31). If positively perceived, the reality counteracts the argument in that the backward shift from modern to the chieftainship traditional system of governance and management could legitimize, and offers greater empowerment of land acquisition and administration. It could be interpreted that chieftainship traditional system of governance and administration produces depersonalization of orders to eliminate overbearing power.

Wouters (1993:23), further states that *power over, power under, power against* symbolize the detrimental usage of power associated with colonial, modern and some democratic governments in land acquisition and administration. These dynamics of power were manifested through confrontations, forceful removals, and discriminatory Acts in the case of previous colonial Apartheid South Africa, among other harmful strategies to realize land conquest. The situation of Zimbabwe and the land question requires to be contextualized within the ambit of the colonial history of that country. Forceful removal of white farmers in occupied land is however non-African, and this practice resembles colonial patterns, and it renders the government *action(s)* to be illegitimate. It cannot be contended that only government *action(s)* is illegitimate and that the government itself is legitimate, illegitimate government *action(s)* illegitimises the *government*

as well. Redistribution of land through legislative measures would be less offensive to humanity than the situation is in Zimbabwe. The chieftainship system of governance and management is not known for forceful removals but redistribution of land as a hereditary practice to advance the course of humanity. The chieftainship traditional system of governance in relation to the land issues is not known for applying power dynamics illegitimately and harmfully. Where power *over* and *against* prevail in the land question, members of the community experience the *under* dimension of power, while those who are exercising power experience the *over* dimension. It is contended that the question of orders; and the feeling of being *under* the power of someone, of *subordination*, of *servility* and of being at the *will* of someone has negative effects such as *fear* of, *compliance* with, *survival* within and loss of the real self. It is all right to work *with* someone. *With* is a good preposition not because it encompasses collective management practices but because it provides functional unity. Receiving of orders from the situation involves the *"with"* preposition. Community citizens who desire to work under the environment where orders are issued and received relinquish a degree of their responsibilities. Taking of responsibility, each according to his capacity and function as a whole is the most vital aspect of viable community interaction (Follet, 1992:71-72). It can be deduced that what Denhardt (1991: 353) refers to as *punishment* or *coercive power* (the ability to deliver a painful or punishing outcome to others and hence control them by their desire to escape punishment), forms part of the *over* and *under* dimensions. The advantageous usage of power represents the rewarding power that is the ability to satisfy the needs of others. This is related to the view of power as an instrument for empowerment. Hofstede (1985:348) factors the question of power distance, the extent to which community accepts power in the group dynamics. The constructs tend to be identified with the willingness of the less powerful community members to accept their lower status and authority roles vis-à-vis the more powerful members of the society. The members of the high power distance cultures are more likely to be accepting of, and comfortable with, structured power relations than are members of low power distant cultures.

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Collective governance and management do not undermine the role leadership plays in the land issue, rather it shapes it positively within the beneficial usage of power. It is concluded that *valuable lessons* can be learnt from this traditional system of governance and management. Comparative analysis between modern and traditional system of management and governance on the land issues suggests the advantages and disadvantages of these management scenarios. The advantages of collective land management are however highly promoted in this work against western and modern practice.

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Tenurial Reform in the Context of Southern Africa Constraints and Opportunities

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Land reform refers to the redistribution and or confirmation of rights in land for the benefit of the poor (Adams 2000:1). In this context, land reform includes both: tenurial reform, which 'concerns the terms on which the operational holding is held and worked and transacted (Byres 2004:3), and redistributive land reform, which 'seeks to redistribute operational holdings, taking land from those with large operational holdings and transferring it to either those with no land at all…or those with tiny holdings…' (Byres 2004:3). The need for both tenurial and redistributive land reform is evident in Southern Africa, given the unequal distribution of the resource. For example, in South Africa about 65 000 white farmers own about 80 per cent of the agricultural land whereas in Namibia about 4 000 white settler freeholders own 6 400 farms with an average of 5 700 hectares each (Moyo 2007). In Zimbabwe, until year 2000, about 4 500 whites (0.03 per cent of the Zimbabwean population) owned about 42 % of the prime agricultural land (Moyo 2007).

1. Southern Africa landscape

Most of the land in Sub Saharan Africa can be divided into two broad categories: The holding and the commons. The holding is used exclusively by individuals or households for various purposes that include housing, agricultural production or other entrepreneurial activities (Adams, Sibanda and Turner 1999). On the other hand the commons refer to land used and shared by multiple users for livelihood activities that include grazing and gathering veld products (Adams, Sibanda and Turner 1999). According to Deininger (2003) and Chimhowu and Woodhouse (2006), between 2-10 per cent of land in Sub Saharan Africa is held under freehold title. The remaining 90 per cent is held under communal or customary tenure. This shows that access to land in the largest proportion of Sub Sahara Africa is determined through the indigenous systems of land tenure (Chimhowu and Woodhouse 2006).

2. What type of tenure reform?

Most scholars generally agree that land tenure reform underpins any successful land and agrarian reform programme. However the key debate amongst scholars and policy makers has been: what type of tenure reform is well suited for Africa? This debate over tenurial reform largely focuses on the merits of converting informal traditional systems of communal rights into "modern" formal systems by a process of land adjudication and individual titling (Adams 2000).

Free market theories predict that agricultural growth will follow formalisation of land rights. De Soto (2000)[1] argues that prevailing poverty in Africa results from the failure of governing institutions to follow the legal property system of Western capitalism. De Soto (2000) asserts that the solution to tenurial reform, which seeks to improve productivity and the economy, stems from the need to integrate land held under the commons[2] and formally into one property system as happened in the Western world. He argues for land titling in that it will "unlock the hidden assets of the poor". Free market theories have

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(1) A leading free market thinker.
(2) He calls this land extra legal.

influenced policy makers to such an extent that the United Nations Development Programme (UNDP) established a high-level commission on the legal empowerment of the poor which was launched in 2005 and De Soto is the co-chair. Dorner (1992); Rukuni and Jensen (2003) demystify the mythologies of America and provide a more convincing argument on why private land rights in western world have proved to be innovative:

"It is not very helpful, nor is it accurate to say that private property and enterprise made the United States great and that this is what the United States has to offer in the struggle for economic development around the world. In fact, it is our open and flexible political system that has allowed us to make private enterprise within the United States consistent with the general public interest, as Marx thought it would never be. However, there is no reason to expect that private enterprise will automatically function in the public interest in a system lacking political institutions" (Dorner 1992:10 cited in Rukuni and Jensen 2003:255).

3. The case for private titling

Critics of customary tenure argue that this system of land use provides poor incentives for farmers who use the land (Hudson 1996, De Soto 2000). To them, land held under these conditions is closely associated with cultural non-monetary values. The underlying philosophy is that individual land titling programmes provide farmers with security in land holding and enable the farmers to employ higher levels of agricultural investment and productivity. This would provide a firm basis for phenomenal economic growth and development for most African economies. How? Private titling promotes lending to the poor from banks through the use of land as collateral. Will banks open up credit for the poor? Banks often do not lend to the poor because of the risks of non-payment. Households earning less than US 500 per month are unlikely to get access to formal credit from banks using land or houses as collateral, whether or not their properties are formalized (Cousins et al 2005). If government policy can convince banks to lend to the poor, with the poor's assets as collateral for the loans, foreclosure of bank

loans would result in asset stripping of sources of livelihood. This may even result in homelessness amongst the poor (Cousins et al 2005).

Another argument by free market theorists, that formalization will give the land the character of capital, is largely debatable. Recent empirical evidence shows the existence of rural land sales and rental markets well suited to the needs of the poor (Cousins 2005 et al; Chimhowu and Woodhouse 2006). This challenges the dead capital characterization of informal property systems.

One severe shock can result in permanent loss of livelihoods among the poor through the sale of land and it will be sold below market value.

Formalization can be expensive for many poor people. There is a correlation between the registration of title deeds and service delivery systems. Once the boundaries have been surveyed and formal plans prepared, then the local government becomes active in the management of the centralised property. This means that the poor will have to fork out money for services, and the rates remain a recurrent cost, which may be unaffordable for many poor people. Apart from the costs, the formal land use plans may not reflect practice on the ground; shared rights are a common feature of most communal areas, and in times of distress the poor rely on the open access or the commons for a living (Alcock and Hornby 2004).

4. Land titling: The evidence from elsewhere

There is no clear evidence to show that land titling has led to more efficient use of customary land or greater agricultural growth (Bruce 1986; Migot-Adholla et al 1991; Okoth-Ogendo 1982). In Kenya, the Swynnerton plan aimed to provide an individualized tenure system. However, results on the ground show increased concentration of land ownership amongst those who are in a position to manipulate the registration system. There is now diminished security of tenure for non title-holders who relied on social practices to get access to land (Quan 2000). Kenya's experiences with private titling show that the livelihood insecurity of women, children and landless poor farmers has been exacerbated (Quan 2000). There is increased landlessness amongst the vulnerable through sales of land resulting in growing trends of

rural-urban migration. In some cases there have been increased disputes over land use management since individual title deeds are imposed on multiple user rights.

In areas of the Malian cotton zone where land is being converted into private title, the process has widened inequality in land ownership. This is because the market value of one hectare of land after titling is now about US 15 000, whereas untitled land from a farmer costs between US 200-250 (Benjamnisen 2002). Speculators are winners because they buy and sell the land at 60-80 times what the customary holders get (Benjamnisen 2002). Titling can widen inequality between the rich and the poor, and eventually, as trends in the Malian cotton zones show, the prices of land may be out of reach to the poorer farmers.

Land titling requires a full cadastral survey and land rights have to be converted to a full certificate of title which can be extremely expensive for most of the poorer governments of Africa. In Uganda, the costs of land titling and ownership transfer alone have been estimated as in excess of UK280 million (Government of Uganda 1999). Moreover, maintenance of a land registry is a significant recurrent cost, and an inability to consistently fund this has been another reason for disastrous results (DFID 2003:15).

However, free market theorists can argue that land titling programmes have been successful in Thailand in the 1960s. The scholars argue that titling has increased farmers' access to banks, raised the value of their land and agricultural production (World Bank 1999). The untold story is that the Thai government had no capacity to fund such a titling programme despite the fact that the Thai economy was much stronger at that time of implementation, compared to the current economies of Southern Africa. In fact, it was the World Bank that supported a 20 year programme to improve the land titling system. Policy makers need to consider the socio- economic contexts in which the changes are to be effected.

5. A shift in tenure systems

The World Bank's 1975 Land Reform Policy Paper, which had an almost exclusive focus on land titling, recommended at great length

the need for formal titling as a pre-condition for modern development. In light of recent empirical evidence across Africa, the World Bank has revised its recommendations and now widely acknowledges that land titling is not the way to improve security of tenure and ensure agricultural productivity (Deinenger 1998; Migot-Adholla 1999). The World Bank now recognises that communal tenure systems can be a more cost effective solution rather than formal titling programmes if land administration systems become more transparent.

6. Tenure reforms in former homelands of South Africa

The South African government has enacted the Communal Land Rights Act (CLRA) of 2004 in order to secure land tenure rights for black South Africans. The CLRA extends private ownership of land to rural communities. In areas where land was owned communally, it establishes a register of new order rights. It also provides for traditional councils to act as land administration committees wherever they exist. The land administration committee will exert ownership on behalf of the community.

In April 2006, four rural groupings initiated a constitutional challenge to CLRA (Cousins 2008). The question of the legitimacy of traditional councils to act as land administration committees is one of the key challenges. In all the four cases, a history of manipulation of land rights by traditional authorities informs the mistrust in the communities. Moreover, the jurisdiction and legitimacy of the chiefs is being challenged in two of the cases. For example, the Kakfontein community is questioning the jurisdiction of the chief on the allegation that the chief was imposed by the colonial authorities. Claasens (2005) argues that this version of customary tenure results from colonial and apartheid polices. The colonial authorities believed that modernity rested on someone being appointed in supreme command over a given demarcated boundary (Crais 2006: 722-726 cited in Cousins 2008). This tends to undermine rather than strengthen land rights as chieftaincy may trump land rights that exist at lower levels like households. However Cousins (2008) stresses that this challenge is not against the indigenous value system.

7. Bad for land reform: Bad for tenure reform

In Zimbabwe, the fast track land reform has undermined land rights of vulnerable groups. Control of land has been retained by existing powerful traditional, political, and social groups. The Zimbabwe government has initiated the A1 Model and A2 model with different tenure systems. Under the A1[3] model, the government issues 25 year permits which are not very secure. The state and traditional leaders are competing to control administrative arrangements. On the other hand, 99 year leaseholds are set to be issued to individuals who got land under the A2[4] model. According to Moyo (2007) the 99 year leaseholds are more secure than the 25 year permits. Under the Fast Track Land Reform up to 178 members of the elite got more than one land allocation covering more than 150 000 hectares. Dominant ZANU PF political elite members have accumulated more than one farm, especially under the A2 model, in defiance of the liberation war 'slogan' of 'one man one farm'.

Other beneficiaries have been traditional chiefs. The government has set them as a priority: "All traditional chiefs without land but are interested in A1/A2 plots will be given preference in land allocation" National land audit (2006:78). 34 Chiefs have benefited from A2 Plots (ZI 2007). In Matabeleland South province many of the chiefs were given wildlife farms. Beneficiaries like chiefs gained a lot of power and could also allocate land. Some of the chiefs, such as in a case of four chiefs in the Zaka district, have re-allocated land to their sons (ZI 207). Chiefs were given plots outside their areas of jurisdiction and some failed to take up the plots. Beneficiaries question the jurisdiction of chiefs in displacing them and replacing them with their favourite subjects. Apart from that, traditional leaders have a strong alliance with governing party. They are on the government's payroll and they were given new vehicles, piped water and electricity at the tax-payer's expense.

The insecurity of tenure amongst the marginalised groups, such as farm workers and women, has been largely reproduced and exacerbated (Zamchiya 2007). The percentage of female beneficiaries

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(3) Most of the poorer households were allocated land under the A1 model.
(4) Most of the politicians and traditional leaders were allocated land under the A2 model.

under Model A2 was as follows: Midlands (5%), Masvingo (8%), Mashonaland Central (13%), Mashonaland West (11%), Matebeleland North (17%), and Manicaland (9%) (Utete 2003). The Women and Land in Zimbabwe lobby group has criticized government policy on land reform, stating that: "Although females heading house-holds can access land and be given permits in resettlement areas, their married counterparts still had to access land through their husbands and have no security of tenure should their husbands die; there are not many women who own land in small scale commercial areas as most women are poor; the legal and policy framework has not incorporated inheritance rights pertaining to land for widows; the fact of women's lack of access and control over land leads to them being excluded from credit, marketing facilities, decision-making powers over agricultural production activities and benefits, negatively impacting on the productive capacity of women" (SARDC 2005).

While government policy states that farm workers qualify for land, no commitment was made regarding a specific proportion of the land resettled. In fact about 200 000[5] farm workers were displaced during fast track land reform and their access to land has been undermined (Sachikonye 2003; Zamchiya 2007). This has affected their livelihoods. Recently, the Commercial Farmers' Union (CFU) president reported that 100 of the remaining farms had been invaded from 04-08 April 2008 resulting in further displacement of 40 000 farm workers.

It is imperative to note that even the A2 model tenure system has largely failed to achieve the intended results. Firstly, only 125 farms were issued with the lease at the launch of the 99 year leasehold in 2006 yet there are about 15000 A2 plots (ZI 2007). The 125 farms were not subdivided, which shows that the government is having problems in funding the cadastral surveys. Secondly, the A2 model was meant to provide collateral for farmers. However, some A2 farmers told the joint parliamentary portfolio committees on Lands, Land Reform and Resettlement and Agriculture and Public Service, Labour and Social Welfare that they had inadequate capital to venture into serious commercial farming, with others having difficulty in accessing bank loans. The committee was informed that some

(5) Which constitutes about 70 per cent of the original farm workers.

banks were not accepting the 99-year leases as collateral security as they felt that the leases had legal loopholes, hence they did not provide adequate security (Herald March 10 2007). The lease documents are not being readily accepted as collateral.

Tenure insecurity remains a thorn in the government's land and agrarian reform programme. Fast track land reform beneficiaries rely on offer letters to access allocated land, but even though about 20 per cent of the beneficiaries do not have offer letters. The offer letters are highly insecure; between 2003- 2006 about 115 offer letters were withdrawn in Manicaland province alone (ZI 2007). From our survey, about 40% of the respondents also indicated tenure insecurity and security is linked to the existence of political order. "We live in fear once a new government takes over" (Land reform beneficiary 2007). The case of Zimbabwe particularly shows that tenure systems are most unlikely to work in the public interest if political institutions are neither accountable nor democratic.

8. Conclusion: Which way Southern Africa?

Southern African governments need to build on the initiatives in Lesotho and Botswana. In Lesotho, rural land is allocated by village development councils. The councils are composed of people elected in public meetings and chiefs sit in the councils as ex- officio members. Lesotho provides a critical lesson as it has gone a step further than other countries like Swaziland, where chiefs alone allocate land (Adams, Sibanda and Turner 1999). In Botswana, the Tribal Land Act of 1968 transferred authority from chiefs to Land Boards. This has minimized manipulation in land administration by the chiefs. Land boards are under the direction of district councils. However, these systems still have problems as farm workers (Basarwa) in Botswana are still denied their traditional rights.

Of significance is that no one size fits all for different countries in Southern Africa because they are at different stages in tenurial reform. Evidence presented in the paper shows that more often than not the consequences of trying to introduce private titling to land ownership have proved disastrous. Southern African governments must try to support existing social practices that have widespread legitimacy,

rather than expensive solutions that are not grounded in local conditions. However, it is important to note that there are problems with the role of traditional chiefs in land management. Thus, there is need to have elected boards at a local level that are effective, accountable and accessible.

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Annexes

Annex 1: Governance in Africa Challenges and Prospects

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Annex 1

Governance in Africa Challenges and Prospects

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As the development process in Africa came under more intensive scrutiny in the late 1990s, the attention of observers shifted to the relevance of governance. Governance was perceived as a critical factor in accelerated and sustainable economic growth and development. The divorce from the old pattern of governance was considered necessary for the advancement of economic development. Some countries were deemed to be operating under critical circumstances including doubtful political legitimacy and flawed economic management. Many African countries continued to rely on centralized and highly personalized forms of government and some had also fallen into an unacceptable pattern of corruption, ethnically based decision-making and human rights abuses. It was clear that there was need for more progress in the majority of countries to provide an environment in which individuals were protected, civil society was able to flourish, and Governments executed their responsibilities efficiently and transparently, through adequate institutional mechanisms that would ascertain accountability. These assumptions led to the convening of the 2005 Governance Forum which attempted to define the character of governance and the related fundamental issues. Thus, this paper will first examine the outcome of the Forum. Subsequently, it will look into the progress that has been made before shedding light on some of the critical obstacles. In the last section, the way forward, attempts will be made to make some recommendations on the key challenges to governance.

1. The 2005 Governance Forum

The 2005 Governance Forum was jointly organized by the AUC and the Alliance in Addis Ababa, Ethiopia, on 26 November 2005. The Forum was informed by current initiatives and convened against the background of the urgent need to adequately address development problems in the continent. Following extensive debate, the Forum concluded with a Declaration which among other things emphasised that governance was central to the difficulties militating against rapid development of African countries. The Declaration associated governance with societal ills, persistent poverty, and the political crisis, as well as the prevalence of conflicts in some countries. For this reason, the Declaration stated that Africa would need to adopt a system of governance in which the various actors would recognize themselves and that the system should also respond to their aspirations.

The Declaration further clarified that the process of renewing governance would occur at the local, national, regional, and continental levels, and should entail linkages with existing initiatives. It was noted that the local level should be the vital strategic level for the renewal of governance in Africa. Decentralization at the local level affords a suitable environment to devise and apply innovative methods in the management of public affairs and promote local development. According to the Declaration, localization is fundamental for the improvement of the living conditions of the people and the prevention of conflicts. In this connection, it was recommended that there should be representation of local government associations at the level of the AU through relevant mechanisms, and through the integration of local governance in the Draft Charter on Democracy, Elections, and Governance.

At the national level, the Declaration flagged that the major challenges confronting states essentially relate to principles of respect for human rights, democracy, and governance, including effective public action, which are the pillars of the legitimacy of government. In other words, the capacity of the State should be enhanced to regulate, to ensure social dialogue, and to create an enabling environment for economic growth and for the informal sector, on which many people depend.

At the regional level, the Declaration stipulated that the renewal of governance could be promoted by ensuring that the integration process rests firmly on local actors, spatial dynamics, and through targeted delegation of responsibilities to regional organizations, which should be reinforced at the institutional level. Furthermore, at the continental level, the Declaration stressed that the renewal of governance in the AU would, inter alia, entail the consolidation of its institutions. It would involve the strengthening of its financial basis and the reinforcement of its implementation, monitoring, and evaluation capacity. These were deemed essential for the advancement of continental integration and meaningful development of Africa. In effect, the Declaration provided additional understanding and a framework for the promotion of governance in Africa.

2. Progress in Governance

While it is too early to evaluate the progress made in governance based on the 2005 Declarations and recommendations, it is not out of place to note some of the cumulative actions that have been taken in the overall desire for sound governance in the continent in recent years. The Declarations had to a large extent provided a dynamic for the on-going efforts on governance in the continent. To begin with, it is relevant to state and acknowledge that African countries have, at the national level, in recent years, initiated certain national governance programs to address specific governance issues. However, there are some challenges in the various areas in which actions have been taken. Generally, there were interventions to review management systems, processes, and mechanisms targeting the strengthening of institutions, including leadership and human resources capacity building, as well as effective operation of the State and the improvement of service delivery. Besides this, these interventions were also designed to promote the implementation of resolutions emanating from international bodies. In addition, many initiatives have been undertaken in the areas of conflict management and prevention, reduction of corruption and increasing transparency, promoting economic growth and reduction of poverty, unloading of debt burden and public aid for development, and on the issue of HIV/AIDS. Generally, these interventions and initiatives have

been handicapped by poor institutional support, inadequate human resources, and paucity of funding. In effect, there is an urgent need to resolve these critical limitations in order to have sound governance systems in these countries. All these have provided the premises for the implementation of the Declaration of the 2005 Forum.

Moreover, governance was an important feature of the Organization of African Unity (OAU) and has been accorded priority by the African Union (AU) which replaced it in 2002. In this context, there is a culture of progressive developments on governance at the continental level. During the second half of the 1990s, the bases of renewal of governance were to be found in a number of instruments, namely: (1) the Cairo Agenda for Action (1995), a program for re-launching Africa's political, economic and social development which aimed at a comprehensive solution to the accumulation of development problems of the continent in the first half of the 1990s; and (2) the African Common Position on Africa's External Debt Crisis (1997), a strategy for addressing the Continent's external debt crisis, through which the continent sought to unload the external debt burden in order to release resources for economic development.

In 2002, the Constitutive Act articulated the guidelines on governance for the continent. It defined the parameters of political, economic, and institutional governance of the continent. Further elaborations were made in the Durban Declaration on Elections, Democracy, Governance, and New Partnership for Africa's Development (NEPAD), and the Declaration on Democracy, Political, Economic, and Corporate Governance. In the same vein, the Protocol on the Rights of Women and the Algiers Decision on Unconstitutional Changes of Government (1999) addressed the rights of women and their integration in the development process and the promotion of democratic governance in the continent respectively. The Lomé Declaration on the framework for an OAU Response to Unconstitutional Changes in Government (2000) dealt with unconstitutional changes and the need to adhere to the electoral process in governance. The 2000 Solemn Declaration on the Conference on Security, Stability, Development, and Cooperation elaborated the fundamental principles for the promotion of democracy and good governance in the continent. The African Common Position on the review of the MDGs articulated Africa's approach for

the successful implementation of the eight issues in the MDGs. The Solemn Declaration on Gender Equality in Africa (2004) that aims at effective mainstreaming of women into development process in Africa was adopted at the Summit of the AU.

Other measures on governance involved the establishment of organs of the AU, the Peace and Security Council that deals with conflict prevention, management, and resolution; the Economic, Social and Cultural Council (ECOSOCC) that engages the participation of civil society, trade unions, and academics in the governance process of the African Union. The Pan-African Parliament is providing the forum for the input of African parliamentarians into AU processes. In addition, the Africa Peer Review Mechanism (APRM) is an important system for the renewal of governance at the continental level; it is an arrangement facilitating the sharing of experiences in development by African leaders. Furthermore, the protocol on the relations of the AU with the RECs was signed in January 2008 at the Summit of the AU. The protocol has articulated the relations and method of coordination with the RECs in the pursuit of continental integration.

In addition, it is important to add that the United Nations Economic Commission for Africa (UNECA) has also been at the forefront of the governance debate in the continent. It has repeatedly pointed out the centrality of governance factors and stressed the current African predicament and the interrelationship between good governance and sustained economic development. UNECA has stressed the relevance of proactive, democratic States vis-à-vis the prospects for Africa's development and recovery. It advocated that a reversal of the economic decline would require proactive governments with improved capacity to effectively formulate policies, manage essential services, and show evidence of transparency and accountability. Also, in its efforts to promote African development, and in its capacity as the lead agency of the "governance" component of NEPAD, it has committed itself to assist in the enhancement of government capabilities in the area of governance and to consolidate institutions and good governance practices in the continent.

3. Challenges in Governance

National Level

Decentralization: At the national level, the policy of devolution of power and authority to sub-national governments is perceived as a method of re-establishing the African State and rebuilding its legitimacy from the bottom up. This process, although increasingly being implemented in Africa, is subject to some constraints, which include the lack of capacity of local administrations and the voicing of the population's needs towards legitimate local governance. Other limitations are the low level of accountability of local government institutions and the necessity to improve the quality of service delivered.

Rule of law and Human Rights: The lack of respect by leaders and citizens for the rule of law and human rights often poses a great challenge to stability. The judiciary in many states is handicapped by structural difficulties and inadequate funding. The independence, integrity, and performance of the judiciary would only be guaranteed through adequate funding, remuneration, modernization, professional staff, and regular training.

Public Administration: In this area, there are challenges in the reform initiatives undertaken by African countries. There is an urgent need to enhance public service capacity, the provision of adequate incentives to public servants to retain highly qualified and motivated staff, increase performance and accountability, as well as reducing corruption. The use of ICT in government requires further encouragement and service delivery improvement.

Peace and Stability: At the national level, wars, civil strife and the proliferation of light weapons militate against the efforts of some countries in the establishment of sustainable development. Some countries are still handicapped following current conflicts, and others by the challenges of recovery following the termination of conflicts. The challenges following these include the consolidation of national capacities for the prevention of governance crises, conflict and natural emergencies and taking initiatives on peace-building. Furthermore, relating to national security, there are challenges in the capacity to manage

cross-border population movements and coping with drug and small arms trafficking, epidemics, and human trafficking, to mention a few.

Other challenges: Other important challenges at the national level include the lack of civic education among citizens and civil society leading to low participation in the political process at both national and local levels, low gender participation especially in the legislature, weak exploitation of the potential of traditional rulers in the governance process, and the lack of credibility of the electoral system, especially of the Electoral Commissions.

Continental Level

Institutional Capacity: The transformation from OAU into AU in 2002 redefined the objectives of the continental organization with priority accorded to the complex problems of economic development. There are still challenges in institutional capacity in spite of the institutional reforms that were carried out over the last decade. There are challenges in attracting the best African brains to work in the organization. The limitations are to a large extent emanating from inadequate funding and the non-competitive professional staff remuneration, but there is an on-going process to resolve.

Supranational Authority and Transfer of Sovereignty: There is the challenge of the transfer of sovereignty to the supranational authority. Regional economic integration ultimately implies the creation of a unified political state following its process of market integration. As of now, market integration is gradually occurring at the regional level in the regional economic communities (RECs), eight of which are designated as the pillars of continental economic integration. In effect, the transfer of sovereignty may be deemed to be made partially only to the RECs. As of now, there is no transfer of authority to the African Union Commission, but an Audit Report on the AUC is currently being considered by the ministers of Foreign Affairs. It is envisaged that the ministers will, in their recommendations, pay attention to this concern.

Financial Resources: There are also the challenges of inadequate financial resources for the operation of the organization. The assessed contributions from some Member States are not paid up sufficiently

regularly to ensure smooth operation of the institution and the implementation of programs and projects. Governance of the organization is weakened and compromised as a result of unpredictable resources.

Other challenges: Other important governance challenges are to be found in the development of infrastructure, including the harmonization of commercial and transport laws and regulations. Progress in the development of a continental infrastructure, network of roads, railways, and air transportation is constrained by inadequate political commitment, human resources, and capital. In some cases, where agreements have been reached in regional road transport development, implementation projects run into delay difficulties as a result of mismanagement and corruption.

4. The Way Forward

African countries have taken a number of necessary and bold initiatives on governance as one of the essential factors for sustainable economic growth and development for the alleviation of poverty. But these initiatives are still constrained by a number of critical challenges that should be tackled to enhance the prospects of governance and if development objectives are to be attained.

National Level

In the way forward there is a need for further improvement in public sector management and delivery. The financial, human resource, and ICT limitations in these areas should be removed to ensure meaningful progress.

There are also financial, human resource, ICT, and capital limitations in the process of decentralization. These should be removed in order to enhance the functioning of local authorities.

The private sector is critical to accelerated economic growth and development but this sector still suffers major constraints in its full operation; mismanagement and corruption are some of the hindrances in governance in the private sector that should be eliminated to ensure sound governance.

The three arms of government still suffer from linkages and influences of one arm on the other. Stronger application of the principles of separation of powers between the Executive, Legislature, and Judiciary are required to guarantee excellent and effective governance.

There are legal and judicial reforms underway in many countries but progress has been slow as a result of a lack of adequate experts, ICT, and financial resources. The strengthening of legal and judicial reforms are preconditions for the monitoring of human rights and robust governance.

Parliamentarians are representatives of their constituencies and are obliged to be responsible to them and serve their interests. There should, in this context, be consistent forward and backward linkages between constituents and their parliamentarians. There is a gulf between parliamentarians and their constituencies deriving from poor communications arrangements and or lack of interest on both sides. The communications linkages with parliamentarians should be improved and built where they do not exist. There should be an increase in information to the public on the responsibilities of parliamentarians to their constituencies. Also, efforts should be made to elevate the calibre of parliamentarians representing constituencies. Parliament is a law making body; those who operate as parliamentarians should comprehend the art of government and the processes of law making for sound governance.

There continues to be improvements in the electoral bodies in many countries but they still operate under some constraints deriving from inadequate skilled personnel, funding, and technology. It is therefore vital that the capacity of electoral bodies should be enhanced to guarantee better governance during elections and ensure smooth transition from one government to the other.

The management of post-election crises needs to be improved. Post-election crises emerge either from perceived or real flaws, including rigging and manipulation of voting results, in the election processes. There should be strict adherence to the stipulations of the constitution and electoral laws. The announcement of the results should be effected as stipulated by the Constitution and Electoral Laws and not be unduly delayed in order to avoid negative speculation and, at the extreme, of political crisis and social violence.

The emerging democratic systems in many African countries are leading to the creation of several political parties within countries. This, to a large extent, is a good development for emerging democracies. But the presence of several political parties with similar objectives, policies, and manifestos could be frustrating to electorates. Also, the organizational and operational structures of most of them are weak for reasons of lack of adequate human and financial resources. Thus, there is a need to streamline and strengthen multi-party systems for effective democratic governance.

African countries have taken varying measures following the AU Solemn Declaration on Gender Equality in Africa to increase the participation of women in politics and national economic development. They are increasingly involved in policy formulation and implementation. But there are still substantive difficulties in the mainstreaming of women into the development process. In some cases, the difficulties include lack of information, weak capacity to take up positions, limitations imposed by culture, and insufficient legislative procedures to enhance the mainstreaming of women. These difficulties should be resolved to ensure effective participation of women in development and unassailable governance in the continent.

Several African countries have taken measures in the fight against corruption and graft in the public and private sectors. The degree of success in this initiative varies from country to country. But it is clear that the institutions established for this purpose in many countries suffer from several limitations that, *inter alia,* include a lack of the requisite experts, inadequate remuneration, and weak funding for the operation of these bodies to mention a few. Thus, it is important to strengthen the institutions established to combat corruption in both public and private sectors in order to promote reliable governance.

In spite of the efforts made in the system of tax collection in many countries, there is still a wide gap between the potential and actual tax collection as a result of the persistence of fraud, corruption, mismanagement, insufficient human resources, and lack of ICT etc. Solutions to these problems would improve the system of tax collection and raise the volume of revenue available for development.

The emerging Public-Private Partnerships are still fraught with problems of inadequate policy, management, etc. It is necessary

to put in place more innovative measures to improve governance of Public-Private Partnerships in order to advance economic growth and development.

There are several international Charters, Conventions, Declarations, Agreements, and Decisions, which African countries struggle to implement. In this endeavour, they are confronted with various limitations in human and financial resources. The capacities of these countries should be strengthened to enable them carry out their obligations to the international community.

In the way forward, there is a need for reliable external resources to support all processes of governance to make it sustainable. Additional new resources will be required from development partners to complement national resources for the meaningful consolidation of governance.

Continental Level

There are still significant institutional challenges. The operational capacity of continental organization should be strengthened through further employment of adequate human resources at the AUC.

There is a need for additional efforts in the orientation of the organization in governance to enhance the program and project implementation of the continental organization.

Studies are underway to consider alternative sources of funding the AUC for sustainable operationalization. This is a good development, however in the meantime Member States should be encouraged to commit themselves to prompt payments of their assessed contributions. Sound governance of the organization will ultimately depend on predictable internal resources.

The Member States have shown increasing awareness of the authority and goal of AUC. It is anticipated that the Ministerial and Summit considerations in Arusha, Tanzania will lead to acceptable solutions. An improvement in the authority of the AUC and well-defined goals are essential for governance and successful continental integration.

Measures on compliance of the implementation of Charters, Conventions, Declarations, and Decisions should be devised for effectiveness in the process of governance. It is important that the

organization should establish a relevant mechanism to address dysfunctional behaviours.

Ensuring and strengthening the operation of AU ECOSOCC is necessary for more vigorous continental governance. This organ should ensure effective contributions of civil society, the private sector, trade unions, academics, etc. to AU processes. There should be sufficient resources to assure the participation of these bodies in the Assembly of the ECOSOCC.

Strengthen the operations of African Charter on Human and Peoples' Rights through adequate funding and additional human resources. Effective guarantees of human rights are vital for the consolidation of democracy.

The AUC has already started on the development of a policy framework for the involvement of the local government into AU processes. This process should be accelerated.

More consideration should be given to the strengthening and empowering of the Pan African Parliament in legislative areas. The Summit of the AU may need to consider ceding some areas to the Pan African Parliament as a legislative body. In this case, the mode of composition of the Parliament may need to be reconsidered.

With the RECs as the building blocks for African integration, the deepening of their integration should be further encouraged and supported as appropriate by the AU.

The discussion on harmonization and rationalization are already on-going at ministerial level in the AU. Rationalization of the RECs should, in particular, be encouraged to prevent overlapping of membership, allow the consolidation of RECs, and the speeding up of continental integration.

The Protocol on Relations with the RECs was adopted in January 2008. This will be the framework for better working relations with them, and for better coordination for continental integration.

The APRM has been a useful exercise across the continent. As of now, about five countries have been reviewed and 27 countries have enlisted to be reviewed. But rapid review is hampered by paucity of finance and by weak and poor preparatory processes in African countries. There is a need to strengthen the funding process and improve

on the national processes of the APRM to make it more beneficial to governance and to the learning process for African countries.

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African countries are paying attention to the significance of governance in their development process. They have, over the years, taken a number of vital initiatives that are gradually transforming the pattern of governance. But the progress made this far, though somewhat commendable, is not sufficient for accelerated and sustainable economic growth and development. There is an urgent need to consolidate the achievement made in order to sustain economic growth and the development process. African countries will need to increase their political will to support the process. They need also to continue to mobilize internal resources to support the process. But in addition, there is a need for reliable financial and technical support of the development partners for a robust governance system in the continent.

Annex 2

Revivalist Churches and Governance in the Democratic Republic of Congo

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The Christian churches' vocation and capacity to guide men and women in the private sphere is well known. Christianity is not always content to remain within the narrow limits of the spiritual sphere. Numerous publications demonstrate its impact on the governance of societies, that is to say, on social, political, and economic life. But these studies are generally only concerned with the mainstream Christian churches. Our article aims to show that, today, the evangelical communities are emerging as locations of a new form of sociality, and that their pastors are not only spiritual leaders and social patrons, but also leaders of opinion and interest groups capable of influencing public politics. In order not to get lost in generalities, we have chosen to analyse the evangelical churches of the Congo, commonly described as "revivalist churches of the Congo". We aim to show how, in the context of a crisis of regulation, these churches' message of salvation engenders the individual and social transformation which the State, the Law, and their institutions fail to achieve.

The reality of revivalist churches in the Congo

Prayer has become a visible preoccupation in the Congo, where the social environment gives the impression that everyone is praying, that they pray everywhere, in the towns as in the countryside. Everywhere, Christians are liberating themselves from the grip of the institutional churches on an increasingly massive scale. "Driven by the fervour to rediscover a more primitive kind of Christianity, they are breaking out of the prison of orthodoxy and breaking down the confessional barriers

in order to live the experience of a spiritual effervescence which is an escape from institutional channels."[1] Everywhere, independent churches and prayer groups are mushrooming. The streets, private houses, woodland, disused cinemas, former bars, specially adapted halls, stadium... are amongst the places where the so-called revivalist Christians assemble.

In the country's large towns, you get the impression that every street has its church(es) and/or prayer group(s). It is not uncommon for the grand avenues, squares and crossroads to be used for the most important gatherings such as evangelising campaigns or mounting a crusade of Christian films. To that selective occupation of public places should be added the omnipresence of God and Jesus Christ in the street, through tracts, posters, flyers, slogans and stickers on cars, preaching on the buses, the songs of praise of groups returning from prayer, informal discussions of the Bible on street corners, etc.

Multifarious and complex, the revivalist churches "function nowadays as specific groupings within diverse African societies which find themselves in transition between former types of economic and social organisation and new ones introduced with colonisation. Immediately, they seem to be a means of providing solutions, both symbolic and concrete, to this transitional situation where individuals and groups are not able to refer to their former frameworks, and where they experience at the same time difficulty in survival and social reproduction in the new societies formed by colonisation."[2]

In this context, we note that the revivalist churches have an important role in conflict management. In effect, many brothers and sisters in Christ prefer to put their trust in members of their prayer communities where conflicts arise, especially within families or with other members of their community, rather than having recourse to state justice, which does not inspire their confidence. Mediation in conflicts is today one of the fundamental activities of the church pastors and/or their lieutenants in a context in which state justice, considered not only to be alien and distant but also corrupt and maladapted to the real constraints of Congolese society, does not appeal to the accused parties, who prefer

(1) MBEMBE, Achille. *Les jeunes et l'ordre politique.* Paris: L'Harmattan. 1988. pp 17-172.
(2) MWENE BATENDE. *"Les perspectives spiritueliste dans les communautés messianiques africaines",* in *L'Afrique et ses formes de vie spirituelle.* Kinshasa: FTCK. 1990.

customary and/or non juridical resolution. Here we find ourselves at the heart of governance, of which justice is one of the central pillars.

The revivalist churches appear today as genuine parental communities which in reality do take charge when their children are confronted by difficult situations. Beyond purely economic solidarity, they are genuinely taking charge in the moral, affective, and spiritual spheres.

1. The papa-pastors as spiritual and social leaders

Today, the pastors of the revivalist churches are key personages in Congolese social life. As social father figures and spiritual leaders, they are endowed with a genuine power of seduction, fascination, and, indeed, persuasion. However, most of them have never received theological training. Some of them have never even been to school. But how does one become an evangelical pastor in the Congo?

Jean Kambayi Bwatshia and Julien Mutombo Ngonga describe with aplomb how the revivalist churches of Kinshasa came into being. They put it this way: "Generally, as has been noted, it is not difficult to found and initiate a church in Kinshasa. In effect, it is sufficient to get up one morning and begin to shout, Bible in hand, and the miracle is produced. In this town where it is understood that whoever invokes the name of God is feared and gains authority on the masses, anything can happen. Thus we have seen people starting to beat a tom-tom in a plot of land, using the password, 'God has spoken to me, I have had a revelation'. The Kinois masses need that key to open the door to the invisible mystery. Once you have got a few people to listen to that famous revelation, you can proclaim yourself a pastor or choose a biblical or religious title not already used by other self styled men of God. You have got off the ground and the rest depends on your dexterity, oratorical skills and the almost magical manipulation of the enigma presented by the self proclaimed man of God when he makes the best use of the anarchy which characterises our country. And the scene is set."[3]

Many researchers discuss the legitimacy of these self-proclaimed pastors. Max Weber identified three forms of legitimacy: traditional, charismatic, and rational. Since then, this typology has remained as a

(3) KAMBAYI BWATSHIA, Jean and MUTOMBO NGONGA, Julien. *L'enfer de l'évangile.* Kinshasa: Centre de recherches sur les mentalités Eugemonia. 2006. pp 68-69.

significant division of the phenomenon of legitimacy. In which category should we classify the legitimacy of the Congolese evangelical pastor?

We can set aside rational legitimacy straight away. For Max Weber this form of legitimacy is based on a collection of positive rules. It is about legalised legitimacy; more precisely, that which is derived from a norm of positive law. Many writers have criticised Marx for confusing legality with legitimacy.

We believe that the legitimacy of pastors who do not develop through traditional channels is traditional and/or charismatic. For Max Weber, traditional legitimacy is the result of cultural heritage. As a consequence, it presupposes a religious dimension. In this sense, pastors are legitimate through Transcendence. One is pastor by the grace of God. As we have already stressed, most *papa- pastors* have not undertaken theological studies. Some of them have not even 'warmed a school bench'. They claim to base their authority on visions and/or spiritual gifts received from God.

Looking deeper into this form of legitimacy, it is necessary to take into account the fact that it is often based on inheriting the crown and sometimes on a precise type of heredity. The logic of this form of legitimacy becomes concrete in a patriarchal order in which the Eternal Father legitimises the Father of the given community, and it is this Father who gives legitimacy to the Father of the family. Here, the followers are the 'children'. Thus the pastors are authentic social fathers.

The legitimacy of the pastor can also be charismatic. In this case, the effective power of the pastor rests on the force of his personality, his personal qualities, and/or his competence. In effect, it is impossible to verify the transcendental legitimation of a pastor; the magic of the word is a symbolic attribute of authority which does not deceive. If one defines power, in a general sense, as the "capacity to lead one or many to behave individually or collectively in a desired manner"[4], there is no doubt that the papa- pastors have power. For they effectively have the power of conviction and the capacity to mobilise human and material resources. This power is inseparable from their oratorical techniques and their principal message from which it follows that the Christian *should assure his salvation here-below and up-above by grace of a strict respect for traditional Christian morality.*

(4) ROCHER, Guy. "Pouvoir" in *Dictionnaire encyclopédique de théorie et de sociologie du droit. op. cit.*

2. The evangelical churches as a base for the emergence of new forms of sociability

The Congo is going through a period of social and moral crisis. This may be summed up as a reversal of values and a crisis in frames of reference. The different governments, which have succeeded one another since the end of the eighties, have made it their priority to bring a new morality to society, economics, and politics, particularly in a return to political discipline. But they have not succeeded in achieving their aims.

However, the revivalist churches have at times reached a spectacular success. The pastors' preaching generally leads to conversion. Even better, its effectiveness is usually assured, due to an oratorical technique which merits further study. The follow up work carried out by the counsellors usually results in the convert being 'born again' through total immersion baptism.

An opinion shared by many observers is that the revivalist churches, through the message of salvation and the practical problem solving they bring to the masses and even to the elite, are emerging as new models of behaviour and conduct, where the repressive policies of the state have failed. Indeed, after their conversion or 'rebirth', many people decide to renounce their former practices such as corruption, misappropriation of public funds, human rights violations, polygamy, and prostitution, to do the will of God. We shall explain.

There are many who bear witness to the transformation of public administration after individual conversions. This is particularly true in the case of men who are polygamous and who, in order to meet the pressing demands for money and other material goods made by their different wives and/or mistresses, are obliged to embezzle public funds and/or have recourse to some form of corruption. Once converted, most men go on to abandon their previous 'worldly' way of life and live according to biblical precepts. From then on they live only with their legitimate wives and children and, no longer having to provide for secondary wives and/or their relations, they no longer need to misappropriate public funds or allow themselves to be corrupted. We will return to these issues in the following paragraph.

The transformation of models of behaviour and conduct at an individual level is linked to social transformation. Observers of religion will be familiar with the two videos entitled "Transformations" and "Transformations II", which have been circulating around the world in the last few months. These two documentaries, made by the Canadian organisation The Sentinel Group and put together by George Otis, present case studies from world regions where spiritual revivalism has brought about radical changes: less crime, increase in schooling, the halting of the rural exodus, etc.

These documentaries have been widely criticised, even by the evangelicals themselves. They have been accused of gross exaggeration and even pure and simple invention. But in spite of these criticisms, we think that, if at the macro level it is difficult to attribute social transformation to religious revivalism, it is undeniable that, at the micro level small changes which are brought about in the lives of individuals can have an impact on global society.

3. A new class of entrepreneurs, and new positions of political power

The revivalist churches present two different but complementary tendencies. The first "is suitable for introvert temperaments, and emphasises spiritual experience, attendance at services, and purification through fasting and prayer. Those who follow it prioritise preparing themselves for heaven and they support each other mutually in order to pass the tests without weakening. The second, suitable for extrovert temperaments, puts the emphasis on evangelising and on changing society in order to prepare it in readiness to receive the kingship of Christ. Success in this task, impossible to accomplish without divine aid is, above all, a tribute to God himself. The churches or ministers of the first tendency have nothing to do with public affairs, but this is not the case with the others, whose members willingly see themselves as conquerors and reformers of the world for Christ. The latter set great store by the multiplicity of blessings which rain down on the heads of those with an excellent relationship with God. Such blessings are not to be neglected. They have the merit of making Christianity attractive.

However, in order to reinforce this attraction, they must everywhere provide a good example."[5]

In the Congo, most pastors belong to the second tendency and assert loudly that they are partisans of a theology of prosperity. According to this theology, a child of Christ cannot, logically, be poor. Gold and silver belong to the celestial father. In addition, some pastors do not hesitate to show off the material goods which they consider to be God-given: private television channels, luxury cars, numerous real estates, etc.

Many Congolese researchers are quick to assert that these goods are provided through the exploitation of the naivety of the followers, and because of strategic preaching. Jean Kambayi Bwatshia and Julien Mutombo Ngonga write about this preaching: "And what can be said of preaching on the subject of collections and the excessive and selective gathering of alms. On this subject the 'founder pastors' shout loud and strong: ' Sell your possessions and give to charity; make yourselves money belts which do not wear out, an unfailing treasure in heaven, where no thief comes near nor moth destroys. For where your treasure is, there your heart will be also' (Luke 12, 33). Or, again, 'Now concerning the collection for the saints, as I directed the churches of Galatia, so do you also. On the first day of every week each one of you is to put aside and save, as he may prosper, so that no collections be made when I come. When I arrive, whomever you may approve, I will send them with letters to carry your gift to Jerusalem; and if it is fitting for me to go also, they will go with me.' (1Cor 16, 1-4). Under close examination, experience shows that most pastors are in search of their daily bread, which they find easily in the exploitation of the naivety of the Kinois masses who seek to escape from the misery in which they live."[6]

If it is true that the revivalist churches in the Congo are sources of scandal wherever they arise, it is also true that they are genuine 'management schools' for an emerging class of entrepreneurs. Barbara Serrano, writing on the Universal Church of Brazil, " the evangelical churches present for their followers a real pedagogy of success and

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(5) CORTON André and MARY André. *Imaginaires politiques et pentecôtisme: Afrique/Amerique-Latine.* Paris: Karthala. 2001.
(6) *Op. cit.* pp 92-93.

the encouragement to pursue personal projects such as starting enterprises... Their television programmes relentlessly turn out adherents' success stories: owners of a chain of shops, private car parks, or beauty salons....this is not mere advertising; beyond church services, the faithful learn to look for and interpret signs of the presence of God in their lives: never to be content with how things are, to economise in order to invest later, get more involved in activities, aspire to become an individual entrepreneur....And in reality it seems that the faithful often do seem determined to get involved in enterprise, even if it is more likely to be selling umbrellas outside the metro than opening a beauty salon."[7]

It will also be observed that the revivalist churches do not content themselves with creating a new class of entrepreneurs. They also provide them with an intellectual and spiritual framework. In effect, genuine clubs for businessmen function within the revivalist churches. Usually meeting in big hotels, these 'full gospel' clubs are places where Christian men of affairs follow the teachings of the Lord in business matters: credit, guarantees, security... here they also learn that the Christian must make a positive contribution to the development of his country, having regard to the general interest, not seeking to enrich himself illegally, and that he should eschew bad practices such as contraband, corruption, and the worldly way of conducting business. Moreover, Christians everywhere must aim to be most effective and to occupy as many key posts as possible. Thus, Christianity may achieve dominance for the benefit of all, in the government of the country as well as in business management. As exemplary individuals and as occupants of posts of responsibility, Christians should complete the process with the creation of Christian industrial and commercial organisations which can be put to use in the expansion of Christianity.[8]

4. The revivalist churches' political offensive

Since the end of the rule of Maréchal Mobutu, one may observe an offensive by the revivalist churches on political life in the Congo. From

(7) SERRANO, Barbara. "Églises évangéliques, L'Offensive politique". In *Chroniques de la gouvernance.* Paris: Charles Leopold Mayer. 2008. p. 179.
(8) CORTEN, André and MARY, André. *op. cit.* p.56.

the start, national and foreign preachers were regularly recruited by the regime not only to preach forgiveness and reconciliation, but also turn the people towards more spiritual preoccupations. The culmination of this strategy was during the time of the Sovereign National Conference, where everyone was expecting a mass brainstorm.[9]

Since the political revolution of 1997, many pastors have occupied important posts in different organs of the State. Under their influence, the omnipresence of prayer has become a reality in the Congolese political life. The paradox of the secular Congolese State where all meetings of official institutions begin with a prayer asking God to guide their work has been pointed out by some. This practice, which is nowadays beginning to become institutionalised, is a cause for concern for many analysts of the Congolese political life.

Strengthened by the official recognition granted to them since 2003 and by their success in the political terrain, the revivalist churches clearly intend to show that they are no longer inoffensive, even clandestine sects whose existence is dependent on the good will of the authorities of the Church of Christ of the Congo, but a political force of the first order. To assure their political presence, they have set up a Justice and Peace Commission, like that of the protestant and catholic churches, which provides a platform to represent them in dealing with the political authorities of the country. During the presidential elections of 2006, the Commission trained and deployed about 2000 observers throughout the country.

The revivalist churches were not content with deploying observers. They also fielded candidates for the different constituencies. Some were elected as deputies. Others made electoral agreements with candidates. Still others pocketed several million US dollars to give their followers voting recommendations. It is pointless to emphasise that the pastor-fathers enjoy the blind trust of their followers, which means that they would vote as they were told.

The new position of power occupied by the revivalist churches means that they can win over many people who nourish political ambitions. The old generation of politicians has not gone away. Certainly one may find amongst them preachers, pastors, and/or benefactors who are sincere and on whom the Congo can depend for her reconstruction.

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(9) BRACKMAN Colette. *Le dinosaure, Le Zaïre de Mobutu*. Paris: Fayard. 1992. pp. 180-181.

In effect, employing sincere believers in the management of the city may contribute to more ethical politics, for the greater glory of God and the salvation of men, His creatures.

But 'born again' politicians are not always necessarily sincere converts. Many of them hope, through these churches, to haul themselves up into a new position of power to escape from the oblivion to which the new regime have relegated them. Still others, more numerous, are simply looking for (new) credibility, after having pillaged their country and violated the most basic rights of their co-citizens, and they find in this neo-Protestantism a means of reconciling themselves with the masses and regaining their confidence.

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The most recent developments in social science research place great importance on the regulation of societies from below. A great deal of work has shown not only the breakdown of the institutional machinery which was supposed to ensure the harmonious functioning of society by putting in place forms of intervention extended to the whole society, but also the abundance of legal systems in all societies. [10] The Congo is a fine illustration of social regulation from below.

The first conclusion to which our analysis leads us is that power is now multi-polar in the Congo and that "power is no longer synonymous with the power of the State, for the good reason that the population...is quite simply disengaged for the most part from the State apparatus",[11] and that their real life is outside the purview of the State or even counter to it, because their modes of subsistence, their networks of solidarity, their means of social reproduction, and their ongoing values evade those who claim to be their masters.[12]

The second, and principal, conclusion is that, far from being a simple response to crisis, religious initiatives are also an attempt at social, cultural and political reorganisation which, should be understood as fundamental phenomena. Actually, in the context of generalised

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(10) See the multiple modes of *politics from below* illustrated by the work of the team of the *Politique Africaine* review and/or the collection *Les Afriques*, from Karthala Editions.
(11) KABOU Axelle, "démocratie et après?" in *Ecriture et démocratie, Les francophones s'interrogent.* Brussels: Labor. 1993.
(12) LANTERI Jean-François. "La vie comme elle va". *Autrement*, no. hors série. Paris. 1984. p. 123.

crisis, the revivalist churches appear to be where new needs are being taken into account and where new forms of sociality are emerging.

In sum, the revivalist churches, due to their communitarian dimension, their capacity to mobilise resources, their mediation in conflicts, and their channelling of fundamental aspirations of their population, are favoured actors in the process of social reconstruction in the Congo which researchers and public policy designers ought to take seriously.[13]

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(13) The institutionalised churches of the Congo cannot meet the challenge of social reconstruction in the Congo. The Catholic Church, alone, is perceived by the public as a stand-in for the institution of the State. Furthermore, it is intimately linked with modernity and is a vehicle, as are all of the modern institutions introduced into Africa by colonialism, for modern, foreign values which do not accord with traditional African values: condemnation of traditional African religions, condemnation of polygamy, etc. Finally, it has an ambiguous relationship with the State. This collaboration between the Church and the State in the Congo is inseparable from the colonial context and the arrival of missionaries.

Annex 3

Contemporary Traditional Leaders a Study on Land and Governance in South Africa

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South Africa today has one of the newest – and in many ways, most liberal – constitutions in the world. Yet, at the same time, South Africa continues to recognize non-elected traditional leaders who have important powers, especially over rural land. This paper examines the often controversial governance role of traditional leaders in South Africa, with a particular focus on rural land. Land in South Africa is a politically charged and profoundly contested issue, and the control of rural land by unelected officials complicates the picture: What role do traditional leaders play in governance, particularly with respect to land? How do we assess this role in trying to understand 'good governance' and social justice? Drawing on scholarly research and fieldwork in Limpopo, Johannesburg, and Pretoria, this paper seeks to provide a better understanding of the range of popular conceptions of traditional leadership and the nature of its functions as they exist today. Specifically, this paper examines the roles and responsibilities of traditional leaders as they relate to land, including with respect to allocation and use of land, representation, cultural stewardship, environmental management, economic development, and dispute resolution. Finally, it examines the larger implications of the evolving relationship between government, civil society, and traditional leaders in contemporary South Africa, in order to contribute to broader debates about good governance and traditional leadership in Africa.

1. Context: traditional leadership and South Africa

South Africa's unique and historically inspired institutional, legislative, and constitutional reforms recognize the equal rights of all citizens and seek to embrace the pluralistic nature of the country. However, in an effort to acknowledge this diversity, South Africa's constituent institutions also recognize and incorporate traditional forms of leadership,[1] including hereditary positions such as chiefs and headmen.[2]

1.1 Historical Context

When assessing the current roles of traditional leaders, it is important to critically examine the political history of these institutions as well as assertions of pre-colonial roots. Traditional leadership is frequently claimed to be indigenous, historical, and a continuation of an immemorial authority. Moreover, it is often assumed that this indigenous nature, historicity, and other notions of tradition are able to confer legitimacy. Tradition, however, is a highly fluid concept, often deriving more power from such claims than from their actual relation to practices of the past.[1]

Traditional leadership is also associated with antiquated and despotic practices due to its manipulation under the systems of indirect rule and apartheid. The British colonial system in South Africa relied on traditional governance structures to facilitate indirect rule and institutionalized a system of traditional leadership that did not previously exist.[2] Additionally, the British did not always follow customary mechanisms of selecting traditional leaders, deposing those who were uncooperative and supporting those who were compliant. Leaders not eligible for position by lineage were appointed, often without seeking approval from councillors or elders.[3][3] This use of traditional governance

(1) See Appendix I – Chart of Traditional Leadership Structures.
(2) Recognizing that the terms "chief" and "headman" have colonial connotations and are thus controversial, the term "traditional leader" will be used throughout the remainder of this paper and will refer to the entire range of traditional leadership positions; the terms "chief" and "headman" will be used only as necessary.
(3) The set of practices commonly accepted as customary African land tenure norms have been heavily influenced by colonial administrative convenience. Notions of land as unalienable and held by a chief in trust for the community were instrumental in maintaining the control of traditional leaders during the colonial period. See Martin Chanock. "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," in Mann and Roberts. 1991; Klug. 1995.

structures to further indirect rule continued during the apartheid era, with the government bestowing more power on traditional leaders than they had previously held.[4]

Another legacy of these systems was the creation and enforcement of spatially bounded communities, "Bantustans," which generally lacked political or cultural relevance for those forced to live within them.[4] Officially recognized traditional leaders were given tremendous authority over these territories and the populations assigned to them. Additionally, widespread forced removals in the fifties and sixties displaced populations to areas in which they had not previously lived.[5] [5] As a result, the traditional leaders who exercised authority over these areas did not necessarily represent the interests of the populations under their jurisdiction, nor did they necessarily have legitimacy based on shared political and cultural norms.[6]

The current debate surrounding the contemporary role of traditional leadership draws heavily on this controversial history. While some see current traditional leaders as a remnant of the apartheid system and an instrument of indirect rule, and therefore as fundamentally incompatible with a modern democratic system,[7] others maintain that traditional leaders are in a unique position to play an important role in the management of land, in the administration of justice, and the stewardship of culture.[8]

Amid these debates, it is important to recognize that traditional leaders nonetheless continue to actively govern their communities and that there have been increasing efforts to define the role of traditional leaders in contemporary South Africa. In the light of this reality one must critically assess the role of traditional leaders both within their communities and in broader national governance structures.

1.2 Constitutional and Legal Reforms

Policy reforms since 1994 reflect an effort to define the roles of traditional leaders and to harmonize such roles with a constitution

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(4) We will use the term "Bantustan" to emphasize the racialized and separatist ideology that motivated the creation of these areas, rather than the more neutral term "homeland," which implies that assigned populations had natural origins in these areas.
(5) Traditional leaders were used to regulate and supply migrant workers to agriculture and industry and were also employed to control the populations of some mining areas.

that emphasizes individual rights and democratic procedure. In fact, Chapter 12 of South Africa's Constitution formally recognizes the "institution, status and role of traditional leadership, according to customary law."[6]

In theory, traditional leadership institutions, customary law, and related legislation are "subject to the Constitution" and must respect enshrined rights and principles of equality.[7] Practice, however, can be far removed from law, as illustrated by the continuing lack of gender equality associated with traditional leadership.[8] Subsequent legislation has been enacted in an effort to address the seeming incompatibility between the rights laid out in the Constitution and some traditional practices. For example, the Traditional Leadership and Governance Framework Act (TLGFA) of 2003 declares that "traditional communit[ies] must transform and adapt customary law and customs […] so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by (a) preventing unfair discrimination; (b) promoting equality; and (c) seeking to progressively advance gender representation in the succession to traditional leadership positions."[9] Moreover, this Act specifies that at least a third of traditional council members must be women and that forty percent of members must be democratically elected.[10]

The TLGFA, along with other legislation, also seeks to define the roles and powers of traditional leaders that are unspecified in the

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(6) Constitution of the Republic of South Africa. 1996. Chapter 12, §211(1)**:**
211. Recognition
The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
212. Role of traditional leaders
National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law national or provincial legislation may provide for the establishment of houses of traditional leaders; and national legislation may establish a council of traditional leaders.
(7) Ibid.
(8) The influence of colonial ideologies on gender relations and the imposition of contemporary European gender norms on African societies are also well documented; we do not attempt here to disaggregate the effects of colonial codification and administrative practice from underlying gender norms and will instead consider the totality of practices experienced under traditional leadership. See Amadiume. 1987; Claassens. 2005.

Constitution. It states that "the following leadership positions within the institution of traditional leadership are recognized: (a) kingship; (b) senior traditional leadership; and (c) "headmanship."[11] [9] In giving leadership powers in rural communities to 'traditional councils' (Tribal Authorities, reformulated to include somewhat more democratic requirements) through the TLGFA, the government provides a role for traditional leaders with respect to arts and culture, land administration, welfare, the administration of justice, and the environment, among other functions.[12] Again, it is noted that the government is required to ensure that these roles and functions are consistent with the Constitution.

However, in spite of recent policy and legislation, incongruity exists between the official roles and responsibilities of traditional leaders and those actually exercised on the ground. As a result, expectations with respect to the degree of authority that is, or should be, vested in traditional leaders vary greatly depending on the individual leader and community. Lack of clarity about these roles also contributes to inefficiencies and to an unclear relationship between government functionaries and traditional leaders. Furthermore, official recognition of some traditional leaders, but not others, has led not only to competition for power within communities, but also to inconsistent processes for determining which contenders should be recognized.[10]

While the recognition process and structure of traditional leadership varies across South Africa, at the community level the spheres of influence of traditional leaders are more homogenous. Barbara Oomen, in her research in the Sekhukhune District Municipality in the Limpopo Province, identifies land issues, dispute resolution, and participation in initiation schools as the three primary areas of responsibility for traditional leaders.[13] These areas of responsibility have been reaffirmed throughout South Africa and also by our fieldwork, though

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(9) Additionally, regents, persons acting as traditional leaders, and deputy traditional leaders are also recognized, but subject to specific procedures of appointment by one of the aforementioned three officially recognized leadership positions.

(10) The Government of South Africa recognizes the existence of widespread challenges to the hereditary legitimacy of many traditional leaders; the five-year Nhlapo Commission has been tasked with evaluating competing claims to royal and other positions. Our interviews indicate a low level of confidence that the Commission will be able to resolve these claims to the public's satisfaction, although it should be recognized that some contestation over such positions is a part of all leadership systems, including South Africa's hereditary leadership, and may introduce an element of competition to the current system, as it has done historically.

it is important to note that not all leaders enjoy the same degree of authority or influence due to significant local differences in support for traditional leadership.

1.3   National Level Institutions

The integration of traditional leaders within state institutions has also changed significantly in recent years. There are currently two representative bodies of traditional leaders: the Provincial Houses of Traditional Leaders (PHTL) and the National House of Traditional Leaders (NHTL), with the establishment of Local Houses of Traditional Leaders anticipated in the near future. Members of the PHTL are chiefs who are elected by other traditional leaders to represent their respective provinces. The same process applies to the NHTL, where representatives are elected by members of the PHTL.[14] [11]

In addition to participation through these institutions, some traditional leaders directly serve in government structures, and consult with various departments, including Provincial and Local Government (DPLG) and Land Affairs (DLA).[12] Despite the strong presence of traditional leaders at the national level, few linkages exist between local and national levels of governance, and communication between the two existing levels of houses of traditional leaders remains rudimentary.[13]

1.4   Contemporary Land Issues

Traditional leadership presides at the nexus of current controversies over land in South Africa. As noted, apartheid and colonialism led to widespread land dispossession, intimately linked to the creation of Bantustans, which South Africa is now seeking to remedy. Indeed, South Africa's Bill of

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(11) While these houses can be seen as a potentially valuable forum for representation of often-marginalized rural communities, it is important to note that these leaders are not elected by community members.

(12) Some traditional leaders also currently serve in Parliament and the judiciary, some with regents fulfilling their traditional leadership roles, further illustrating the extent to which they are incorporated in multiple national institutions.

(13) Fieldwork, 2008. We have omitted any personally identifiable markers for those we interviewed; this anonymity permitted residents of small communities, leaders at all levels, and government officials to speak freely without concern that they would be identified with their views, which in many cases were inconsistent with their public roles. All fieldwork was conducted between January and March, 2008.

Rights declares that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources." Land reform in South Africa broadly includes: the redistribution of land to disadvantaged and poor South Africans in order to achieve a more equitable distribution of land; restitution, in order to redress specific instances of historic dispossession; and tenure reform to address historically insecure ownership rights for black South Africans. A form of such tenure is "permission to occupy" or PTO certification, which continues to be a common form of land holding in rural communities.[14] Major land reform programs include the restitution of land through the Land Restitution Commission and the Land Claims Court; the Communal Land Rights Act (CLRA), which recognizes a secure form of group tenure rights under the authority and administration of traditional councils; and the extension of private land tenure opportunities to previously ineligible areas. Although the pace of many programs is increasing, South Africa's ambitious land reform process has been extremely slow, due to the magnitude and complexity of the process, resistance from current landowners, insufficient dedicated resources, and apparently inadequate political motivation.[15]

Traditional leaders in South Africa are playing a key role in the land reform process. This is because, as discussed in greater detail in the following sections, cultural connections exist between traditional leaders, land, and communities, and also because traditional leaders maintain effective (as well as *de jure)* control of allocation and management of land in many areas. Traditional leaders also play a role in articulating claims for restitution.

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(14) Under the PTO system, the occupant and family members are granted a permit for "utilization rights" through an extensive bureaucratic process and may remain on allotted land indefinitely, contingent on continual use, and these rights can be transferred to subsequent generations. However, this form of tenure is not associated with the same level of security or rights as private ownership. For example, respondents in our research expressed concern over the fact that their PTOs could not be used as collateral. Mogale, Thomas, Alan Mabin, and Alain Durand-Lasserve. "Residential Tenure Security in South Africa: Shifting Relationships Between Customary, Informal and Formal Systems" in Anseeuw and Alden. 2007. Also see Ntsebeza, 1999, 2005.

(15) South Africa's land reform process has adopted a 'willing-seller willing-buyer' approach with sales made by willing landholders to the government for subsequent redistribution; high land values and government funding insufficient to make significant purchases at market prices have contributed to a low rate of success. While just compensation is required by the Constitution, the use of higher fair market values has been implicated in the slow pace of reform. Van den Brink, Rogier, Glen Sonwabo Thomas, and Hans Binswanger. "Agricultural Land Redistribution in South Africa: Towards Accelerated Implementation" in Ntsebeza and Hall. 2007. See also IRIN, July 2003; IRIN, November, 2007.

Community-based claims for land rights are generally led by traditional leaders and can facilitate land redistribution by consolidating groups of individual or overlapping claims. Such claims can also work to the advantage of traditional leaders; for example, the redistribution and restitution of land often expands the territory over which traditional leaders exercise control. It is important to note that while traditional leaders often represent communities in restitution cases, and thereby contribute to the resolution of land disputes, this representation is not strictly necessary for a community to make a claim.[17] This suggests that the authority vested in traditional leaders to represent the community and their ability to address subsequent land issues could diminish.

As some previously exempt areas begin to include private land ownership, traditional leaders lose some authority over land use, which one leader described as being "the cornerstone of the institution." As such, a transition to private land ownership is opposed by many traditional leaders. Privatization of land, which also reduces the territorial jurisdiction of traditional leaders, is often strongly opposed by traditional leaders on the principles of community rights and social welfare. Indeed, most traditional leaders have consistently challenged legislation that transfers land to individuals and other legal land-holding entities, instead advocating that it "be transferred to traditional or tribal authorities," in some cases greatly expanding their jurisdiction.[18]

The direction and pace of South Africa's land reform process will continue to be intimately linked with the power of traditional leaders over land. The following section will explore the governance roles of traditional leaders as they relate to land, as well as the current state of integration of traditional leaders and other state structures as they continue to negotiate land distribution, ownership, and use in a complex and evolving framework of institutions, policies, and realities.

2. Traditional leadership and governance trough the lens of land

Management and administration of rural land are critical roles played by traditional leaders and are intimately related to many of their other functions and responsibilities. Using the lens of land, we will examine some significant governance roles and responsibilities of

traditional leaders, recognizing that both positive and negative consequences emerge from the fulfilment of these roles.

2.1 The Role of Traditional Leaders in Land Allocation and Use

Beyond its economic functions as an input to production and commodity for exchange, land is imbued with spiritual and social significance and plays an important role in individual and community identity. The ability to maintain the fertility of land and promote positive ancestral relations is an important dimension of traditional leaders' legitimacy as arbitrators of land issues.[16] This role is first manifested in the initial allocation of land to families participating in the founding of communities. It continues through ongoing oversight of use and distribution of communal land and serves a mediating function that underlies both the social and spatial distribution of land assets within the community. Similarly, assignment and resolution of overlapping and competing use claims provides social and economic protection, as well as safeguards for community resources.

While authority over land allocation and administration formally transferred to the colonial state as owner of these lands, on the ground many traditional leaders continued to exercise a great deal of control in this respect through official and unofficial allocation of land, and substantial authority has been returned by the TLGFA and CLRA, which vest administrative powers over land in traditional councils on behalf of the communities that now own their land.[19] This role is in many respects rooted in the authority traditional leaders have historically exercised over land.[20]

However, interpretations of 'customary chiefly ownership' vary. For instance, we found that land in areas of the Limpopo Province was often referred to as "the *kgoši's* [chief's] land," and indeed, in some cases community land is titled in the traditional leader's name. However, in other areas, groups have received redistributed land

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(16) In some instances, such as that of the Modjadji, or Rain Queen, the protective and spiritual components of traditional leaders' stewardship of land retain considerable legitimacy. Although providing spiritual rather than political leadership, this position is recognized by the South African government with a salary, and government officials attended the most recent queen's inauguration. During our Limpopo fieldwork, the Modjadji and her rainmaking powers were spoken of highly, and the Rain Queen's role as protector of fertility of land in the region appears to be broadly understood and respected.

independently through Communal Property Associations and other land-ownership structures that permit group tenure rights on the basis of a democratically created constitution without requiring the leadership of a traditional leader.[21]

The ambiguity of traditional leaders' authority over land and the process through which land is allocated can lead to a lack of transparency in land administration. This system of allocation is frequently criticized by those who are denied access to land or perceive their share as inappropriate. Community members have reported that those with a higher social status receive preferential land allocation, and that women and youth remain largely excluded by the allocation norms.[17] For example, some have asserted that land allocation is not based on need or equality: "People without land go to the chief for land...your access depends on the relation of your surname to the chief. If you are close, you have a chance."[22] While women do not generally have equal access to land, progress has been reported in some communities: "Five years ago, everything changed completely, and now women can go to the chief to get land, because of so-called democracy, now all of this has changed."[23] Despite this progress, the lack of equality and transparency experienced by many community members remains problematic.

However, other interpretations of traditional authority over land emphasize the role of leaders in ensuring societal well-being through working and living on the land and fulfilling social welfare functions within their communities. For example, during our research it was asserted that "*Nkosi* [chief] is also a farmer himself. He is responsible for making sure people do not suffer. He encourages them to work on the land, so they do not starve...."[24] One traditional leader asserted to us that the right to land derives, in principle, from responsibility for others, and that "even *Nkosi* cannot issue land to someone who is not married. It's given because you're responsible for someone, so a woman with children and siblings will be given land, [but] a man [who] could not afford to get married and is not responsible (for family) [would

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(17) In his fieldwork in Mzinti, Brian King found that partiality in the distribution of resources can also be used to reinforce patterns of inequality, such as the preferential provision of access to land in development schemes to political elites within the existing hierarchy, rather than to the poorest or newer members of the community. This was supported by our fieldwork. See King, 2004; James, 2007; also Udry, 2005.

not].” This in many respects reflects the communal importance and social welfare notions of land use and allocation.

2.2 Representation

Traditional leaders play an important role in representation on both a national and local level and through formal and informal processes. In particular their authority over land and knowledge of related issues – including its distribution, history, and capacity for development – put traditional leaders in a unique position to inform, influence, and actively participate in decision-making processes.

Traditional leadership representative structures, known as “houses of traditional leaders,” discussed in the previous section, serve as a parallel representative structure through which traditional leaders can provide policy recommendations and review legislation. Through these new institutions, traditional leaders have the potential to challenge national-level politics and governance policies in their areas of influence.[18] Moreover, to the extent that traditional leaders speak for their communities, such structures provide an opportunity to represent otherwise under-represented rural communities.

A number of our interviewees noted that state government officials did not always provide long-term leadership and were subject to political party mandates (particularly those elected by proportional representation in rural areas), but felt that traditional leaders were able to serve as permanent representatives of community interests.[19] One community member expressed his feeling that traditional leaders are more responsible to the community than their elected counterparts: “the most important thing is trust. That it is someone you grew up with.

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(18) The Congress of Traditional Leaders of South Africa, CONTRALESA, has also been active and successful in advocating reforms increasing the standing and influence of traditional leadership. Ntsebeza and others have argued that the political strength of CONTRALESA is responsible for the early ambiguity surrounding the role of traditional leaders as well as subsequent increases in the power of traditional leadership reflected in the final versions of the TLGFA and CLRA. Ntsebeza 1999, 2005; Fieldwork, 2008. Also see Bank and Southall, 1996.

(19) Tapscott has also raised concerns about the low level of trust for state institutions in these communities and limits to social engagement due to apartheid structures, with implications for the success of programs and institutions at the local level. Tapscott, Chris. “Democracy and Trust in Local Government” in Askvik and Bak. 2005. See also Cousins, Ben and Aninka Claassens. “Communal Land Rights and Democracy in Post-apartheid South Africa” in Jones and Stokke. 2005, on the competing influences of traditional leaders and identity politics in this process of democratization.

A community does not worry...if they know you. Politicians are corrupt because they are leaving in five years," implying that elected officials are likely to misuse resources in the limited time that they have access to them.[25]

Traditional leaders, at times better educated than the majority of their community members, are also well placed to articulate their members' positions to a larger audience. Indeed, the number of formally educated traditional leaders participating in politics, law, and development is increasing. However, not all of those serving in traditional leadership structures are educated, or motivated primarily by the desire to represent their constituents. As one respondent explained, "Educated traditional leaders see that the NHTL is toothless, and don't want to participate. Those who don't have much to do might do it to build their profile, and those are the ones that go up to the national level." Another respondent noted that status and financial remuneration may be incentives for participation in these representative structures. "They focus too much on pay, they look at everything on how they will be remunerated... traditional leaders see NHTL as a payment structure, and [are] using it to advance their case." And, while this new institution could potentially be a valuable form of representation for rural community members as a national interest group, it would require disaggregating of individual communities' interests in order to avoid creation of a monolithic Native Administration-type voice in national level politics.

Another important aspect of representation is effective communication between decision-making bodies, communication of community interests to such bodies, and finally, the transfer of information to communities with regard to resolutions reached by decision-making bodies. However, within the current information-sharing networks, "there is no formula for communication between [the two levels of traditional] houses. The provincial level sends delegates to the National House, but they don't report back, even though they request the minutes."[26] Similar issues arise as traditional leaders seek to inform elected officials about community land issues. As these institutional frameworks are strengthened, however, traditional leaders may be able to serve as more effective representatives of their communities' concerns.

Traditional leaders (as well as the state-affiliated Ward Councillors) are expected to share information on new policies and business conducted at the regional and national levels with their communities. We were told that in addition to announcements during regular *kgotla* meetings,[20] extraordinary sessions may be called for dissemination of information, and that media, including local print and radio, are also sometimes asked to attend and to make these announcements.[21] However, the consistency and frequency with which information is shared with the community is such that community members are not always aware of the decisions being made on their behalf.

Nonetheless, the traditional office can serve as an important space for other government officials, including the Ward Councillor and the police, in that it provides a common, public area where community members can convene. While traditional offices can provide space for consultation with other officials, it is unclear whether community members feel comfortable raising concerns there that would reflect negatively on traditional authorities.

The fact that both traditional leaders and state government officials, particularly Ward Councillors, fulfil overlapping functions on a local level can also be problematic. For instance, both the Ward Councillor and traditional leader have the ability to issue reference letters, yet individuals continue to use the traditional office for this service.[22] Similarly, traditional leaders can be publicly perceived as responsible for providing some government services and bringing development funds to the community because they serve as a conduit for programs initiated and funded at a higher level. This lack of clarity in roles can not only lead to inefficiency, but makes it more difficult for community members to demand accountability or raise issues with the appropriate

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(20) Community court and public information-sharing sessions.
(21) One traditional office staffer asserted that "all policies are decided by the community. Any issue is discussed at the *kgotla*. We rely on those that came to spread the word. We always try to invite the media, news and radio. We send community announcements to the radio, here we have local radios." Fieldwork. 2008.
(22) The purpose of this letter is to certify that the individual is a member of the community, (often also that they are eligible for a lower fee structure for services), and receipt of the letter is often contingent on the payment of an annual "tribal levy." Thus, if individuals obtain other proofs of residency and resources, such as title deeds, such letters would no longer be necessary. This could significantly alter the functions, and perhaps authority, of traditional leaders. However, the fact that individuals continue to use the traditional office despite the availability of state-run alternatives may indicate that leaders may continue to be useful in such administrative roles.

governance body. Thus, although traditional leaders have the ability to represent their communities in certain respects, their ability to effectively do so remains subject to internal and external constraints within a complex, largely democratic system.

2.3   Cultural Role

Traditional leaders are often supported because they are seen as a link to – and a representative of – 'tradition' and 'culture,' and are a powerful symbol of unity and pride for many people.[27] Indeed the fact that traditional leaders are charged with the administration of land links them to the continued management of a cultural resource, with ties to ancestry and history. As Ben Cousins explains, "traditional leadership draws much of its legitimate authority from its embeddedness in the social and cultural life of rural communities, where discourse of 'tradition' associated with cultural identity are still persuasive for many."[28] This stewardship of culture is demonstrated not only in the management of common resources but also in the practice of cultural norms, such as the management of initiation schools.[23]

Within communities under traditional leadership there may be a link to a common sense of values and language, for which traditional leaders are a leading voice on the national and provincial levels. However, just as this link to culture and identity can unite a population, it may also have the effect of marginalizing those who are not members of a dominant group but are still residents in the community. By the same token, women and young people within communities under traditional leadership can be marginalized by the ways in which 'culture' has been defined and performed in these communities. For instance, women are significantly underrepresented in traditional forums, leaving them largely excluded from major decision-making.[29] The role of culture and socialization in the exclusion of women is also manifest in the relationship between traditional courts and women, as discussed in a subsequent section of this paper.

'Culture,' therefore, is contested and dynamic and the exclusionary aspects of cultural practice reflect asymmetries of power. However,

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(23) A communal rite of passage, in which youth are inducted into adulthood through education in community practices and history, often including circumcision.

cultural norms do have meaning, both positive and negative, for many communities, and traditional leaders are often at the center of cultural debates. Moreover, it is important to note that reforms to enhance the inclusion of women and disadvantaged groups are also proceeding, for example through the TLGFA, and we encountered strong verbal support for new gender inclusion programs among leaders, although their implementation remains far from complete.[24]

2.4 Management of the Environment/Natural Resources

Closely tied to traditional leaders' supervision of land usage is the responsibility for the protection of land fertility. Traditional leaders observe rituals and activities to maintain soil fertility and determine appropriate land usage in accordance with ancestral norms. In Pedi culture, for instance, the chief is responsible for initiating the process of rain-making, for determining the appropriate time for planting to begin, and for overseeing the first harvests.[30] Traditional leaders can draw upon their symbolic repertoire for protecting land in order to perform environmental regulation roles. Although a clear role for traditional leaders in environmental management is not legally defined, in some areas traditional leaders have been entrusted with the regulation of natural resource use on behalf of the community, for example through the allocation of wood-cutting permits.[31] Within communities we studied, traditional leaders continue to play a role in ensuring that land is allocated in such a way as to allow for rotational land use.

The role of environmental management is also intimately related to the economic resources associated with land. In some instances, communities under traditional leadership have been able to benefit from shared usage rights. One respondent reported that, "things like sand and thatch tend to be [collected in] rural communities, which is good because they can be sold as a commodity by the community. The money is used to build hospitals and schools." However, there have also been cases in which traditional leaders have illicitly sold land or commonly held natural resources.[32]

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(24) Interestingly, it has been found that women tend also to be slightly more supportive of traditional leaders than men, suggesting that gender exclusion does not solely determine overall attitudes toward traditional leaders. See Oomen, 2005 and Walker, 1997.

Tensions arise from instances in which economic imperatives trump environmental protection concerns and are evidenced by certain cases of mining development. In one instance, we were told that the local chief "sold land to develop for mining to a foreign company, without any consultation, although this is required."[33] Problems also arise when the state's ownership of mineral resources conflicts with local tenure and ownership regimes: "Mineral rights are a concern for both freehold and PTO land, because if the government exercises its mineral rights, the person doesn't effectively own the land."[34] Although communities are compensated, current mining policies seem to prioritize financial gain over other concerns. As South Africa continues to develop its industrial and extractive economic base, such conflicts over the responsible use and control of land may become more frequent, and traditional leaders could possibly serve as intermediaries in many such situations.

2.5   Economic Development

Traditional leaders are central in debates over whether land should be used to promote social welfare or for economic growth more generally. In a market economy, traditional leaders can enunciate communitarian principles of land-holding and use on a national level within a highly market-based and individually focused economic system, a function unlikely to be filled by other stakeholders. One Land Affairs official noted the potential contributions of traditional leaders in this respect, and observed that their insights can promote equitable reforms.[35]

Business Development, Resource Allocation and Use

Balancing local community development and guardianship of the communal land entrusted to traditional leaders is a particular challenge when community members do not have the resources needed to develop businesses to encourage economic growth.[36] There are many obstacles to attracting outside investment to traditional authority areas, which can include their isolation, low profitability, and discrimination against outsiders.

One key obstacle to investment is the fact that the acquisition of land for business purposes is more burdensome for those who are not considered members of the community. At the same time, applications for land leases can involve a pledge to the traditional leader to employ a certain number of community members, as well as a commitment to business longevity. All rents —which are assessed at a higher rate for those not from the community—are paid to the traditional leader, who is responsible for redistributing them to the community.

Few other voices are being heard at the national level for non-commercial valuations of land or for community-based agricultural marketing, and the promotion of African understandings of these commoditized resources is a unique contribution of traditional leaders to South Africa's development. Many of these roles for traditional leaders, however, stand squarely opposed to market institutions and equal citizenship notions supported by the government.

One traditional leader mentioned a recent development within his community that strives to bridge this gap. "A new thing that we are starting is a system for land to be secure for bank investments," he said. "A system of long leases is secure. Now the bank can only lease the land [for a relatively short period of time] in a rural area. If you cannot pay back a loan, the bank used to take the land forever. If you owe 2 million, they take it forever. This is how much land was taken [from our communities]. Now the bank only gets the land for a period of time, until the loan is paid."[37] This is a new system, being implemented in specific areas, but it has the potential to fundamentally change the dynamics of landholding in areas administered by traditional leaders.

Social Welfare

The role of traditional leaders as guardians of communal land is ultimately tied to their responsibility for the maintenance and promotion of the well-being of their communities. A PTO is not automatically granted to every person who solicits land occupation rights, but is instead based on the degree of responsibility borne by the individual or family requesting this land. The imposition of such a requirement helps ensure that land is allocated based on need, rather than simply on eco-

nomic or political grounds, and serves a role in curbing landlessness among community members with few resources.

In the event that community land is sold, the payment is entrusted to the traditional leader not for personal use, but for redistribution to the community. Thus, the role of traditional leaders with respect to land can contribute in many respects to the effective balancing of group and individual rights based on notions of social justice, to the overall benefit of the community.

Dispute Resolution

Because traditional leaders play such a significant role in the administration and allocation of land, they also play a dominant role in resolving related disputes. Interestingly, traditional leaders can play the role of mediator between community members by addressing problems outside of court, as an arbitrator in traditional courts, and as a negotiator or representative of the community in inter-communal disputes.

Inter-Communal Disputes

Traditional leaders play an important role in resolving inter-communal land disputes. For instance, during our fieldwork, a case in the Limpopo Province in which one particular piece of land had many claimants was being discussed. This land dispute had heightened inter-communal tensions, reflected in allegations of property vandalism and field burning. The traditional leaders of both communities consulted with one another to address the problem and to ensure that members of each community did not engage in such activities. While the Land Claims Court, rather than the traditional leaders, will ultimately determine ownership in contested cases, such inter-communal communication can foster greater understanding and, arguably, prevent the escalation of conflict.[38]

Intra-Communal Disputes

Generally, when a dispute arises in a traditional authority area, if it cannot be solved within the family unit, it is taken to a headman. If it still cannot be resolved it is referred to the chief. From there, traditional court cases can enter the Magistrate's Court on appeal if they cannot be resolved within the community.[39]

Traditional dispute resolution mechanisms not only reduce the burden placed on state institutions, they also take into consideration the cultural, linguistic, and inter-personal contexts of a particular community.[40] Indeed, traditional courts can promote fairness in certain respects because traditional leaders are able to effectively contextualize the dispute. For example, the procedural flexibility of traditional courts provides an opportunity for members of the community, even those not acting as official witnesses, to attend hearings and offer their opinions and comments.[41]

However, there are certain aspects of traditional courts that can be problematic.[25] For instance, the lack of procedural uniformity and the applicability of "living and oral customary law", rather than codified law, can result in disparate treatment among cases.[42] The application of customary law is also controversial for those who see the equality of rights and citizenship as embedded in the uniform application of a single legal system and view the application of customary law as a remnant of indirect rule.[43] While customary law is currently required to be applied in accordance with the rights enshrined in the Constitution, the application of customary law, and the structure of traditional courts more generally, can be discriminatory in practice. This is particularly evident from a gender perspective. For example, while women do participate in some traditional courts as witnesses, as members of royal councils, and even as leaders, some women in Limpopo have "stated that they are not prohibited from attending and participating in the court proceedings but they do not attend because they believe that it is a man's job and it would be contrary to culture for them to attend. Thus, the socialization of women as to their role in society, in the traditional context, is an

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(25) The presence of a dual legal system (both institutions of customary law and Roman Dutch civil law) also raises significant issues for the communities and individuals subject to different legal regimes as well as debates over the right to culture and the role of individualism in law. See Hinz, 2007; Grant, 2006; Bennett, 1995.

impediment to their participation in public life and institutions."[44] For this reason, women interviewed in KwaZulu Natal as part of a South African Law Commission project argued that customary courts should not have jurisdiction over matters relating to land.[45] Youth have also expressed dissatisfaction with the way in which the traditional courts handle matters. As explained by one community member, decisions are not always based exclusively on the merits of the case, but also on the social identities of the parties involved and on the reputation of the families of which they are members.[46]

Interestingly, it has been noted that "[a] good chief is someone who 'judges wisely without looking where you come from' and 'builds the community.'"[47] This concept of community-building is reflected strongly in the notion of restorative justice, which "teaches the communities the values of responsibility, respect, caring and knowledge... [and] ultimately replaces vengeance with forgiveness, alienation with healing, and punishment with education."[48] This approach to justice is based on the idea that parties to a dispute are also members of a community and, as such, dispute resolution does not focus simply on the determination of guilt or responsibility and the meting out of punishments, but also on enforcing certain social norms.[49] These social norms can be reinforced through the allocation or denial of PTOs, the latter being one means of punishment.[50] However, this function of traditional leaders has become increasingly challenging in some communities; as certain traditional leaders have noted, enforcement can be difficult because youth are not always compliant with the system and do not necessarily respect their authority. The challenges of norm enforceability through land allocation are further exacerbated by the fact that most youth do not apply for PTOs, as they are not normally eligible to hold them.[51]

With respect to land disputes, traditional leaders are particularly knowledgeable about land and their communities' related needs, and are therefore in an advantageous position to resolve such disputes. However, even for those who support traditional courts and find them substantially better than the Magistrates' Courts, there is also a compulsory element to the use of such courts as the forum of first instance.[52] As a result, although appeals may be made to other courts, the degree of effective access to such courts is questionable.[53] As one

Magistrate's Court official noted: "It often happens that people come to us with cases that belong in the traditional courts, like family problems and disputes over land. They want us to try them, because they say the chiefs are biased. We tell them to still go to the traditional court first, and that they can always appeal to us afterwards. But somehow they never do. These people are loyal to their chiefs."[54] While this phenomenon could be explained in part by the fact that traditional leaders are able to satisfactorily resolve the dispute, it could also be a reflection of social pressure or logistical challenges, such as the difficulty of travelling to Magistrates' Courts.[55]

Therefore, while traditional courts are accessible, allow for the consideration of important factors that are often ignored by state judicial structures, and contribute to the just resolution of disputes in certain respects, they also raise concerns regarding the realization of certain civil and political rights.

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Examining the ways in which traditional leaders currently represent their communities on multiple levels illustrates that a nuanced understanding is necessary when exploring the role of traditional leadership and governance in contemporary South Africa. The critical issue of land is but one lens that can be used to examine many of the contemporary roles of traditional leaders, yet it is one that illuminates a full range of their contributions and contradictions at the local and national levels. Traditional leaders in some cases present problems of representation, but can also play an important social role in increasing equity and voice for their often marginalized rural communities. What is clear is that they cannot be ignored by those concerned with conceptions of governance. The fact that traditional leaders continue to enjoy legitimacy in the eyes of many community members, despite a controversial history, is significant, even if such legitimacy is not universally conferred.

As with many forms of leadership, the individual personality of a traditional leader and the particular characteristics of a community can play a determining role in the degree to which a leader is perceived as legitimate. However, support for traditional leaders is also rooted

in their unique contributions including cultural maintenance, social welfare, and dispute resolution. Traditional leaders can contribute to their communities not simply by performing these functions, but also by the ways in which such roles are fulfilled – traditional leaders are in a position to take the local context into consideration in the fulfilment of these roles, including relational dynamics and community interests, by nature of the fact that they are members of these communities.

However, just as traditional leaders understand their communities' dynamics, awareness of the risks of cultural fragmentation and discrimination is essential, particularly within a larger society that continues to address the legacy of apartheid. While the pluralistic nature of South Africa has been rightfully embraced, there is also a danger that traditional leaders could perpetuate potentially divisive ethnic identity politics in making community-based claims. Moreover, adequate progress has yet to be made in terms of ensuring the realization of rights of equality and non-discrimination; the responsibility to respect and ensure these rights falls both on the state and on traditional leadership.

Traditional leadership has the potential to contribute to governance in both positive and negative ways and therefore must be assessed with a thorough understanding of this complexity. In addition, in order to understand the relationship between traditional leadership, land, and governance, one must also explore the current dynamics of power and authority that allow traditional leaders to make these contributions.

On a functional level, particularly within communities, the authority of traditional leaders is intimately linked to their control over land and their ability to determine who "belongs" to a particular community through, for example, the provision of residency letters. However, as more individuals obtain alternative forms of land tenure, such as freehold, certain functions of traditional leadership could become unnecessary, thereby reducing the degree of control they exercise over their communities. Land reforms could also potentially counter some negative aspects of traditional leadership – if the power of traditional leaders ceases to be significantly based on their control over land, they may seek to garner support through actively addressing and representing community needs.

On a more institutional level, rather than the incremental exclusion of traditional leadership that many observers anticipated in the late 1990s, the roles of traditional leaders are experiencing accelerated definition, particularly on a national level. This is evidenced most recently by the establishment of the National House of Traditional Leaders and new institutions, such as the Department of Traditional Leadership, that could potentially enhance the authority and capacity of traditional leaders.[26]

An effective understanding of the governance role of traditional leadership and constructive policies is a challenge for policymakers and those interested in understanding governance. Equally problematic polarities emerge; one cannot ignore traditional leadership, but at the same time, this form of governance cannot be supported or rejected without a thorough, critical, and contextualized analysis of the realities of contemporary governance.

It is only after such an analysis that policymakers should seek to bolster positive elements of this form of governance and to ameliorate negative ones. Not only will such assessments vary among communities and leaders, because traditional leadership does not operate in a governance vacuum, but over-simplified policies that fail to consider the socio-political context may have negative implications.

The past decade has seen a resurgence of interest in traditional leadership and it is into this context that South Africa has emerged, actively negotiating the relationship between state and community, cognizant of its complex past and of the existence of competing claims over the status of traditional leadership. However, because traditional leadership in South Africa is a product of its unique history and socio-political context, one cannot simply export the South African model to other countries. It is important to examine the particularities and merits of each case, and this paper has sought to identify some of the tensions and complexities associated with traditional leadership as it operates on many levels in South Africa. Such complexities undoubtedly arise in all countries and communities where traditional

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(26) The recently-approved Department of Traditional Leadership is expected to strengthen linkages between traditional leaders and other government departments, and the proposed National Programme of Support for Traditional Leadership is envisioned to support traditional leadership structures, build the capacity of traditional leaders, and enhance their involvement in communities. See Mbeki, 2 April 2008.

leadership exists and must be critically examined and addressed. It is important to understand what makes this form of governance valuable to communities and the state, but one must also identify the aspects of this traditional leadership that are problematic and inconsistent with other norms that are valued by society. Such norms, as well as the relationship between traditional leadership and other governance institutions, will inevitably vary among states, yet many of the same tensions are likely to exist.

It is evident that while South Africa is enhancing the role of traditional leaders in some respects, national policies with respect to land reform also have the potential to weaken the authority of and perceived necessity for traditional leadership on a local level. The nature of these interactions and the implications for citizens that will result from the land reform process and the integration of traditional leaders into high-level government and policy remain to be seen.

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Annex 4

What Options for Ensuring Effective Constitutions? The Experience of West Africa[1]

By Assane Mbaye
Alliance to Refound Governance in Africa

1. Striding forwards and surging back

The '90s were marked by a frenzy of constitutional activity in West Africa, coinciding with the fulfilment of certain democratic demands aimed at promoting political pluralism, improving the safeguarding of rights and freedoms, and achieving a better balance of power in countries' institutional structures. The constitution, supposedly reflecting the political settlements of the time, seemed on the whole to embody the hopes cherished during decades of struggle against totalitarian regimes, dictatorships and restrictions, and violations of individual and collective freedoms. It was as if by simply affirming the supremacy of the constitution one could guarantee that most countries' recently inaugurated democratic systems, together with the values they conveyed, would stay the course. The faith placed in constitutions adopted during this period is justifiable on two counts, at least. Firstly, the conditions in which they were drawn up mark a profound break with the constitutional past of most of the states. These constitutions were, for the first time, the result of wide-scale national consultations, which took place within the framework of "national conferences". This drafting

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(1) This text re-examines the main conclusions of a workshop entitled "Africa in search of innovative constitutional alternatives", organised by the Alliance to Refound Governance in Africa, at Lomé on May 28 – 30, 2008.

and adoption procedure led to the legitimate belief that the constitution really was a collective effort, involving all segments of the nation, and that the settlements formalised within it were therefore inviolable – thus supposedly ensuring their longevity and protection from individual interests. Secondly and more basically, constitutions drawn up during this period were, in the main, strikingly circumspect, holding themselves up as true instruments for limiting power and submitting it to a superior standard. The excesses of the period prior to this play a part in this tendency. An implicit part of any progress towards democracy constituted, for the creators of these constitutions, the holding in check of presidentialist systems of government by promoting a two-headed executive, the strengthening of the legislature, and judicial controls, which would deal more rigorously with potential threats to the supremacy of the constitutional norm and to rights and freedoms.

In the last few years however, the euphoria of the democratic triumphs and the accompanying boom in constitutionalism has given way to a more mitigated reality, a sort of surge backwards, which in turn has provoked bafflement, and a challenging of the democratic and institutional systems now judged ineffective, due to their failure on the whole to deliver the expected results. These systems have become unstable and are, paradoxically, doing more to stoke up crises and conflicts – occasionally violent in nature – than they are to regulate them. This surge backwards can be measured against the yardstick of the two tendencies mentioned above. On the one hand, presidentialist systems of government have scarcely been affected, with some even permitting themselves the 'luxury' of becoming *de facto* monarchies; procedures for devolving power are still in serious dispute, resulting in an ongoing loss of credibility; parliaments are still weak and the judicial control over political power is not always satisfactory. What is worse: there is a growing trend towards a re-examination of some of the most symbolic settlements reached during the '90s and the national conferences[2], one obvious example being changes to the length and number of the president's terms of office. One is therefore left with the impression that these constitutions are not fulfilling their role as an effective limit

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(2) This re-examination is also to be observed in countries, such as Senegal, which never held any of these great constitutional gatherings.

on power. On the other hand and from a procedural point of view, constitutional revisions have become commonplace and are characterised by their unilateral nature and a general lack of what had previously been the trademark of the national conference, namely, consensus. The principle of *parallélisme des formes*, whereby legal acts may only, in general, be modified or 'repealed' by following the procedure used for their adoption, goes unrespected – and for good reason. Changes are imposed by the governing party and generally affect the ways in which power is organised and conceived, rather than increasing and strengthening democratic and constitutional mechanisms, or fostering new rights for citizens.

A study of this general evolution gives rise to two contradictory approaches. The first, maybe more extreme approach, consists in viewing the current constitutional crises as nothing more than the expression of a great surge backwards with regard to the advances made in the '90s. The second approach is more subtle and, whilst it does not deny the existence of the current crises, sees within them the manifestation of constitutional systems, which are undergoing massive changes or maybe even reaching maturity; the prelude to changes heralding a greater stability. Each of these approaches deserves to be put to the test as – general trends aside, – one must not lose sight of the fact that each nation's experience retains a degree of specificity, and that some nations are evolving in a positive direction, albeit in fits and starts. Whatever the approach, however, it remains undeniable that a crisis in constitutionalism is brewing, marked by a palpable eroding of constitutional principles and the mechanisms that underwrite them, and that the underlying causes of this erosion needs to be identified before any path towards a solution can be proposed.

2. A three-way crisis

2.1 Crisis in representative democracy

The temptation to establish a link between constitutionalism and democracy is impossible to resist. In West Africa, advances in democracy were clearly contemporaneous with the expansion of constitutionalism, the latter deriving sustenance from the progress of the

former and translating this formally into its content. Conversely, it is evident that democratic retreats affect constitutionalism and weaken faith in the superiority of the constitutional norm, and in its function of creating a durable structure for the political system and acting as a limit on power. If this link exists, albeit indirectly, it should be no great surprise that the crisis in constitutional models is one aspect of the crisis in the democratic model and, more specifically, in representative democracy. The latter is formal and procedural in essence, and somewhat drained of substance (government of the people by the people, although through the intermediary of representatives). This may be noted from three perspectives, as regards the constitution.

Firstly, the crisis in democracy affects original constituent power in that – aside from the period of national conferences – the procedures enabling the people to become involved in drawing up constitutions are grossly distorted. Very often, the contents of a constitution are debated within a restricted and generally technocratic circle. Popular support only intervenes at the adoption by referendum phase, in which it is more a case of calling citizens to give their verdict on an 'off the peg' solution, than asking them to make an informed choice as to which changes they want, based on an understanding of the issues involved. Furthermore, as they are called to vote at the very moment of a constitution's adoption, citizens are systematically excluded from the consultation process if the constitution is to be revised, no matter how significant the amendment.

Secondly, the crisis affects derived constituent power. This crisis, one of national representation in itself, and particularly of parliaments, expresses perfectly the way in which representative democracy can influence constitutionalism. Majority politics *(le fait majoritaire)* and the political tactics they give rise to, as well as over-inflated presidential powers, serve to weaken constitutional principles and guarantees. For proof of this point, one need only observe the ease with which constitutional amendments of questionable legitimacy are adopted by parliament through the sole will of the party in power and its personification.

Finally, representative democracy is exercised through the choice of leaders and this choice is primarily the result of an election. However elections, or at least the conditions under which they are held, are

purveyors of instability, both political *and* constitutional. They sometimes lead to constitutional reforms, which are linked to the economic climate of the time and only act as short-term, non-enduring solutions to profound political problems.

2.2   Crisis in constitutional justice

Constitutionalism is able to develop when the mechanisms guaranteeing the superiority of the constitutional norm are functioning. The state of constitutional law is a key indicator of a constitution's influence. From this point of view, undeniable progress has been made in West Africa. Various states have formally inaugurated monitoring bodies, defined the scope of their jurisdiction, and accorded them a certain text-based statutory independence. Although certain national courts such as the constitutional court of Benin enjoy a reputation of independence, judicial power in general, and constitutional courts in particular constitute a weak link, for various reasons.

The first reason lays with judges themselves and the way in which they perceive and carry out their brief. The moment they incline towards prescribing themselves limits, interpreting their jurisdiction in a literal and restrictive sense, and making quasi systematical pronouncement on issues of formal regularity, rather than substance-based judgements, they give the impression that they are not the appropriate resort against attacks upon the constitution and above all, that they are not fostering the debate, which is needed to enrich the constitution through interpretation.

The second reason is linked to the position of judges within the framework of constitutional litigation, a position of some complexity, given that they are rather more required, in quantitative terms, to arbitrate in political disputes, than they are to pass judgement on subjective rights accorded to citizens by the constitution. Their decisions are therefore challenged as a matter of course, whatever their implications, sometimes for political purposes and above all when they favour the dominant political party more often than not. The position of judges is rendered all the more complex because their decisions are likely to be analysed from the point of view of legitimacy. Indeed, when they are required to pass judgement on acts adopted by bodies stemming from

popular suffrage, they run the risk of being accused of tending towards a 'government of judges', and of flying in the face of the will of the people, as expressed by the decisions of their elected representatives.

Finally, the crisis in constitutional justice is partly linked to the conditions of submissions to the court. Generally, the right to refer a case to the constitutional judge is restricted, and is not accorded to citizens. Even when this right is opened up and extended, the constitutional courts' output is feeble, due to the small number of cases referred to the court – which is itself explicable by taking into account citizens' attitudes to the law, their preference for non-litigious modes of resolution, and, sometimes, their negative impression as to the independence and impartiality of judges.

2.3 Crisis of legitimacy with regard to the constitutional norm?

The debate on the crisis of constitutionalism in Africa should be re-framed within a broader context, which matches the constitutional norm to the societies it is supposed to regulate. This is a question of general legal interest, which, more directly stated, examines the issue of the legitimacy of the constitution as an institution. One may well wonder whether a re-examination of the principle consensus of the '90s, plus the ineffectiveness of political and civil opposition to uni-lateral amendments, are not fundamentally linked to this perception of the constitution as an element alien to society. It is a fact that, upon achieving independence, most African states sought to bolster their extremely fragile status by unifying their legal systems – the law being regarded to a certain extent as one of the key elements in the construction of stable nation-states. These legal systems have two major distinctive tendencies. Firstly, they are generally monistic, in the sense that only the law of the state, known as "modern" law, is recognised as the source of legal norms. Most countries achieved this ranged from the worst-case scenario of abolishing all customary practices to the best-case scenario of integrating certain customary norms and institutions into the official law, with the state remaining in all instances the unique source of that law. Secondly, these so-called modern laws were char-acteristically constructed by importing the legal systems and norms of

the countries' former colonisers. This grafting on of a new system, born out of mimicry, also carried through to constitutional matters.

Many observers question the effectiveness of this graft however, and speculate as to its consequences upon the superiority attributed to the constitutional norm by positive law. This is a thorny issue, verging on the taboo - for if the constitution is not respected and if modern constitutionalism is not making its influence felt, could this not be due, in part, to the values which they disseminate and which form their basis? In other words, could it be that, under the guise of the principle of universality, these states have imported not only values unsuited to African societies into their constitutions, but also subsequent procedures for legitimising power which have no connection with their historical, social, and cultural substratum?

And if the values extolled by these constitutions are in effect the hallmark of a graft which hasn't taken, this would explain not only why constitutions are too frequently and knowingly violated by those whose power they are limiting, but also why they are not defended by society itself and by its citizens in particular. If they do not defend these constitutions and their values is this not because they do not feel any great sense of guardianship towards them? The 'natural' and 'spontaneous' duty to obey the constitutional norm and to recognise its 'transcendental' superiority does not perhaps depend exclusively upon technical and procedural mechanisms, which guarantee its respect; there should maybe exist a healthy dose of myths, of constitutional mystique, of moral and ethical representations, forming a bedrock for an act which institutes – indeed constitutes – a state. The search for these 'founding myths' would thus be an essential, even existential issue for states whose common foundations are being eroded in favour of divisions by partisanship, ethnicity, tribe, brotherhood or religion.

Secondly, any dispute as to the legitimacy of values equally calls into question the legitimacy of the technical and formal procedures for adopting and revising constitutions. This has already been touched upon above from the point of view of the crisis in representative democracy, and can now be re-examined using the crisis of the constitutional norm itself as a frame of reference. In the same way that the legitimization of leaders through elections arouses questioning, procedures for expanding, adopting, and revising constitutions affect their legitimacy.

The wide array of drafting techniques is appealing, but the results they achieve are less impressive. One is certainly therefore entitled to pose questions regarding new methods for elaborating constitutions, in particular. The participation of 'everybody' in the definition and amendment of the rules for living together constitutes an essential guarantee of the adequacy of the values they disseminate and of their collective defence. Specifically, should there not be preliminary stages of consultation, in which citizens and the wider community can participate before any constituent assembly is held? Could not such consultations do more than simply collect basic opinions on a ready-made project and instead be the point at which a project is put together collectively, thus giving real meaning to the notion of original constitution-making (*constituant originaire*)? What new procedures could be formulated to ensure that every constitution truly belongs – both fundamentally (in terms of its leanings) and structurally – to the society adopting it?

In sum, the way in which one approaches the question of the legitimacy of constitutional values and systems, and the answers one supplies (over and above requirements linked to the structuring of power and the strengthening of constitutional justice), seem to us to be decisive factors in ensuring that the current changes undergo a more managed evolution as regards political and social progress. There are several avenues worth exploring from this point of view.

3. Several avenues of reflection

3.1 Key issues and challenges

The expansion of constitutionalism depends more or less entirely upon the re-legitimization of the constitution, which presupposes that the aforementioned three-way crisis is resolved. The most daunting challenge remains that of collectively identifying those shared values, necessary for constituting the bedrock of any credible constitution. The problem lies in having to reconcile the specific elements of each particular society with what are understood to be universal principles. Now, if it is possible to clearly identify these universal principles, the same cannot be said with regard to what is considered specific, as references to traditional or custom-based values tend to be implicit rather

than explicit, and these values are equally subject to social change and should not be idealized in any way. The difficulty of the task, however, should not dissuade us from carrying it out, and inter-disciplinary research plays a key role from this point of view, in that it can allow us to suggest where the right balance for preserving social stability may lie. It gives us an understanding of the people, the societies, and their underlying workings – all necessary to ensure that constitutions represent the formalisation of values regarded as fundamental (for example: what is the dividing line between systems based around the individual and societies which remain attached to the community as a place for identification and definition of social status? How can the principle of equality be reconciled with differing levels of social status? Etc...).

Furthermore, one cannot re-establish the credibility of the constitution without indirectly providing a concrete demonstration that it is genuinely fit for purpose, that purpose being the appropriate limitation of power, and the constitution of an effective civic bastion against injustice and arbitrariness. The challenge, as regards the developments taking shape, is basically that of reintroducing consensus into constitutional procedures, particularly regarding any amendments to previously-won settlements, and of making available to citizens individual and collective rights, which are efficiently guaranteed and effectively safeguarded.

This last issue is not unconnected to the challenges relating to constitutional law, namely the affirmation of an increased sphere of influence for judges on public life, the strengthening of their credibility through their nomination procedure and the exercise of their brief, and the guaranteeing of their independence, particularly with regard to political power.

3.2   Proposals, which came out of the Lomé workshop

Due to its exceptionally political nature, the constitution cannot completely avoid political incidents and power struggles, or 'temperature' fluctuations within the political and democratic systems. That doesn't mean that one should not boost its societal and collective aspects and attempt to re-establish confidence in the representative system and in constitutional justice.

The alternatives lie both in fundamental options and in technically re-framing the democratic vision. There are several promising proposals, worthy of being developed further. As regards the issue of bringing constitutions in line with social diversity: admitting even a limited form of legal pluralism and extending this on an institutional basis seems an intriguing jumping off point. Two proposals deserve to be outlined briefly in this respect:

• the establishment of a permanent (derived) constituent authority, representing a fourth branch of the State, guarantor of the sacred status of the constitution, and of the appropriateness and relevance of all amendments and contributions from various recognised stakeholders, by its very structure;

• the reform or the establishment of a second parliamentary chamber, which both reflects social diversity, whilst excluding political parties, and has legislative power.

As regards the issue of preserving the consensual nature of constitutions and ensuring that all power-limiting checks and balances remain in place, it might be worth considering:

• an improved system for revising constitutions with a specific ban on any political actors introducing revisions, which concern the constitutional codification of their own status and entitlements;

• a better procedure for ratifying revisions by requiring prior national consultations and inclusive – rather than exclusively political – processes, by abolishing parliamentary revisions, or even by insisting that revision procedures are permanently recorded and relate to an assessment of the constitutional text as a whole, so as to avoid short-termist revisions, drawn up in haste and exclusively seeking to exploit the constitution for partisan and purely political gains;

• the internationalisation of constitutional guarantees by establishing convergence norms for constitutions at a regional level (ECOWAS, for example) and setting up effective mechanisms for penalising constitutional violations.

The last set of proposals regards constitutional justice and touches upon:

• boosting its independence by amending the procedures for appointing constitutional judges (in particular, either by requiring non-elected bodies to participate in their nomination, or – taking the more vigorous line of a strict separation of powers – by withdrawing the nominative power from the executive and legislature and even giving it to a constituent authority);

• amending the composition of constitutional courts and opening them up to non-lawyers, because of the implications of the subjects on which they rule, and because they do not only deal with purely legal considerations;

• amending the conditions for submissions to constitutional courts, particularly by making the right to take legal action generally available to citizens;

• extending the category of acts subject to constitutional control to include infra-legislative acts and establishing a general principle of competence for constitutional judges as interpreters of the constitution, if an act upon which they are adjudicating could have any effect on the interpretation of or the implementation of the constitution;

• creating a supranational system of constitutional justice, a judicial resort against certain decisions by national courts which affect the convergence norms of constitutions, as defined at a regional level.