CENTRAL EUROPEAN UNIVERSITY

Promises (Un)Met? Constitutional Performances in Comparison: Experiences from Kenya, Ghana, And South Africa

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LLM SHORT THESIS
Comparative Constitutional Law
Course: Constitution Building in Africa
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ACKNOWLEDGEMENTS

I am indebted to the Central European University for the opportunity to pursue this master course. The miles I have made are a result of this deeply engaging and rewarding course that has been an avenue to new insights.

My sincere gratitude to my supervisor, Professor Markus Böckenförde for his resourceful guidance.

I am eternally grateful to my family and friends who have been very instrumental in my academic journey. May you be richly blessed!

ABSTRACT

Constitution building does not end with the adoption of a constitution. In fact, the work begins once a new constitution is adopted. Yet, the normal tendency is to trust that the constitution will achieve the aspirations that attended its adoption.

Effective constitution building demands that the progressive implementation of the constitution be taken into account. In order to determine whether a constitution fulfils its functions as designed, it must be tested through implementation. For lessons to be drawn about the impact of a constitution, some form of evaluation is critical, to provide the basis for learning. It is this evaluation that also gives insight into the appropriateness of the design options that were adopted in the making of a constitution.

This research pursues the concept of measuring constitutional performance using Ghana, Kenya and South Africa as case studies. It explores the extent to which the respective constitutions have realised their intended goals under one theme. Furthermore, it identifies gaps in the constitution that call for reconsideration if the intended purposes are to be achieved.

LIST OF ACRONYMS

ANC - African National Congress

CIC - Commission for the Implementation of the Constitution

JSC - Judicial Service Commission

LSK - Law Society of Kenya

CHAPTER I: BACKGROUND AND INTRODUCTION

1.1 Statement of the Research Problem

A constitution is viewed as the representation of the aspirations of a nation. Common to the constitutional histories of Kenya, Ghana and South Africa was a desire for change, from oppressive rule to democratic government. Their respective constitutions heralded fundamental changes. Free democratic elections were a first for South Africa in 1994 under a democratically elected black president. Ghana's 1992 constitution ushered what is widely referred to as the fourth republic, and military coups have been a thing of the past. Kenya's 2010 Constitution introduced changes in the system of government. While it retained the presidential system of government, a system of devolved government was adopted to diffuse power from the centre. A bicameral parliament was a new component, while the judiciary was assured of independence. A robust Bill of Rights as well as national values were entrenched. Independent commissions were established, key of which included the Commission for the Implementation of the Constitution (CIC) to oversee the transition to a new constitutional order.[1] No doubt, these were huge promises for change!

Among the three countries, Kenya is at its infancy in as far as implementation of its constitution is concerned. Both Ghana and South Africa have been governed under their respective constitutions for over 20 years. South Africa's constitution has been touted as a model progressive document, while Ghana has enjoyed stability over the years. These positive attributes are reflected in their ranking in governance matters.

[1] Sixth Schedule Constitution of Kenya, 2010. The Commission for the Implementation of the Constitution Act, No. 9 of 2010. This ranking in based on performance in four thematic areas: safety and rule of law; participation and human rights; sustainable economic opportunity and human development

According to its Freedom in the World 2017 Democracy in Crisis Report, Ghana was ranked with an 83% score while South Africa scored 78% while Kenya comparatively poorly at 51%. In 2018, Ghana and South Africa retained the same score while Kenya dropped to 48%, based on performance in political rights and civil liberties. The figures remain the same in the 2019 ranking but a slight improvement for South Africa to 79%. This ranking is comparatively mirrored in the World Justice Rule of Law Index 2017-2018 Report.[2] Ghana is ranked 43rd out of 113 countries globally, and is the top performer in the Sub-Saharan region, out of 18 countries that were ranked. South Africa is the second regional performer, and stands at 44th in the global ranking. Kenya was ranked at the 95th position globally and 12th regionally. In the 2019 ranking, South Africa showed a slight improvement at 5th position out of 30 countries regionally, while it ranked at 46 out of 126 countries globally. Ghana ranked at the 5th position and 46th position globally while Kenya dropped to 17th position regionally and 110 globally.[3]

Yet despite the somewhat favourable rankings, these countries presently to date still face the same challenges that they sought to address in their constitutions. Kenya's chairperson of the defunct Commission for the Implementation of the Constitution delivered a discouraging diagnosis, stating that the country had failed to promote the national values and adopt constitutionalism.[4] This is not far-fetched, considering the manifest lack of accountability, mismanagement of public funds and pervasive corruption,[5] enactment of regressive laws, attacks on the judiciary, disobedience of court

[2] World Justice Rule of Law Index is based on eight factors: eight factors: (a) constraints on government powers; absence of corruption; open government; fundamental rights; order and security, regulatory enforcement, civil justice, and criminal justice.
[3] "WJP Rule of Law Index® 2018-2019," accessed February 29, 2019, http://data.worldjusticeproject.org/#.
[4] Michael Ollinga, "CIC: We Have Failed in Implementing the Constitution," The Standard, accessed March 29, 2019, https://www.standardmedia.co.ke/article/2000176741/cic-we-have-failed-in-implementing-the-constitution.
[5] According to Transparency International's Corruption Index Survey of 2017, Kenya scored 28 out of 100, the highest it has since 1996, maintaining an average of 22.62 points. Corruption index available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table

orders, extra-judicial killings and flawed elections. Despite the devolved system of governance, power is still heavily concentrated in the presidency.

South Africa whose Constitution is cited as one of the most transformative documents, is still facing some of the primary challenges the constitution sought to address. Regular free and fair elections have not delivered the necessary checks against abuse of executive power, mainly attributable to dominance by the ANC.[6] This dominance has gradually created voices of discontent, as evident in the rising of new parties to counter ANC's dominance. The immediate former president Zuma who had long enjoyed supported was ousted following a series of corruption scandals at his helm. Having emerged from the apartheid era, one of the daunting challenges that remains is the inequalities that stemmed from the colonial era. South Africa has been cited as one of the most unequal country in the world.[7]

Despite the constitutional change, including the periodic holding of democratic elections, Ghana's president enjoys huge executive powers with limited parliamentary checks. Calls to amend the constitution to improve good governance and democracy led to the appointment of the Constitution Review Commission of Inquiry to lead the review process, however, the process is yet to bear fruit.[8] With these highlights, it is not an unfair pronouncement, that several years later, there remains a gap between the promises and the reality.

[6] "Assessing the Performance of the South African Constitution," ConstitutionNet, accessed March 25, 2019, http://constitutionnet.org/vl/item/assessing-performance-south-african-constitution.
[7] Victor Sulla and Precious Zikhali, "Overcoming Poverty and Inequality in South Africa : An Assessment of Drivers, Constraints and Opportunities" (The World Bank, March 22, 2018), http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities.
[8] "Constitution Review Commission Final Report," ConstitutionNet, accessed February 20, 2019, http://constitutionnet.org/vl/item/constitution-review-commission-final-report.

1.2 Objectives of the Research and Research Questions

However, to determine whether indeed the constitution is working, it is critical to undertake a deliberate assessment against the objectives that it sought to achieve. The goals of a constitution can be discerned from the constitutional text as well as the context surrounding the making of a constitution. South Africa's constitution for instance acknowledges the past divisions in the society as it aspires for a society bound by democratic values, social justice and human rights. It promised a breakaway from the oppressive apartheid regime to an inclusive society through which the marginalized majority hoped for a stake in the nationhood.[9] The Constitution of Ghana as espoused in its preamble sought to establish a government that would ensure liberty, equality of opportunity and prosperity. Kenya's 2010 constitution recognises in its preamble, the people's aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

These aspirations reflect the context in which these constitutions were made. South Africa's constitution was a result of hard-fought breakaway from apartheid rule. Ghana on its part had gone through periods of upheavals characterized by military rule. Kenya's 2010 constitution was a culmination of a longstanding clamour for change from authoritarian rule characterised by breakdown of institutions and conflicts. Indeed, the 2007-2008 post-election violence presented a wakeup call to address these endemic problem promises

This research therefore, aims at assessing constitutional performance of Ghana, Kenya and South Africa, examining the extent to which the constitutions have achieved their intended goals. Incidental to this assessment is an examination of these questions: What was the constitution

[9] Preamble

purposed for? What has it achieved? To what extend is this purpose realizable? To this end, an examination of the extent to which the constitutional design responded to the aspirations of the constitutions is imperative. Equally important is an assessment of the successes and failures of the constitutions.

A crucial element to this assessment, therefore, is a prior understanding of what counts as constitutional success, a question that is explored in the next chapter. In the end, these questions will form the basis for determining whether indeed the constitutions have been a success in terms of their implementation in line with the constitutional goals. This deliberation is nevertheless alive to the limitations of a constitution. As Ginsburg and Hug point out, the process of measuring performance should entail an assessment of what a constitution can do and what it cannot do.[10]

1.4 Research Methodology

The research employs mainly qualitative research methods. It interacts with constitutions of the county case studies and benefits from authorities on approaches for assessing performance of constitutions, which provide useful guidance for undertaking the assessment. Assessment on performance also relies on data from studies, reports and case law.

s1.5 Rationale and Significance of the Study

A study into the performance of a constitution is inseparable from the primary question: why a constitution? In order to understand whether a constitution achieved its intended goal, the first triage of this examination is an appreciation of its function. In constitutional implementation, it should be the concern of the polity to question whether the constitution is bearing the intended

[10] Tom Ginsburg and Aziz Z. Huq, "Assessing Constitutional Performance," Assessing Constitutional Performance, August 2016, https://doi.org/10.1017/CBO9781316651018.001.

results, whether it is functioning as expected, and whether the resultant institutions are meeting the functions for their establishment.

Given that the constitution is a reference point for a nation's government, the expectation is that the question of its performance would be a dynamic element in daily interactions. Assessing a constitution's performance is in my view part of the constitution building process. However, in many instances, the process tends to end at the drafting and enactment of a constitution. Somehow, there is a tendency to trust that once a constitution is in place, the work is done. Yet the reality is, a constitution is not self-executing. This is why the longevity of a constitution, while it might be a source of useful lessons, is not an obvious predictor of its success.

Furthermore, studying a constitution's performance helps to question whether its design was indeed the most suitable way to achieve its aspirations. Such an assessment is critical for informing future endeavors for constitutional changes, from a constructive as opposed to politician-driven perspectives.

1.6 Delimitations and Limitations

This research does not attempt to undertake a comprehensive review of the status of realization of the goals targeted by the constitutions of the country case studies. It would be too a daunting task beyond the possibilities of this research. It focuses on one goal that the constitutions of the three countries sought to address, discussed in the next chapter. Alive to the limitations of a constitution noted earlier, the research is limited to those goals that can be reasonably expected to be realised by the constitution.

The focus of this research is three pronged: it assesses constitutional performance from the perspective of the constitutions' goals, institutional design and implementation. From this

viewpoint, the research proceeds on the premise that the constitutional design ought to be a reflection of its goals. It also presumes that the goals of the constitution, being the basis of the study, are identifiable as goals, particularly from the constitutional text. The inextricable question therefore, that arises from this presumption is whether the constitutional design was well-matched to achieve the goals. Further, assessment of constitutional success also presumes that the constitution is able to influence the intended change.

The research is analyzed in four chapters. Chapter one serves as the introduction of the study. The second chapter explores the concept of constitutional performance, examining such questions as: what counts as success of a constitution? How does constitutional design relate to constitutional success? How should performance be measured? Chapter three discusses the constitutional goals and the design matches in response to the goals. Chapter four examines the actual performance of the constitutions of Ghana, Kenya and South Africa based on a criteria established in the previous chapter. The last chapter makes some concluding observations based on the analysis on performance, touching in challenges with accompanying recommendations.

CHAPTER II: DECONSTRUCTING CONSTITUTIONAL PERFORMANCE

2.0 Introduction

This chapter discusses the concept of constitutional performance in the context of understanding the meaning of constitutional performance, approaches used to evaluate performance of constitutions, taking into account the implications of design for a constitution's performance.

2.1 What Counts as a Constitution's Success?

The concept of performance of a constitution remains contested.[11] Evaluation of a constitution's performance is a relatively under-studied subject. Some have suggested that there might not be a specific definition of constitutional success, based on the fact that the duplicity or multiplicity of criteria for its determination as the views discussed here demonstrate.

Some may view success of a constitution in terms of its text. Helene Landemore proceeds on the premise that what makes a good constitution, is that which would render it worthy of implementation, including the possibility of it becoming successful. Landemore offers three elements that make it a good constitution: (a) democracy which denotes the institutions set out by the constitution; (b) temperance, as a reference to aspects of the constitution that restrict powers of office holders while it tempers politics to promote balanced and considered engagement; and (3) durability to signify the longevity and resilience of a constitution over a period of time.[12] This may be seen to be a rather constricted approach as it seems to focus heavily on the constitution being measured against its content, without a consideration of its success in implementation.

[11] "Assessing the Performance of the South African Constitution"
[12] Hélène Landemore, "What Is a Good Constitution? Assessing the Constitutional Proposal in the Icelandic Experiment," Assessing Constitutional Performance, August 2016, https://doi.org/10.1017/CBO9781316651018.003 at p. 74.

However, in the context of Iceland, which was Landemore's focus, it was reasonable as it focused on a document that was yet to be tested through implementation. Hardin quite rightly argues, that it would be irrational to judge a constitution from its content alone, rather focus should be on its actual consequences which would allow for a judgment that is grounded on the context a constitution operates.[13]

Hirsch defines constitutional success from the point of view of its design. He argues that success of a constitution is not from its durability, but 'by its ability to deliver, independently or in association with other factors, the substantive goods it purports to advance.'[14]This is a useful pointer for evaluating constitutional success, as long as it is not lost to the evaluator that design itself may possess inherent flaws that impact on ability to perform. Furthermore, a good design may nevertheless fail to deliver success due to external factors, thus an independent evaluation of design is insufficient.

Ginsburg and Huq define constitutional success on the basis of internal and external criteria. Whether to adopt external or internal variables is determined by the viewpoint of the person carrying out the evaluation. According to them, the criteria can be applied to both democratic and nondemocratic regimes, taking to account the social, political and geopolitical context of a particular system.[15] From this approach, an appropriate assessment would require an evaluation of objectives of a given country with a realistic examination of their success within the context of the surrounding circumstances. Additionally, it would call for an identification of the main issues that drafting of the constitution sought to address as well a realistic appreciation of what constitutions

[13] Russell Hardin, "Why a Constitution?," Social and Political Foundations of Constitutions, October 2013, https://doi.org/10.1017/CBO9781139507509.005 page 52.
[14] Ran Hirschl, "The 'Design Sciences' and Constitutional 'Success.,'" *Texas Law Review* 87, no. 7 (June 2009): 1339–74.
[15] Ginsburg and Huq, "Assessing Constitutional Performance."

can achieve and what they cannot. As the discussion on approaches to constitutional evaluation reveals, different criteria are involved in the measurement of performance whether one uses the external or internal approach. Furthermore, the fact that the criteria adopted needs to be applied to the context of a particular country renders the concept of constitutional success plural in nature. Constitutional success therefore, is a derivative of its goals, design and implementation in context.

2.2 Constitution Design vs. Constitution Success

The little attention to understanding constitutional performance may be attributable to the presumption that there is a general agreement on success in constitutional design and therefore a basis for determining whether a constitution meets that standard.[16] From that approach, constitutional design is narrowly viewed as the gateway to solutions that constitution making seeks to address. Such an approach fails to recognise the shortcomings or the ability of a constitutional design to address the issues. Undoubtedly, constitutional performance is interlinked with constitutional design. However, success in constitutional design is not an obvious guarantee to its successful performance, though constitutional design cannot be separated from a performance evaluation. From the point of view that a constitution is a reflection of the people's will, it is expected that constitutional design responds to the problems that are sought to be changed in the new dispensation to achieve those goals.[17]

2.3 Approaches to Constitutional Assessment: Criteria and Processes

Ginsburg and Hug categorize constitutional assessment into two categories; external and internal, which are based from the viewpoint of the person undertaking the evaluation. Accordingly, the

[16] Ibid n. 10
[17] Hirschl, "The 'Design Sciences' and Constitutional 'Success.'"

internal criteria entail an assessment of whether the constitution succeeded on the basis of the objectives of the constitution as identified in the text or in the opinion of the people governed by the particular constitution. This can be done by gleaning the goals from the document, the circumstances surrounding its drafting or from the works of the drafters of the constitution.

The internal criteria however, poses many challenges related to the daunting tasks of identifying the constitutional goals. An assessment from this perspective firstly entails an assessment of the short-term goals, normally reflected by transitional measures that would bring the constitution into effect. On a second level, is an evaluation of the broader values and aspirations set out by the constitution. Ginsburg and Huq caution that this advanced level may be difficult to measure because they depend on a range of factors. In a recent study on the performance of South Africa's constitution after 2010, the evaluators adopted both the internal and external criteria for assessment. They proceeded to make an evaluation on two broad levels: thin compliance which is concerned with the short-term performance in terms of setting up mechanisms and institutions for constitutional implementation and thick compliance which entails a deeper assessment of whether those mechanisms and institutions have met the goals of the constitution.[18]

Ginsburg and Huq propose the use of external criteria using independent standards removed from the internal perspectives to give a general evaluation of a constitution's success. The external criteria as with the internal criteria presents challenges. From the external viewpoint, they suggest criteria based on four goals; namely: (a) the sociological legitimacy in the eyes of the public; (b) the channeling of potentially violent political conflict into constitutional institutions and nonviolent forms; (c) the control of the agency costs associated with the institutionalization of

[18] "Assessing the Performance of the South African Constitution."

government; and (d) the creation of appropriate of public goods. Other scholars have offered more broad-based approaches. For instance, Prof. Ghai proposes the following goals: to ensure that power resides in state offices rather than individuals; to create socially grounded structures through which the state can function; to separate the economy from the state so as to prevent corruption and monopolies; and to engender respect for human rights and the rule of law in the people.[19]

According to Landemore, an assessment can be done through two criteria: Firstly, using formal qualities of the constitution such as its conciseness, clarity, and logical coherence. This has to do with how well the document is drafted, its organisation and structure as well as is logical soundness when considered as a whole. Secondly, through a pre-diagnosis of how well a constitution is likely to achieve the purpose it is intended for, based on its ability to provide resolution of political disputes and protection of individual rights.[20] This approach in my view befits evaluation of a document that has not yet been subjected to implementation, and will serve to improve its design in order to meet the intended objectives. Even where one adopts a particular approach, there is a likelihood of intersectionality of the two approaches.

2.5. Conclusion

Agreeably, the reality of a constitution can only be examined when the constitution is put into practice, within the realm of political realities. Furthermore, it would be unwise make a judgement on a constitution before it is tested in application. It is the actual implementation that reveals the appropriateness of a constitutional design, its strengths as well as its flaws. Another inescapable

[19] Ghai, Y. (2010) 'Chimera of constitutionalism: state, economy and society in Africa'. In S. Devi (ed.) Law and (In)Equalities: Contemporary perspectives. Lucknow, India: Eastern Book Company, pp. 313–31 cited by Ginsburg and Huq, "Assessing Constitutional Performance,".
[20] Ibid note 12.

reality is that constitution making is a political process, with players of variant interests. Political actors, whichever side they stand during the process lean towards preserving their own interests. Compromises made and opportunism tend to find their way in the constitution making process and eventually its design.

Finally, a constitution being aspirational, encompasses ideals that a country aspires to achieve. These ideals are couched in constitutional values. Inculcation of these values is expected to reflect a change of attitudes towards a constitutional culture, a cultivation of an enabling environment by willing actors, as well as sustained popular demand. Such progression does not happen in a day, thus assessing performance cannot be a blanket judgment that a constitution has particularly failed, without an appreciation of these factors. The practical reality, as Ginsburg identifies is that, constitutional design involves making speculative prescriptions to regulate people and institutions in future, some of which have not been tested; thus, how a constitution will perform, is on many levels a probabilistic guess.[21]

Environmental factors also affect the possibilities of enforcing a constitution, some of which are external to the document itself. Being a futuristic effort, it is naturally not expected that a constitutional design will provide for all unforeseen circumstances. Some of the innovation that is required in constitutional design is a result of experiential learning, that can only happen when the constitution is tested. With all these factors in mind, the design aspiration may in the end be limited. These form the basis of the next chapters' discussions.

[21] Tom Ginsburg, *Comparative Constitutional Design* (New York : Cambridge University Press, 2012., 2012).

CHAPTER III: CONSTITUTIONAL GOALS AND CORRESPONDING DESIGN RESPONSES.

3.0 Introduction

This chapter examines the constitutional goals of Kenya, Ghana and South Africa and identifies how constitutions were designed in response to those goals. The examination is guided by the approach defined by Ginsburg and Huq of using external goals to examine constitutional performance. However, it is notable from the context in which these goals are examined, overlaps are visible from the point of view of internal and external goals. The research focuses on one external goal for purposes of the assessment, and critical appraisal of the constitutional performance in each country.

3.2 Identifying Priority Constitutional Goals

Constitutions do not ordinarily set out their goals expressly. Goals may be discerned its text such as the preamble, or the rationale behind particular provisions of the constitution. Other sources of constitutional goas include documents from the drafting process as well as the historical context within which the constitution was made also points to the concerns that a constitution seeks to address. In the case of Ghana, following decades of military takeovers, the priority was to restore democratic rule under a civilian government. This is also reflected in the preamble of its constitution which affirms commitment accountability, the rule of the law, protection of fundamental human rights and freedoms and achievement of unity and stability.

Kenya's history defines some of the priorities that were the at the centre stage of the constitutional review processes. High on the priority list was the need to deal with abuse of power by the executive, due to the decades-long authoritarian rule and the lack of accountable institutions. This

was mainly evidenced by constant resort to violence, distrust in the defunct electoral institutions to guarantee untainted election results while the judiciary could not be trusted to prevail over electoral disputes. Some priority areas were identified by the Constitution of Kenya Review Act, 2008 under the provisions on the objects and purpose of the constitutional review process.[22] From these encounters, two predominant aspects to be focused in this evaluation are: (a) to rebuild accountable institutions for democratic governance and (b) to create a system of checks and balances.

Unlike Kenya and Ghana, for South Africa, the process towards a new constitution signified cutting all links with the old apartheid regime to give way to a fresh negotiated treaty. South Africa remains unique in its approach to have the interim constitution of 1993 to guide the drafting of the final constitution. Of the provisions of the interim Constitution, the 34 constitutional principles could not be departed from, and the interim constitutional court was set up to ensure they were complied with in the final constitution. This breakaway from the past regime is recognised by objects expressly set out in the preamble: (a) Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; (b) Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; (c) Improve the quality of life of all citizens and free the potential of each person and (d) Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. For purposes of this study, focus will be on the third objective which contains twin aspects of equal protection of all citizens and democratic government.

[22] Section 4

The evaluation that follows is based on the external criterial of limiting agency costs proposed by Ginsburg and Hug. According to them, the goal of a constitution limiting agency costs is premised on the aspiration of constitutions to ensure that institutions and public representatives act on behalf of citizens as opposed for personal gain, thereby limiting agency costs. Under this goal, the constitution limits agency costs through for instance system of separation of powers, presidential term limits, and counter-corruption institutions. This broad these also reflects the overarching goals of the three countries identified above. Using this goal, the study examines whether the institutional framework set out by the respective constitutions of Kenya, Ghana and South Africa has succeeded in limiting agency costs. This is limited to the broad aspects of horizontal accountability.

3.3. Constitutional Design Response to the Constitutional Goals

3.3.1 Executive-Legislature Power-sharing

At the time of adoption of their respective constitutions, Ghana, Kenya and South Africa had common goal of restoration of constitutional order, albeit with varying specific priorities. Ghana thirsted for civilian government after a stained history of military coups. Kenya desired a democratic government accountable to the public after decades of authoritarian rule marred by violence. South Africa was more ambitious, instituting a complete breakaway from the apartheid regime. Thus, to meet the goal, of limiting agency costs, the constitution would play the dual function of enabling restoration of constitutional order and constraining government conduct.[23]

[23] Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford University Press, 1999), http://www.oxfordscholarship.com/view/10.1093/0198290845.001.0001/acprof-9780198290841. p. 133

The first point of entry was creation of institutions that would ensure power was diffused from the central authority. Kenya and Ghana adopted presidential system, save that Ghana's system is hybrid in nature with a fusion of functions of the executive and legislature. South Africa opted for a parliamentary system with a directly elected parliament[24] accountable to the people and a president elected by and answerable to parliament. This according to Albie Sachs, was an attempt to guard the country from its own history.[25]

In all the three countries, power is distributed across the three arms of government with variations. Ghana retained a strong executive despite its history of abuse of power. The president appoints ministers most of whom must be drawn from parliament[26] as well as deputy ministers[27]The president has huge appointing powers including of judges and commissioners of independent offices.[28] Furthermore, the ministers (even those drawn outside the house and the vice-president can take part in parliamentary proceedings.[29] Ghana's constitution makes no restriction on the number of ministers.

Kenya provided a tighter control. The constitution caps the number of cabinet ministers to twenty two,[30] who should not be members of parliament.[31] It however, removed the position of assistant ministers, instead providing for principal secretaries who head state departments.[32] This may have been a deliberate move considering that assistant ministers had previously complained that they

[24] Article 42 Parliament is made up National Assembly and National Council of Provinces

[25] Albie Sachs, "The Creation of South Africa's Constitution Speech," *New York Law School Law Review* 41 (1997 1996): 669–702.
[26] Article 78(1)
[27] Article 79
[28] Articles 70, 74, 86, 202, 207, 212, 232, 243, 183, 185, and 189
[29] Article 112
[30] Article 152(d)
[31] Article 152(3)
[32] Article 155

did not serve any purpose.[33] For South Africa, any number of ministers can be appointed from members of the national assembly, while not more than two ministers from outside.[34]Like Ghana, South Africa does not limit the number of ministers or deputy ministers.

Presidential powers are also limited by subjecting presidential appointments to parliamentary approval. Kenya's presidential appointments of secretary to and members of the cabinet, attorney general, director of public prosecutions[35], other state officers,[36] members of the Public Service Commission,[37] Inspector General of Police,[38] presidential nominees to the Judicial Service Commission[39] are subject to approval by parliament. In other appointments, the president's role is limited to formal appointment with the selection of nominees being left to independent processes such as appointment of the chief justice, and judges of superior courts. Similarly, Ghana's appointment of minister, deputy ministers and other key senior appointments must be subjected to parliament's approvals.[40] Parliamentary approval is not a concern with South Africa's parliamentary system.

Another limitation to government conduct is setting term limits, an element common to all three countries. In Ghana, the presidential term is limited to two terms of four years per term.[41] Kenya's president can only serve for a maximum of two terms, each of five years. South Africa's president's term is similarly like Kenya serves for a five-year term, limited to two terms.[42] All the three

[33] "Assistant Ministers Fight for Recognition," The Standard, accessed March 20, 2019, https://www.standardmedia.co.ke/article/1144020064/assistant-ministers-fight-for-recognition.
[34] Article 91 (3) (b) & (c)
[35] Article 157(2)
[36] Article 132 (2), Article 152(2), Article 154(2)(a), Article 155(2)(b), Article 156(2), Article 157(2)
[37] Article 233
[38] Article 245
[39] Article 171(2)(h)
[40] Article 78(1)
[41] Article 66(1) and (2)
[42] Article 88

countries provide for removal of the president on such grounds as incapacity, gross misconduct, violation of the constitution or any other law.[43]The removal process is a function of the legislature.

In all three countries, parliament is vested with legislative authority and oversight powers over the executive.[44] Only Ghana has a unitary parliament. South Africa has a bicameral parliament with the National Assembly serving the national function and the National Council of Provinces serving the provinces. Kenya introduced a bicameral parliament comprised of the senate and national assembly at the national level. The senate's functions are limited mainly to representing the interests of county governments and impeachment proceedings of the president or deputy president.[45]

On legislative functions, Ghana's president retains under Article 108, exclusive power over bills that implicate on financial or tax matters. In effect, this leaves no room for introduction of private members'' bills. Due to the wide powers this entails, it undermines the independence of the legislature.[46]

The oversight role includes allocation of budget through parliament's approval on money bills.[47] Kenya and South Africa went ahead to provide for participation of the public in legislative processes including input on budget process.[48] Ghana differs from South Africa and Kenya in that power over financial matters are left to the executive which approves all budgets including the Judiciary which submit its estimates to the president.[49] In South Africa, parliament retains all

[43] Article 69 Ghana, Article 89 South Africa; Articles 144 and 145 Kenya
[44] Article 93 Ghana; Article 94 Kenya; Article 43 & 44 South Africa.
[45] Article 96
[46] Cite Cranenburgh
[47]Article 95(4) Kenya; Article 77 South Africa; Article 179 South Africa.
[48] Articles 42(4), 57(1), 59 South Africa; Article 118 Kenya
[49] Article 179

legislative authority except money bills which are introduced by the relevant minister. In Kenya, the executive has no function in the legislative process in parliament.

Cabinet ministers are accountable to parliament in South Africa and are required to give regular reports. In Kenya's and Ghana's presidential system, parliament retains the power to censure cabinet ministers over their conduct, in Ghana by a vote of two-thirds majority. [50] In Kenya, where the resolution to dismiss a cabinet secretary is passed by a majority, the president is enjoined to act on it, it is not discretionary.[51] This is not the same for Ghana, the power of parliament to censure ministers is diluted by the president's power not to revoke the minister's appointment.[52] Besides a vote of censure requires a two-thirds majority, which would not be easily insurmountable in a parliament dominated by the executive. In Kenya a cabinet secretary may be required to attend parliamentary committee to respond to certain issues.[53] Ghana's instead gives more room for executive involvement in parliament. The deputy president and cabinet ministers who are not members of parliament authority to sit in parliamentary proceedings, enjoying powers of a sitting member except voting.[54]

3.3.2 Judicial Oversight

A further checking system is ensured by giving the judiciary power of constitutional review. In South Africa, this power is exercised exclusively by the constitutional court[55] which has power to settle disputes between organs of states, constitutionality of a bill before it is passed upon referral by parliament or the president,[56] constitutionality of any amendment to the constitution and the

[50] Article 82 Ghana;
[51] Articles 152(6) – (10)
[52] Article 82
[53] Article 153(3) Kenya
[54] Article 111.
[55] Article 167
[56] Articles 79, 80 and 122

question of whether parliament or the president has failed to fulfil a constitutional duty. Constitutional review powers in Ghana are entrusted in the Supreme Court although compared to South Africa is limited only to issues on enforcement or interpretation of the constitution and constitutionality on an Act of Parliament.[57] Under Article 2 the Supreme Court the mandate to make a finding of violation of the constitution. Failure to obey the court's directive is considered a high crime, that amounts to a ground for removal of a president or vice-president.

In Kenya this power lies in the High Court[58], although its decisions can be challenged before the Court of Appeal and Supreme Court. This power includes reviewing constitutionality of conduct of government officers, constitutionality of laws, enforcement and interpretation of the constitution. The High Court enjoys wider constitutional review powers compared to Ghana, as it includes any question on interpretation of the constitution, including constitutionality of any law, constitutionality of any action done under the authority of the constitution, constitutional powers of state organs in relations to levels of government and conflict between national and country legislation. Jurisdiction on advisory opinions requested by the national government or any state organs is left to the supreme Court.[59] Unique to Kenya, the constitution installed a transitional mechanism for vetting of judges and magistrates who were serving at the time the constitution came into effect.[60]

Key to the effective exercise of constitutional review powers is independence of the judiciary in view of the president's power. In Ghana's Supreme Court judges are appointed by the president upon consultation with the Judicial Council and Council of State and approved by Parliament.[61]

[57] Articles 2 and 130
[58] Article 165
[59] Article 163(6)
[60] Section 23 Sixth Schedule
[61] Article 144(2)

The Chief Justice is appointed by the president only in consultation with the Council of State and approval of parliament.[62] Yet majority of members in both councils are executive representatives;[63] thus, the advice and consultation may have no any retraining impact. The constitution fails to place a limit on the number of Supreme Court judges.[64] Considered together with the president's appointment powers, this leaves room for more interference.

South Africa's has a better model,[65] since appointments are done by the president in consultation with the Judicial Service Commission and leaders of parties represented in the national assembly in appointing the Chief Justice and Deputy Chief Justice. He appoints the President and Deputy President of the Supreme Court of Appeal. Upon consulting the Judicial Service Commission, while appointment of other judges is conditional upon consulting the Chief Justice and JSC. In Kenya, the president's role is limited to appointment after parliament has approved the nominees. The JSC selects all judges through a competitive process, and presents the selected judge(s) to the president who transmits to parliament for approval.[66]

3.4 Conclusion

The priority goals set out, in these case internal goals above reflect both diverse and common threads among the three countries. Common to the three countries was the need to set up institutions that would foster democratic governance, the rule of the law, and accountability.

The comparative analysis of the constitutional response to the need for accountable institutions exposes some gaps in design. South Africa's parliamentary system renders the executive

[62] Article 144(1)
[63] Article 153; Article 89
[64] Article 128(1)
[65] Article 174
[66] Article 166

automatically accountable to parliament. Ghana's constitution of all the three countries, creates a more powerful president, with minimal room for oversight by other arms of government.[67]

The oversight functions are further flawed by a requirement of a two-thirds by allowing cabinet ministers to participate in parliamentary proceedings and the president to control legislative agenda. Furthermore, Ghana's president enjoys wide legislative authority which curtails private member bills. Failing to defined money bills, like Kenya and South Africa has done, leaves a wide exclusive legislative mandate to the president. This therefore, gives excessive room to the executive to control legislative agenda as well as budgetary allocation and expenditure.

Careful constitutional design as revealed in this discussion, can indeed address some of the perils that the constitution sought to address. Thus, constitutional design plays a role in installing necessary measures for safeguarding against abuse of power.

[67] Ransford Edward Van Gyampo and Emmanuel Graham, "Constitutional Hybridity and Constitutionalism in Ghana," *Africa Review* 6, no. 2 (July 3, 2014): 138–50, https://doi.org/10.1080/09744053.2014.916846.

CHAPTER IV: A STOCKTAKE OF CONSTITUTIONAL PERFORMANCE: KENYA, GHANA AND SOUTH AFRICA

4.0 Introduction

This chapter examines the extent to which the constitutions of Ghana, Kenya and South Africa have succeeded in realizing the goals set out. It seeks to respond to the question whether the constitutional allocation of powers has enabled effective checks and balances as to render all organs of government accountable.

4.1 Assessing Parliament and Executive Controls

The first easy success to point out is the fact that Ghana, Kenya and South Africa hold periodic elections as required. Thus, placing limitations on both elections and presidential term limits have succeeded. In none of the countries has there been a violation of the term limits or even attempts to increase term limits through constitutional amendments. The ANC has dominated political rule in South Africa, unlike Ghana where both the ruling and opposition parties have taken over leadership following elections. However, this dominance is attributable to the fact that the ANC has for a long time been the only party, with opposition factions emerging only recently.

However, the intention of the constitutions to decentralise power and tame executive powers has not fully succeeded. The design of Ghana's constitution gives the president more leverage over the other arms of government. Failure by Article 78 to limit the number of ministers and to prevent ministers from holding other public or private positions has been abused. There have been instances where members of parliament are appointed to head executive bodies. In 2009, Ghana Centre for Democratic Development criticized president Mills for appointing several members of

the parliament to serve in boards and councils of state corporations.[68] Due to this unbridled power, when president Addo appointed a cabinet of 110 ministers; he did not face any opposition since all were approved.

Failure by South Africa's constitution to limit the size of the cabinet has resulted in a ballooned cabinet with 35 ministries. Former president Thabo Mbeki had a cabinet of 50 ministers and deputies while former president's Zuma was seventy-three. The current cabinet is made up of seventy ministers and their deputies[69] despite promise to trims the cabinet.

The capping of number of ministers to be appointed in Kenya sought to cure the abuse of appointing powers by the president for his patronage. The current president has during his two terms kept within the maximum number of cabinet secretary. However, in the second term, he introduced a position of chief administrative secretaries, who are supposed to assist the cabinet secretaries. This was despite the constitution abolishing the position of assistant ministers, retaining only principal secretaries.[70] The return of deputy ministers, viewed by many as a means of rewarding the president's cronies, thus goes against the original intention. If allowed to continue it will give the president unbridled authority to enlarge the cabinet through the backdoor, since this is not limited anywhere by the law, not mentioning the huge implications on the wage bill. The current cabinet is comprised of 22 cabinet secretaries, one of whom has no portfolio, and is not officially listed as a cabinet minister,[71] 16 chief administrative secretaries and 41 principal

[68] The Legislature and the Executive in Ghana's Fourth Republic: A Marriage of Convenience
[69] Staff Writer, "Ramaphosa Advised to Cut 10 Ministers in Big Cabinet Reshuffle: Report," accessed March 29, 2019, https://businesstech.co.za/news/government/298384/ramaphosa-advised-to-cut-10-ministers-in-big-cabinet-reshuffle-report/.; https://www.parliament.gov.za/ministers accessed March 26, 2019
[70] Article 155
[71] http://www.president.go.ke/cabinet-secretaries/

secretaries.[72] When announcing the new list of cabinet secretaries, the president indicated that the 22nd nominee would only be co-opted on a need basis and did not therefore undergo vetting.[73] Again the constitution does not provide for such a scenario since any nominee to the cabinet must be appointed upon approval by parliament. This circumvention violates the intention of the constitution to limit the president's appointing powers.

Furthermore, despite the constitution prohibiting appointment of cabinet secretaries from among members of parliament, president Kenyatta appointed Joseph Nkaissery an opposition member of parliament to be the cabinet. Parliament did not raise an issue about the unconstitutionality of this appointment and went ahead to commence the approval process. In fact, the leader of majority in the National Assembly advised the nominee not to resign from his parliamentary seat until his nomination was approved.[74] His nomination was eventually approved by an overwhelming majority, including the opposition. Eventually, he resigned from his position and a by-election was held for his replacement. Allowing such appointments is not only expensive for the country, but can also be abused by the executive to reign in on opposition in the house.

Ghana's hybrid system creates loopholes that render effective of checks and balances unrealizable. The failure can be attributed to the design flaw, thus inhibiting the ability of parliament to exercise oversight over the executive. As a result of the president's vast powers, Ghana's parliament lacks legislative as well as financial autonomy. Even though parliament has some oversight powers such as approval of presidential appointments, members of parliament who are also ministers would not

[72] "Taxpayer to Bear Salary Burden for Expanded Cabinet - Daily Nation," accessed March 29, 2019, https://www.nation.co.ke/news/politics/Taxpayer-to-bear-salary-burden-for-expanded-Cabinet/1064-4281552-13clwiyz/index.html.
[73] "Cabinet: Why Raphael Tuju Will Not Be Vetted," Citizentv.co.ke, accessed March 25, 2019, https://citizentv.co.ke/news/cabinet-why-raphael-tuju-will-not-be-vetted-190625/.
[74] Wilfred Ayaga, "Kenya's President Uhuru Seeks MPs' Consent on Nkaissery," The Standard, accessed March 27, 2019, https://www.standardmedia.co.ke/article/2000143464/undefined.

be expected to question the executive in which they serve. Conversely, members of parliament would not be expected to hold their colleagues to account. Parliament's business is also bound to be compromised by non-attending members whose commitment is split with executive functions. Appointment to cabinet is also viewed as a progression, thus, members would ordinarily want to remain in the favour of the president in the hope for an appointment. In 2010, president Mills appointed the leaders of the opposition as ministers, thus removing any opposition in the house.[75] There have been reported incidences of the president using appointment to sway voting in favour of the government in parliament. Such was the case when the president wanted a certain speaker to be elected, when ministerial and other appointments were pending. Members from the ruling party were compel to reveal their vote.[76]

Despite these limitations, parliament itself has abdicated its role, even ceding its legislative authority to the president. For instance, in 2001, it passed a statute giving the president power to establish, combine or even abolish ministries and state agencies without recourse to parliamentary approval.[77] Ghana's parliament has also not been keen to question the executive; the 110 ministers were approved without any opposition. It has also been cited for failing to scrutinize the government's appropriation of natural resources in the oil and gas industry.[78] On a positive note, the parliament has opened up itself to the public by opening up its proceedings to the public; the public accounts committee has since 2005 held open proceedings. However, the financial

[75] Gyampo and Graham, "Constitutional Hybridity and Constitutionalism in Ghana."
[76] Gyampo and Graham.
[77] H Kwasi Prempeh, "Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa," *HASTINGS CONSTITUTIONAL LAW QUARTERLY*, n.d., 74 at page 816
[78] "African Legislative Effectiveness | The North-South Institute | International Development Research," accessed March 29, 2019, http://www.nsi-ins.ca/publications/african-legislative-effectiveness/.

dependency and lack of technical support continues to hinder operations of committees' ability to engage in certain functions such as examination of accounts.[79]

South Africa has a better oversight mechanism being a parliamentary system that subjects the executive to account before parliament. However, since the constitution was adopted, the ANC had been the dominant ruling party enjoying overwhelming majorities in the house. This has reduced the ability of minority parties to exercise oversight over the executive. This dominance has permeated service delivery including influencing appointments to political office. It has been reported that the ANC uses its influence to ensure that procedures in parliament limit criticism. It was reported that ANC once declined to allocate time for debate for a no-confidence motion by the opposition as it amounted to engaging with internal affairs of the ANC.[80] Indeed, during Zuma's rule, the national assembly constantly supported him despite the continuous calls for his impeachment.[81]

South Africa's proportional system coupled with ANC's dominance reinforces members' accountability to the party, to the detriment of their responsibility to voters. Moreover, the questioning of cabinet ministers does not serve the effective function where the main party dominates in parliament. It is akin to expecting the executive to check itself. Public participation in legislative proceedings, has been reported to have suffered a decline owing to non-utilization of question time and controlled procedures of debates skewed to party interests. The national assembly has also been cited for failing to engage with the public on particular legislations.[82] ANC

[79] "African Legislative Effectiveness | The North-South Institute | International Development Research."
[80] Ibid n. 78
[81] Marianne Merten, "Opposition: Dissolve Parliament for a New Mandate – No 'Elitist' ANC Zexit Discussions," Daily Maverick, accessed March 29, 2019, https://www.dailymaverick.co.za/article/2018-02-12-opposition-dissolve-parliament-for-a-new-mandate-no-elitist-anc-zexit-discussions/ accessed at March 26, 2019s.
[82] " (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)," accessed March 19, 2019, http://www.saflii.org/za/cases/ZACC/2006/11.html.

is further blamed for stifling the Standing Committee on Public Accounts thus rendering it unable to use its investigative function to examine government processes. This is in addition to ANC's two-thirds dominance in parliamentary committees.[83]

On a positive note, wen Zuma was faced with the threat of a no-confidence motion, he opted to resign from office. By this time ANC had withdrawn its support due to a series of corruption scandals including use of public funds for renovation of his home and external influence in cabinet appointments for financial gain. This shows, that when properly applied, the oversight function can work; thus the problem is not a result of the constitutional design, but failure to respect it.

Of the three countries, the separation of functions is most distinct in Kenya's constitution. However, like South Africa, the ruling party dominance has affected its oversight function, though Kenya's political parties have been morphing with almost every election cycle. Further to the legislature's approval powers, parliament enacted the Public Appointments (Parliamentary) Approval Act,[84] which provides for the procedures for vetting nominees. However, in practice, it has not taken on the executive concerning presidential appointments. Despite the public voicing concerns of nominees not meeting constitutional requirements,[85] parliament has not questioned the president, and more often than not, approves the appointments without much hurdle. In 2015, it rejected the nomination of Dr. Monica Juma as Secretary to the cabinet on citing her lack of demonstrable passion to serve the public. The real reason was her previous run-ins with members of parliament when she questioned their requests when she served as a principal secretary.[86] This

[83] "African Legislative Effectiveness | The North-South Institute | International Development Research."
[84] Act No. 33 of 2011.
[85] "Kenyans March to Demand More Diversity in President's Cabinet," VOA, accessed March 29, 2019, https://www.voanews.com/a/kenya-protests-kenyatta-cabinet-list/4244656.html.
[86] "MPs Reject Monica Juma for Secretary to Cabinet," Business Daily, accessed March 26, 2019, https://www.businessdailyafrica.com/news/MPs-rejects-Monica-Juma-for-Secretary-to-Cabinet/539546-2747038-7ich60z/index.html.

case demonstrates parliament abusing its powers, not basing its decisions on matters of eligibility and competence. Yet her approval did not attract such opposition when she was eventually appointed as a cabinet secretary where she currently serves. Recently, however, it rejected the nominations of the chairperson nominee to the Salaries and Remuneration Commission who had faced numerous allegations of corruption while serving at a government parastatal.[87] In other cases, appointments approved by parliament have faced constitutionality challenges on the question of the procedure of appointment and suitability of candidates.[88] Some of the presidential appointments must be approved by both Houses such as the Inspector General of Police.[89]

The senate's role however, remains limited. The initial proposal had provided more powers for the senate that would have enabled better oversight functions. For instance, the senate would equally take part in passing laws, thus a bill passed by one house would have to be presented to the other house for consideration and if one house rejected a bill, it would fail unless it was a money bill.[90] In the current design, the senate is seriously inhibited to be a suitable check over the national assembly which has shown its proclivity for abusing authority. It took the court's intervention in *Speaker of the Senate & another v Attorney-General & 4 others*[91] after the National Assembly and the president disregarded the advice of the CIC to involve the Senate before assenting to the bill. Due to this encumbrance, failures by the national assembly to keep the executive in check cannot be redressed by the senate.

[87] Mercy Asamba, "Chumo Rejected for SRC Top Job," The Standard, accessed March 27, 2019, https://www.standardmedia.co.ke/article/2001289415/chumo-rejected-for-src-top-job.
[88] By Pamela Chepkemei, "Matemu's Return Challenged in Supreme Court," The Standard, accessed March 25, 2019, https://www.standardmedia.co.ke/article/2000089962/mumo-matemu-s-reinstatement-as-anti-graft-boss-challenged-in-supreme-court.
[89] Article 245
[90] Clauses 134 of the Bomas Draft accessed http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf
[91] "Advisory Opinions Application 2 of 2012 - Kenya Law," accessed March 22, 2019, http://kenyalaw.org/caselaw/cases/view/85286.

Kenya's parliament, like South African, has also not made an impact in keeping the government in check over expenditure. Corruption remains a big threat to the nation's stability as it permeates virtually all public sectors. In December 2018, the auditor general reported that over Ksh. one trillion remained unaccounted for from all sectors of government.[92] Surprisingly, parliament has taken no action on the yearly reports of the auditor general which have consistently revealed non-accountability of public funds. Instead, it has been complicit in entertaining attacks on the auditor general. In 2017, parliament accepted a petition seeking the removal of the auditor general, and only by the court's intervention in *Republic v Speaker of the National Assembly & 4 others Ex-Parte Edward R. O. Ouko.*[93] were these proceedings halted. The fact that Zuma had severally managed to avoid a no-vote of confidence points to unwillingness of parliament to play its part due to party interests. Zuma continued receiving from parliament backed by his party until it became untenable.

4.2 Assessment of Judicial Oversight

Of the three arms of government, the judiciary seems to bear a greater burden of protecting the constitution. Ghana's Supreme Court in this respect attracts mixed reviews owing to its unstable jurisprudence. It has received acclaim for some of its decisions overturning overtures by the executive. Notably in *New Patriotic Party v Inspector-General of Police* where it nullified provisions of the Public Order Decree finding that no prior permission was required to take part in a demonstration. This decision was significant for a country that was coming out of dictatorial rule

[92] The Standard December 9, 2018 Sh1 trillion - Shocking numbers in the plunder of a nation, accessed at https://www.standardmedia.co.ke/article/2001305596/the-shame-of-sh1-trillion-queried-yearly-by-auditor
[93] Miscellaneous Application 108 of 2017 [2017] eKLR

and was still under the same leadership that had initially come to power unconstitutionally.[94] In *New Patriotic Party v Attorney-General,* the court declared a holiday unconstitutional on the basis that allowing it would be glorifying the coup *d'état* as it coincided with the date the government was overthrown.[95]

The court has not shied from denouncing unconstitutional actions of the executive and legislature. In *Agbevor v. Attorney-General,* the court nullified dismissal of a judicial officer by the president who had acted upon the advice of the judicial council on the ground that the recommendation was founded on a pre-1992 statute.[96] In *Amidu v Attorney-General, Waterville and Woyome*[97] it the court nullified Ghana international contracts entered into by the Ghana government because they were made without parliamentary approval as required by Article 181. Similarly, in *Mensah v Attorney- General,* the Court firmly held that all ministerial appointments must be subjected to parliamentary approval. It overruled president Rawlings, stating that even ministers who were retained following a reelection had to undergo parliamentary vetting. The Court also emphasized that its power of judicial review was not limited by the constitution and included the power to determine political questions.[98]

The court has also made progressive decisions to promote people's access to courts, notably in its interpretation of Article 2(1) in *Sam (No 2) v Attorney General,* that no requirements of standing

[94] [1993-94] 2 GLR 459, cited by Kwame Frimpong and Kwaku Agyeman-Budu, "The Rule of Law and Democracy in Ghana since Independence: Uneasy Bedfellows?," *African Human Rights Law Journal* 18, no. 1 (2018): 244–65, https://doi.org/10.17159/1996-2096/2018/v18n1a12.
[95] Frimpong and Agyeman-Budu at page 261
[96] "Cited in Part 2 Archetypal Examples of Different Models of African Constitutional Adjudication, 5 The Supreme Court of Ghana under the 1992 Constitution."
[97] Ibid n. 88
[98] M. Mhango, "Separation of Powers in Ghana: The Evolution of the Political Question Doctrine," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 17, no. 6 (January 1, 2014): 2704-2744–2744, https://doi.org/10.4314/pelj.v17i6.13.

are necessary for someone to file a constitutional complaint.[99] Considering that failure to obey the court's order is classified a high crime, if activated, it would have been an effective channel for instilling discipline among political elites, as it threatens their political life expectancy. Its non-activation however, is not in any way a reflection of good performance of the constitution, as its efficacy is dependent on the people's demand. In spite of such shortcomings, the Supreme Court has asserted itself its authority as the constitutional court.[100]

However, the court is also accused of inconsistency in its position as some of its decisions demonstrate. For instance, in 2016 the Court in *Ghana Bar Association v Attorney- General & Others* expressed the position that it was not binding upon the president to follow the recommendation of the Judicial Council in appointing judges of the Supreme Court.[101] This is a perilous decision which fails to recognise that the balance of power already tilts towards the president in judicial appointments. Criticism also came from its decision in *Ekwam v Pianim* (*No 2)* for declaring a candidate ineligible for election because he had been convicted by the previous oppressive regime of attempting to overthrow the government. The court failed to question that the government in in question was unlawful. This decision in effect went against the constitutional provision on the right to defend the constitution, which was also provided for under the 1979 constitution.

A common challenge to the judiciary's role of upholding constitutionalism is the manifest disregard for the law by the other two branches. Following the decision of Ghana's Supreme Court

[99] "Part 2 Archetypal Examples of Different Models of African Constitutional Adjudication, 5 The Supreme Court of Ghana under the 1992 Constitution." *Prof Kofi Quashigah* Ghana Country Report , Institute for Internitonl and Comparative Law, accessed *http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf*

[100] Customs Excise & Preventive Service v National Labour Commission Writ J1/5/2007 accessed at http://www.jtighana.org/links/cases/CEPS_VRS_LABOUR_COMMISSION.doc March 18, 2019

[101] "(J1/26/2015) [2016] GHASC 43 (20 July 2016); | Ghana Legal Information Institute," accessed March 21, 2019, https://ghalii.org/gh/judgment/supreme-court/2016/43. See also Frimpong and Agyeman-Budu at page 263

in *New Patriotic Pasrty v Attorney-General,* the executive circumvented it by commemorating the date as the day when the fourth republic was founded.[102]

Kenya's Judiciary has unquestionably made the greatest progress compared to other arms of government in conforming to the Constitution. The first major success was the vetting of judges and magistrates, a process that reinstalled faith in the judiciary. Besides regaining its independence, it has expanded its services in an ambitious court expansion program and increased hiring of judges and magistrates. More importantly it has remained a trusted recourse for Kenyans seeking remedies for violations of the Constitution. Hot on the heels of a new Constitution, in 2011 the High Court nullified the president's appointments of the Attorney General, Chief Justice and Director of Public Prosecutions and the controller of budget for not conforming to the new constitutional directive.[103]

There has been consistent reliance on the judiciary to resolve disputes. Electoral disputes have been resolved in two election cycles within the strict constitutional limits. In a first of its kind, the Supreme Court nullified the presidential election for non-compliance with the constitutional principles of a free, fair, transparent and accountable electoral process.[104] Even though president Kenyatta was re-elected after the repeat election and his election upheld[105] it is safe to say that the Court presented a strong indication to political leaders and public bodies that the constitution is an

[102] Frimpong and Agyeman-Budu, "The Rule of Law and Democracy in Ghana since Independence." page 261-262
[103] *Centre For Rights Education And Awareness (Creaw) & 7 others v Attorney General* [2011] eKLR
[104] *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta* Presidential Petition 1 of 2017
[105] Presidential Election Petition 2 & 4 of 2017 (Consolidated) *John Harun Mwau, Njonjo Mue & Khelef Khalifa v Independent Electoral and Boundaries Commission, Chairperson of Independent Electoral and Boundaries Commission & Uhuru Kenyatta*

enforceable instrument. This, hopefully, can instill discipline and accountability that has eluded Kenya's electoral process.

Parliament's penchant with the cooperation of the executive for passing unconstitutional laws has also faced judicial pushback. Courts have consistently nullified unconstitutional laws such as the security laws.[106] Parliament's attempt to ouster courts from reviewing its proceedings and decisions through the Parliamentary Power and Privileges Act[107] was quashed by the High Court in *Apollo Mboya v Attorney General & 2 others*[108] finding sections 7 and 11 of the Act unconstitutional.

This has occasioned backlash on the judiciary. The Speaker of the National Assembly remarked that amendments ought to be introduced under Article 160 of the Constitution to regulate how the High Court should exercise its power over matters that are pending in Parliament.[109] Recently, in a move seen as getting back at the court for nullifying elections, parliament initiated amendments to the electoral laws, to circumvent the court's decision.[110] In another attempt to stifle the courts, the Statute Law Miscellaneous Amendment Act, 2015 introduced amendments to the Judicial Service Act seeking to change the manner of the Chief Justice and Deputy Chief Justice. If effected, it would have required the JSC to give three nominees to the president to select for appointment. This move was overturned by the High Court in *Law Society of Kenya v Attorney*

[106] "Petition 628, 630 of 2014 & 12 of 2015 (Consolidated) - Kenya Law," 628, accessed March 29, 2019, http://kenyalaw.org/caselaw/cases/view/106083/.
[107] No. 29 of 2017 – section 11 No proceedings or decision of Parliament or the Committee; (1) No rocess issued by any court in Kenya in the exercise of its civil jurisdiction shall be served or executed— (a) within the precincts of Parliament while either one or both Houses are sitting; or (b) through the Speaker or any officer of Parliament Privileges acting in accordance with this Act shall be questioned in any court.
[108] Petition 472 of 2017 [2018] eKLR
[109] The Star Newspaper accessed at https://www.the-star.co.ke/news/2017/03/21/parliament-appeals-court-order-that-barred-debate-on-ouko-removal_c1529265
[110] Election Laws Amendment Act, 2017

General & another[111]These gradual threats have continued to date, now evident through consistent attacks on the JSC such as refusal by the president to gazette nominees to the JSC which became a subject of a court petition. The Court declared the president's action unconstitutional. Attempts to control operations of the JSC have been perceived as seeking to infiltrate the process of appointment of the Chief Justice and Deputy Chief Justice.

The burden becomes increasingly imbalanced against the judiciary when constantly faced by an executive and legislature that are unwilling to abide by the constitutional dictates. The financial and operational independence of the judiciary is subject to approval by parliament which uses its position to threaten the judiciary and reduce funding. The Judiciary Fund Act[112] which sought to safeguard the financial and operation of the judiciary has not been activated.

On its part the judiciary continues to contend with declining public confidence attributable to allegations of corruption in the Judiciary[113]and fueled by consistent attacks by political leaders. Persistent disobedience of court orders[114] and personal attacks against judges for their decisions remain a daunting challenge for the judiciary.[115] The institution of proceedings against several judges of the Supreme Court have also raised eyebrows as to the possibility of attempts to dismantle the court under the guise of judicial accountability. Currently, 5 out of the 7 judges of

[111] *[*2016] eKLR Constitutional Petition 3 of 2016
[112] Act No. 16 of 2016
[113] Jacob Ng'etich, "Judiciary Cannot Account for Sh3b Taxpayer Money," The Standard, accessed March 23, 2019, https://www.standardmedia.co.ke/article/2001273600/shock-as-judiciary-fails-to-account-for-sh3b-taxpayer-money.
[114] "Ombudsman, LSK Caution Executive against Contempt of Court » Capital News," Capital News, February 6, 2018, https://www.capitalfm.co.ke/news/2018/02/ombudsman-lsk-caution-executive-contempt-court/.
[115] "CJ Maraga Takes Stand against 'vile Public Lynching' of Judges," Capital News, August 2, 2017, https://www.capitalfm.co.ke/news/2017/08/cj-maraga-takes-stand-against-vile-public-lynching-of-judges/.

the Court are facing allegations of misconduct pending before the JSC, while the Deputy Chief Justice faces a criminal prosecution.[116]

Disparities in jurisprudential approaches also undermine the ability of the Judiciary to uphold the Constitution. In some occasions, progressive decisions of the High Court have been reversed by the Court of Appeal for instance the *Mitubell case*.[117] Thus, if a matter is not challenged before the Supreme Court or fails to qualify, then some gains made at the High Court stand to be lost. This perhaps calls for a reconsideration on the model of constitutional review mandate which is beyond the scope of the discussion here. Ghana and South Africa do not face such challenges, since the Supreme Court of Ghana and the Constitutional Court of South Africa have the exclusive final mandate on interpretation of the constitution.

South Africa's constitutional court is globally acclaimed for its bold decisions challenging government conduct. The constitution succeeded in this respect for its granted the court diverse powers. The court's decisions are also largely respected.

It has asserted its judicial review powers in law-making even whether or not a statute has been passed. For instance, in *Doctors for Life v Speaker of the National Assembly & Others*[118] the court nullified health bills because the national assembly had not undertaken public consultation before passing the bill. The court asserted its exclusive jurisdiction to deal with a petition concerning a bill was signed into law but before it came into force.

[116] "CJ Maraga, 4 Other Judges Get 14 Days to Respond to Petitions » Capital News," accessed March 20, 2019, https://www.capitalfm.co.ke/news/2019/03/cj-maraga-4-other-judges-get-14-days-to-respond-to-petitions/.
[117] "Civil Appeal 218 of 2014 - Kenya Law," accessed March 23, 2019, http://kenyalaw.org/caselaw/cases/view/123600/.
[118] "(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)."

Similarly, the court has been brave in challenging exercise of public power including actions of the president, as determined in *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others*.[119] The court held that it had the power to review and set aside the president's action of bringing a statute into force.

In another first, *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another*[120] the court faulted the prosecution authority for terminating prosecution of former president Zuma for corruption charges. In a related case, *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[121] it asserted its power to ensure that parliament fulfils its constitutional obligations to hold the president to account. This decision infused the impetus to prosecution of Zuma and his eventual forced resignation from office.

In addition, the president's failure to comply with the prosecution's directive to reimburse expenditure of public funds to make private renovations in his home was found inconsistent with the constitution. Parliament was also found to have acted in contravention of the constitution for failing to ensure the president complied with the remedial action. This was a bold decision that other constitutional courts could learn from, where such powers exist in the constitution. Alternatively, courts can purposively give the constitution wide interpretation to hold the public institutions to account.

[119] (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)," accessed March 24, 2019, http://www.saflii.org/za/cases/ZACC/2000/1.html.
[120] (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017)," accessed March 27, 2019, http://www.saflii.org/za/cases/ZASCA/2017/146.html.
[121] "(CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)," accessed March 17, 2019, http://www.saflii.org/za/cases/ZACC/2017/47.html.

As a sign of its steadfast avowal to uphold the constitution, the constitutional court has received backlash from the executive. ANC reportedly once attacked the court stating that it did not adhere to the vision of the constitution. This was after the court nullified a statute that had sought to create an anti-corruption body outside the National Prosecuting Authority placing it instead under the police service.[122]

A weakness in the constitution pertains to the appointment of judges. The ANC is perceived to have control over the process in order to have judges who are considered to be moderate and likely to be less critical of the government.[123] Nevertheless, the court has no doubt protected its independence and its decisions do not give a perception of any influence. Future interventions can seek to remove executive control over the process.

4.3 Conclusion

There are obvious design flaws that have the potential to incapacitate the constitution from realizing its goals. To an extent, some shortfalls stem from the constitutional design. However, as the case of Kenya distinctively demonstrates, the bigger part lies in simply unwillingness to abide by the constitutional ideals.

Where the performance is mainly attributable to the design flaw, blame should not be wholly on failure by the constitution performance. Ghana's parliamentary failure's for instance can be mainly attributed to both the design do to the fusion of powers.

With respect to Kenya and South Africa, the constitution largely remains good in text but not in practice, it has not met its goal. In Kenya's case, the main reason is parliament abdicating its

[122] {Citation}Assessing SA constitution
[123] {Citation}Archetypal

function, giving room for the president to usurp its powers such as the rubberstamping presidential nominees and openly pushing the government agenda even where it does not favour the populace. This is blamed on the flexible approach that the constitution, despite improvements, it leaves the process of policy and law making to open unchecked engagements between parliament and the executive, where the leaving the latter continues to exert more influence. [124]

Other shortfalls are outside the scope of the constitution, such as the political context under which the constitution operates. Nevertheless, common to the three countries, as long as long as the president enjoys party's support, and majority in parliament, very minimal, if at all, oversight will be realised by parliament over the executive. Positive outcomes may be expected where for instance, political parties are democratic institutions not tied to individuals and thus play an important role of checking against abuse of power. This was the case in South Africa, with former president Zuma, who was toppled by the ANC after a string of corruption scandals. Loss of party support also implied loss of majority in parliament.

In this sense, the legislature and executive remain the weakest links to ensuring compliance with the constitution. The judiciary is limited in its reach to check executive and legislative excesses. It does not act on its own motion and its intervention is limited to cases that come before it. It takes, a proactive populace to engage with courts as one of the means of promoting a culture of constitutionalism. One of the areas untested in Kenya and Ghana by courts is decisions that find unconstitutionality on the part of the legislature's failure to act to tame the executive. South Africa's Constitutional Court set an impressive pace. As far public accountability is concerned, for Kenya, the judiciary seems to have made the biggest strides with the success of the judiciary

[124] Prempeh, ibid. note 77.

vetting process. The transparency of the process instilled public confidence in the constitution. However, similar attention was not directed towards others public institutions other institutions of government. It was an error that Prempeh points out that is found in most African contemporary constitutions which fail to hold administrative organs equally to account, contrary to the expectation that the constitution should govern all organs of public power.[125]

[125] H. K. Prempeh, "Africa's 'Constitutionalism Revival': False Start or New Dawn?," *International Journal of Constitutional Law* 5, no. 3 (June 13, 2007): 469–506, https://doi.org/10.1093/icon/mom016 pp. 499-500

CHAPTER V: CONCLUSIONS AND RECOMMENDATIONS

5.1 Promises (Un)Met? Some Observations

It is safe to conclude that the respective constitutions have to a large extent succeeded in realizing acceptance of constitutional rule. The three countries, despite the shortcomings enjoy a functional democracy; however, the quest for constitutionalism is far from achieved. Since 1992, Ghana has enjoyed political stability. South Africa ended the apartheid rule. In place are institutions for ensuring there are checks and balances. Relevant laws have been enacted and institutions set up. Elections are held periodically in line with constitutional dictates and power has been transferred from one regime to another. Empowered judiciaries enjoy some independence and are clothed with judicial review powers. These are broad achievements that the constitutions have achieved, albeit at varying degree.

However, there are unmet promises which the constitutions have not managed to realise. Despite the peaceful transfer of power and periodic elections, there are concerns about the integrity of democratic processes. In Kenya and Ghana, elections have been challenged at each election cycle, a sign that the countries need to move beyond periodic elections towards accountable elections. Discontent remains about protecting the integrity of elections and episodes of violence around the election period are signs that constitutional democracy has not yet taken root. It may also point towards declining lack of faith in the ability of institutions to resolve conflicts.

Despite putting in place a system of checks and balances, the constitution has not fully resolved the problem of abuse of power particularly by the executive and the legislature. This is especially the case with Kenya and South Africa, both of which have stronger accountability mechanisms than Ghana. The costs on the public is very high when the control mechanisms are not accountable

to the people. Corruption remains perhaps the biggest challenge facing Kenya today, a stark contrast with the 'constitutionalization of leadership and integrity principles.'[126] In 2016, Kenya was ranked poorly at 145/176 in the corruption perception index survey conducted by Transparency International, [127] in 2017 it was ranked at 143/180[128] while in 2018 it stood at 144/180.[129]It falls far behind Ghana which was ranked at position 78 and South Africa at 73 despite having strong constitutional safeguards.

While there is good reason to be optimistic, the reality is that optimal performance demands more than having good laws in place; more than having institutions in place; more than having periodic elections and resolution of electoral disputes. The demands of constitutionalism are much higher. Until all sectors of the society are subject to the rule of the law,

5.2 Prospects Towards a Culture of constitutionalism

From this discussion, it follows that some constitutional amendments are necessary to address design flaws. The gaps in Ghana's constitution need to be addressed through an amendment to deal with the problems inherent in its hybrid system since separation powers cannot function in the ideal sense. Powers of the legislature need to be further entrenched to remove the president's control in appointments, budgetary approvals and law-making. More particularly, the constitution ought to define money bills to delimit the executive's authority only to money bills.

[126] James Thuo Gathii, "Assessing the Constitution of Kenya 2010 Five Years Later," Assessing Constitutional Performance, August 2016, https://doi.org/10.1017/CBO9781316651018.012 p. 338.
[127] https://www.transparency.org/country/KEN
[128] https://www.transparency.org/news/feature/corruption_perceptions_index_2017
[129] https://www.transparency.org/cpi2018

Ghana has opportunities to influence positive changes through the ongoing constitutional review process. However, from the look of the current proposals for constitutional amendments, the problem is likely to persist. For instance, the Commission recommends that Article 78(1) be amended give the president a freehand to appoint ministers from within and without parliament and no proposals on limiting the number of ministers are given.[130] With such discretion, the executive will continue to his upper hand. It also proposed that appointment powers be retained but with increased requirements for consultation with another body and parliamentary approval.[131] Since parliament's oversight powers remain unchanged, increasing appointments that require its approval will have no impact. On law-making powers, the Commission made a weak proposal that the president's legislative powers be maintained but restricted to money bills; the question of whether a bill is a money bill to be determined in parliament.

South Africa's constitution further needs to ensure insulation of the judiciary from interference though appointments and financial independence for judiciaries.

As a lesson from Kenya, both Ghana and South Africa may consider introducing caps on the number of ministers and removal of deputy ministers. Kenya's constitution may need further prescription on prohibiting appointments to cabinet not defined by the constitution.

The proposal to cap number of judges of the supreme court to 15 is a positive one, however, it would be open to manipulation since it is proposed that the number of judges should not be an entrenched clause to enable parliament effect amendments.[132] The problem of having majority of executive representatives in the judicial council was similarly not addressed.

[130] "Constitution Review Commission Final Report" at para. 207-214
[131] "Constitution Review Commission Final Report." Para. 134-136
[132] "Constitution Review Commission Final Report." Para. 107

Unfortunately, Ghana's review process remains an executive-driven process. Following the report of the review commission, the government published a report, setting out the proposals it had accepted or declined; thus further propagating the authoritarian nature of Ghana's constitution and any future document that will be the outcome of the review process. Regrettably, the Supreme Court handed the president more ammunition, in *Professor Stephen Kwaku Asare v Attorney-General*[133] when it dismissed the petition challenging the constitutionality of the president's role in initiating constitutional amendments. The court based its decision on the president's power to appoint a commission of inquiry into any matter which was in the public interest.[134] This in my view was an erroneous interpretation of the law, since chapter 25 presupposes introduction of constitutional amendment bills. It also gives the president ammunition to encroach on the boundaries of other arms of government under the guise of pursuit of public interest.

Other solutions lie in strengthening institutions for limiting exercise of government power. In Kenya, this attention should be drawn towards the senate, which due to its weak design, could not deliver the role it was initially intended for, particularly, to keep an equal check on the national assembly as well as the executive.

Due to the penchant for abuse of power by the executive, future constitutional making processes need to ensure that the constitutional text is more prescriptive, and definite in delimiting the scope of the powers of the president through 'bright-line rules over discretionary or permissive language.'[135] Long-term push for constitutionalism needs to be sustained by building up on the constitutional literacy of the citizens in order to sustain the demand for the respect for the rule of

[133] "Professor Asare v Attorney General (J1/15/2015) [2015] GHASC 101 (14 October 2015); | Ghana Legal Information Institute," accessed March 26, 2019, https://ghalii.org/gh/judgment/supreme-court/2015/101.
[134] Article 278.
[135] Prempeh, "Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa" at page 825.

the law. Indeed, constitutionalism cannot grow out of a constitution unless the people are proactive in seeking its implementation.

As Prempeh observes, the constitutions of other African countries to a large extent promise the realization of constitutionalism, owing to the various safeguards that have been put in place, in terms of checks and balances, robust provisions on freedoms and human rights, independent and empowered judiciaries and independent commissions among others.[136] However, the paradox of the imperial presidency remains, visible in the higher scale of power that the executive retains over the other branches, a searing thorn in the quest for constitutionalism. Thus, to that extent, the constitutions are yet to meet their goal.

[136] Prempeh. at page 810

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