

Chimera of constitutionalism: State, economy, and society in Africa¹

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I Argument

In this lecture I try to explain the contemporary surge in constitution making and the difficulties of implementing constitutions. My focus is Africa but I believe that concerns about constitutions reflect the experiences of other South regions also. The primary reason for adopting new constitutions is the failure of governments to fulfil the promise of independence, or internal conflicts or serious economic crises that have beset these countries. Numerous constitutions have been drawn up in recent decades to promote constitutionalism, in the wake of the demise of communism in Europe and the triumph of democracy and capitalism². These documents seek to solve several problems, of both state and society. In particular they aim to promote values and framework of “nation building” as well as to restructure the state. The perception has gained ground that without constitutionalism, these countries face massive problems of unity, solidarity, fair and effective administration, the protection of rights, and social and economic development. The constitution is then regarded as the basis of both state and society. The simultaneous pursuit of these objectives accounts for the ambitiousness of these constitutions, reflected in the scope and multiplicity of their purposes and the range and complexity of institutions.

Despite the wide participation of the people in the making of these constitutions which is intended to reflect popular concerns with reforms and thus to increase their legitimacy and viability, the record of achievement is poor. It is not so much, as in immediate aftermath of decolonisation, that they are overthrown but rather that large parts are disregarded (particularly values and to considerable extent human rights) and the practices of the state are not unaffected by constitutional mandates and procedures. The lack of success of constitutions in promoting social solidarity or moulding the practices of the state, before and now, have often been explained on grounds such as the lack of the culture of democracy, lack of education, absence of a middle class, and the persistence of pre-democracy social structures. Though there may be an element of truth in them, I want to offer a more structured explanation.

I trace the links of the constitution to three critical factors, which in different ways are integral to the constitution: state, economy, and society. The state and its structures are in themselves the principal object of a constitution. The economy is an underlying, and sometimes an overt, concern and theme (and often the ideology) of the constitution. Society is the underlying basis of the constitution; the maker or recipient of the constitution, with

¹ Chimera: “a hope that is very unlikely to be fulfilled” (BBC English Dictionary).

² “A Journey around Constitutions: Reflections on Contemporary Constitutions” 2004 *South African Law Journal* 804

Paradoxically, in this way the end of the Cold War opened possibilities of decisions on the constitutional order by local people but at the same time there were pressures from western governments and international agencies dominated by them for the adoption of liberal and market oriented models of governance.

complex relationship between it and the constitution, sometimes reinforcing, other times trying to transform, social norms and practices.

The constitution tries to shape each of these factors, rather than take them for granted; but each of them in turn reacts on it, supporting or subverting its values and objectives. I argue that this interaction may be the key to understanding the potential of the constitution and to explaining its success or failure.

My methodology is to examine the emergence of state forms and the economy in Africa by reference to the development of the state, society and economy in the west. Professor John Lonsdale, in a stimulating, personal communication to me, has queried whether one should measure the African experience against that in European (in fact British) when the historical context is so very different. He says, "The constituent processes of making the state more accountable, and the rule of law more effective etc are surely bound to be different too. We may agree on the current shortcomings of African states but why should we expect that they will be remedied by the same processes as occurred in Britain. Kenya will never have an industrial revolution, the key democratising shock in Britain, I think. Of course, if one agrees with that observation, then it is still more difficult to identify the sources of societal energy that might act to reform the state".

What I have tried to do is to identify what I consider are the features and institutions that both the West and Africa have experienced: state, society and market. Their salience in the two areas are certainly not identical nor are their consequences, as I try to show. I have in several places shown that similar rules and institutions have functioned differently in the two cases, explicable to some extent on the prevalence of ethnic consciousness in Africa (a less critical force in the West). In so far as there is some logic in the state and the market economy, an examination of the way they operate in the West and Africa may help towards understanding realities in Africa, and perhaps even to make some predictions. However, it is, at least to some extent, my assumption that social, political and economic forces that are emerging under the auspices of the state and economy are going to be critical to development. I also recognize that in the West it was society that shaped the state, while in colonial and post colonial Africa, the state has so far shaped society. The question is whether the dominant social classes will be able to subordinate the state to their purposes. The challenge is to identify, as Lonsdale points out, precisely what changes in society would trigger off a fundamental change in the state and economy. I do not start with the assumption that these must be the same as in Europe, but do consider that the European experience could throw light on what should be done in Africa. And in so far as the state is as central in Africa as I argue below, the humanizing of the state and bringing it under the sovereignty of the people must be a critical factor.

II Constitutional Order

The principal idea behind constitutionalism is the limitation of the power of the state. However, it also premised on the notion that the function of the state is to provide security for its citizens and other residents and to enable them to lead a life that is meaningful to them. For this purpose the state must be vested with considerable powers of government, to protect the rights of citizens, maintain law and order, with the assistance of police if necessary, and defend the country against foreign invasion. It must provide the machinery for justice, including a body of laws and courts to enforce them. For these purposes it must have the

power to tax the people and to incur expenditure on their behalf, to run the machinery of government. As society and economy have become increasingly complex and as relations with foreign powers and international agencies have become critical, the state must have significant powers of regulation and the ability to operate at the international level. The state has incurred numerous international obligations under treaties and conventions, and there must be authority to discharge them. At home it must provide the framework and the infrastructure for the economy and ensure for its citizens access to education, health, shelter, and employment opportunities. For these reasons the powers of the state are constantly increasing. There is a real danger that these powers could be abused, and instead of serving the people, they can be used to suppress them.

A constitutional regime is governed by a constitution which is supreme and represents the highest ideals of the nation; where state authority is subject to limits which arise from the rights of the people and the principles of good government, in which there is separation of powers of the state, horizontally and frequently vertically as well, and checks and balances, where the judiciary is competent, honest and independent, where people elect and remove governments, and hold them responsible and accountable, with the help of independent institutions. A key element is the rule of law, which requires that State authorities and all individuals are bound by the law; policies must be based on law; and administrative discretion must be exercised in accordance with the law. The law itself must be a reflection of the popular will, arrived at through a prescribed procedure.

This much is well understood now, as characteristics of a good constitution. The notion of a constitutional order is, however, broader than merely the text of the constitution. It represents a fundamental commitment to the norms and procedures of the constitution. It has more to do with behaviour, practice, and internalisation of norms than constitutional text. A central feature is the impersonalisation of power. Power belongs to state offices, not to individuals, however exalted. The purpose for which power must be used and the mode of its exercise are set out in the law. The holders of even the highest state offices are subject to the law, not above it. This aspect of constitutionalism has proved extremely hard to realise in Africa—where public office has its own aura, and expectations of the people merely encourage the whimsical, or capricious and biased exercise of their powers.

But as the constitution is still the foundation of power, we must first understand the background to and the nature of the constitution. A constitution contributes to democracy and the rule of law by: (a) affirming common values and identities without which there cannot be a political community; (b) prescribing rules to determine membership of that community; (c) promising physical and emotional security by state monopolisation, for legitimate purposes, of the use of force; (d) agreeing on the ways in which and the institutions through which state power is to be exercised; (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action; (f) protecting rights (which empower citizens as well as limit state action; (g) establishing rules for peaceful changes in government; (h) ensuring predictability of state action and security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements. These principles and provisions are necessary to maintain public values, and the fair and impartial exercise of power, enable an orderly and peaceful society, protect the rights of individuals and communities, and promote the proper management of resources and the development of the economy. They ensure the legitimacy of the state and its capacity to deal with disputes between citizens and communities.

The idea of constitutionalism sketched out above is based on the experience of western states. Central to that is an agreement under which the people have delegated power to the government—in most cases, the agreement takes the form of a constitution. The constitution represents the form of government, the structure of civil society, and the relations between the state and citizens that have developed over a long historical experience that are broadly acceptable to the people (the elite and masses) of the country. The constitution does not so much create public power or the relations between citizens among themselves, or between them and the state, as reflect historical compromises which have ensured a substantial measure of stability and predictability. In Africa the constitution has been regarded as the means for creating structures and powers of the state, and the limitations on them. They seldom represent any continuity in the development of public power. They may not, indeed do not, have much connection with the reality of the depository of power or its accountability to society. An African dilemma is that the constitution, following colonial precedents, creates and sanctions an extraordinary aggregation of power which it then tries to regulate, modulate and control.

The experience of governance since independence in most countries, even where civilian regimes have prevailed, is that the constitution has failed to regulate, modulate and control the exercise of state power. Most countries moved to strong presidential systems. Civilian and military regimes alike stole massively from state coffers and colluded with and extracted huge bribes from the private sector. They imprisoned their opponents and others who had demanded accountability. They consistently violated human rights. They appropriated land illegally, on an astonishing scale. They subordinated the judiciary to their whims, and ensured impunities for themselves and their cronies. In other ways they used the legal system to protect their ill deeds and to harass their opponents, through regular abuse of prosecutorial powers. They employed the police and the army to destroy democratic movements and kill innocent people. Elections were routinely rigged, voters bought by bribes or intimidated by violence. Many African countries saw both the ethnicisation and militarisation of politics, promoting terrible conflicts. It follows that there was no accountability to the people nor their participation. In much of this, the regimes received considerable support and protection from either western or communist regimes.

The end of the cold war exposed their vulnerabilities, as this external support was generally withdrawn. The example of fundamental constitutional reforms in Latin America and Eastern Europe inspired people in much of Africa, who began to agitate for new constitutional orders. Authoritarian regime could not withstand pressures from their own people and former external supporters. Thus began the third wave of constitutions, succeeding the independence constitutions, largely democratic if somewhat unrealistic, and those which replaced them, often military, sometimes one party, but generally authoritarian.

The framers of the new constitutions took to heart the failures of earlier constitutions. They were determined to create democratic, accountable and participatory systems, and to plug loopholes that had permitted such political and social exploitation and corruption. In the last two decades or more, a large number of countries have established new constitutions in search for a political order governed by the rule of law and constitutionalism. Characterised by extreme distrust of politicians and bureaucrats, they provide institutional rules to encourage the spirit of the constitution. Collective rights supplement individual rights, with greater likelihood of resort to enforcement mechanisms. And in a paradoxical way, the constitution is devoted in substantial measure to neutralise politicians, regulate their conduct,

and remove certain critical and sensitive powers and functions from their control or influence. The powers of state institutions are prescribed with greater precision; the purposes for which powers may be exercised are specified; and rules are established to remove conflict of interests through codes of conduct and other mechanisms. A number of politically neutral, independent institutions are set up to exercise sensitive functions, insulating them from political influences and manipulation (such as the electoral commission, auditing mechanisms, independent prosecutor, and the public service commission). Certain responsibilities (for which the government may not have much appetite) are given to independent commissions: human rights in general and those of vulnerable communities in particular, protection of the environment, prevention and control of corruption. There is a greater concern with enforceability: remedies are formulated, non-judicial bodies such as ombudspersons with enforcement powers supplement the judiciary, easier access to them and to the courts is provided. And devices like the recognition of cultural diversity and inclusion, equal opportunities and affirmative action for marginalised groups are adopted to remove causes of social and political conflict, like ethnic or economic hegemony, or discrimination against and exclusion of certain communities.

The record of these new constitutions is uneven, but on the whole not encouraging. They have not significantly changed state practices, corruption continues unabated and unpunished, political mobilisation and voting are still based on ethnicity, robust judiciaries or independent prosecutorial policies have not emerged. The rich get richer and poor, poorer. Armed forces defy public accountability, and do the bidding of the executive.

In general, as we know, a constitution is not a self-operating or self-executing instrument. Little serious effort is made by the state to implement the constitution. The real task of establishing constitutionalism lies in other spheres: politics as construction of values and policies, the judiciary entrusted with the task of authoritative interpretation of the constitution, the rise of professionalism and civic associations to suffuse the public space with economic and social values and practices, enlightened leadership—and public participation and vigilance of the people. The ultimate control of the state must be by society, but if the state subordinates society, that control becomes impossible. We now turn to the three factors, state, economy and society, which significantly determine the fortunes of the constitution.

III State

It may seem strange to argue that the state is a hindrance to the implementation and observance of the constitution since the state itself is structured, and given authority and powers, by the constitution. Why cannot the framers of the constitution, aware of the sins committed through, and in the name of, the state rectify its structure, impose accountability on its institutions, and require it to adhere to fair and transparent procedures? Well, the framers have done precisely this, in several states—Uganda, South Africa, Ethiopia, Rwanda, Mozambique for example—but not always, as I have demonstrated above, with significant improvement in the ways of the state. There is, I realise, a risk of reifying the state; I want to clarify that I do not mean the state as an abstract entity. State is always an agency of particular groups, although its structures and procedures may, and often do, have their own dynamics. My focus is on the aggregation of the powers and resources secured through the state, and its relationship to society as a whole and to particular groups within it.

We may get some purchase on my argument if we look briefly at the relationship between the state and society in Europe, where the origins of the modern state began³. This relationship has changed over the long period since the state began to be separated from civil society, that is when the autonomous processes of the management of the affairs of the community were replaced by an authority outside the community. When this happens, the relationship of that authority to the community becomes a matter of great importance—and has been the object of great political and social speculation and analysis. At one period power was dispersed between a king and a number of barons, in relationships based on land holding (feudalism), then a wider dispersal between the king and social and territorial groups (including emerging urban centres with their own corporate structures). This was followed by an age of monarchical absolutism with the consolidation of the power of royal power. With the rise of new classes((the bourgeoisie) , associated with the growth of urban organisations and of the industrial revolution the king was compelled to share power with these them, leading in due course to democratic systems in which royal powers were gradually reduced, until they became nominal.

These changes were slow and organic, reflecting in the gradual transformation of the state. In England changes were based on the common law and remained unwritten (except for the widening of the franchise which required statutory amendments). In Europe however the idea of a constitution as a social compact between key classes emerged, recognising and consolidating major shifts of power and principles (including human rights) for its exercise (a practice initiated by the French revolution whose legal contours were delineated in a constitution negotiated between key social forces and forced on the king). This democratisation was accompanied by the notion of territorial organisation of the “nation state”, emphasising the cultural homogeneity and distinctiveness of its people. These changes, even “nation building”, were not achieved without a considerable degree of violence. However, gradually coercion was replaced by consent and the formalisation and sharing of state power among key social forces.

The growth of the state and its constitutional ordering responded to changing social power and relations. The industrial revolution produced powerful social classes, balanced to some extent later by working classes, but never fully. The power of the bourgeoisie shaped the purposes and operation of the state, just as earlier social forces had done. But as society became developed and diversified, it was not necessary that this control over the state should be direct or exclusive. Economy rather than force became the source of effective power as society became transformed by market relations.

The growth of the colonial state was not gradual or organic in this sense. It was not rooted in local developments but imposed from outside, designed to suit colonialism. It was exclusionary, built on racial and ethnic distinctions, the bureaucracy rooted in the imperative of the domination of the various societies that made up the colony, on the close relationship between the colonial administration and the foreign, business community, and its resistance to democracy. This system was buttressed by a battery of repressive laws and a repressive legal system, reinforced by control of armed forces. Its impact on African society was massive. It destroyed the rhythm and autonomy of traditional social systems, brought different communities together within common borders, under foreign sovereignty. Yet colonial domination which kept them apart and competing (in typical forms of divide and

³ A good short introduction to this topic is Poggi, Gianfranco, *The State: Its nature, development and prospects* (Polity Press: Cambridge, 1990)

rule) produced new forms and division of labour. With its magical doctrine of *bona vacantia* and legislation on land, it appropriated huge tracts of land, transferred some of it to further colonial objectives. However, the effect of colonial state was uneven as between different communities and regions, which left a difficult legacy resistant to the post-colonial project of nation building.

Despite independence and its grand constitution, the colonial state was not transformed in its essence. It continued to dominate society and to rely on coercion. Its superficial democratisation did not lead to the practice of democracy or respect for human rights. Its principal role in the accumulation of wealth continued unabated, but now took crude and personalised forms. With universal franchise came not genuine democracy but the ethnicisation of politics, accompanied by violence, serving to obscure the underlying process and reality of inequality and powerlessness. The state is now closely connected to the politics of eating (which is not, as Bayart clarifies, merely gastronomic, but financial which aspires to a network of relations, patronage, incentives and sanctions that sustain an individual or group's hegemony)⁴. The state becomes the principal terrain of political competition.

The state in developing countries, whatever its vulnerability to global forces, is dominant locally—and not sufficiently rooted in society. It is, as they used to say, “overdeveloped”, that is in relation to local social forces (and went beyond what was necessary as Marxian superstructure). The post colonial state is both powerful and weak. It is weak internationally, dependent on handouts from western governments and some of its essential tasks performed by international organisations or civil society groups. But it is strong internally in the sense that it represents a greater concentration of financial and other resources, bureaucracy, network of security forces, and above all, armed might than other groups. It has become the principal source of accumulation (the Marxian version of primitive accumulation). With the capture of the state (the principal pre-occupation of politicians and business community), people can turn themselves from paupers to millionaires in the matter of a year (unless they are very stupid or extraordinary upright). This accumulation takes place through illegalities, and breeds impunity (giving the elite vested interest in criminality). The more the state is reformed, and new regulations enacted to curb predatory practices, the more the predatory practices flourish through systematic violations of the law and the culture of impunity. The independence of judges and prosecutors is subverted. Illegality and violence are thus woven into the very fabric of the state. The state does not depend on consent or legitimacy, but on coercion for which it has disproportionate capacity (thanks to the foreign governments, only too keen to arm the government in the interests of law and order—and anxieties about terrorism). Nor can the imperative of raising revenue lead to negotiations with citizens (as it did in Europe), for public welfare is low on its priority and obliging foreign government provide considerable funds.

The African constitution not only fails to mould civic values or the behaviour of key political actors, it also fails to generate a state which is capable of sound social policies and fair and honest administration, due to obstacles to progress placed by the inherited, pre-constitution bias of the state apparatus. Perhaps inadequate attention has been paid to these obstacles, as opposed to societal obstacles, because it is assumed that the constitution, par excellence, designs and structures the state. The constitution may structure institutions, but often fails to

⁴ Bayart, Jean- Francois, *The State in Africa: The Politics of the Belly* (Harlow: Longman, 1993)

infuse them with values and principles. The constitution tends to structure macro institutions but often says little about values and procedures of the administration of the state (which may persist from one constitution to another). Two factors at least have characterised the state—the colonial, fashioned to establish the hegemony of a particular class, and what Jean-Francois Bayart has called, the “politics of the belly”. The colonial state was exclusionary, built on racial and ethnic distinctions. The bureaucracy was rooted in the imperative of the dominance of the various societies that made up the colony, the close relationship between the colonial administration and the foreign, business community (and consequent economic disparities), and its resistance to democracy—and it is this tradition rather than any adaptation to independence or democracy that marks the present reality (through the office of the president, with its appendage of district and provincial administrators, the persistence of administrative police, and the ways of the civil service). These characteristics ensured that independence would not bring about social transformation, but merely the partial replacement of the old ruling group by a local elite, who found the colonial repressive apparatus highly functional. Bayart identifies three factors which have sustained the authoritarian tradition, despite appearance of democratisation: control over the security forces, which have enabled the state to maintain a covert harassment of the opposition forces; control over economic rents, with which they have bought off dissident politicians and weakened the opposition; and the support of western powers obsessed about “order and stability”. This is the colonial predatory state, but crude and criminalised, relying on impunities, without the sophistication of the colonialist.

Such a state gives rise to a particular type of political class, and is sustained by them, common in most African countries, which have a vested interest against reform. They remind us of Max Weber’s politicians who live by politics, as opposed to those who live for politics. Those in charge of the apparatus of the state have endless opportunities for personal aggrandisement—and amassing fortunes through corruption. Thus those who are in charge of the exercise of the power of the state have very little interest in or incentive for limiting these powers. Other groups in society lack the capacity—or think that they lack the capacity—to impose controls, much less accountability, on the government (on which more later). It is significant that in recent constitution reviews in a number of African states, while civil society emphasises values, democracy, rights, integrity, politicians focus almost exclusively on institutions and access to state power. It is as if there are two concepts of the constitution: as instrument for societal values and nation building, the other as the instrument for power and domination.

IV Economy

Relations between the economy and the state vary—and are complex. A dominant influence on the structures of state and the importance of law in Europe was the emerging market principles of economy. The case in which the courts in England questioned the authority of the monarch to grant monopolies of commerce and trade and thus restraint others to engage in these areas was one of the first decisions to limit the power of the monarch in England—and in the typical English way, the monarch, without conceding the restriction, promised not to grant monopolies by prerogative (that is, outside the framework of law). The market requires much more than restriction on monopolies—it requires clear rules defining the nature and uses of, and transactions, in property, the framework for, and the sanctity of, contracts, and guarantees of state enforcement of agreements made by private parties (and yet limiting the direct role of the state in the economy). The market economy needs and to some extent produces constitutionalism—keeping the state at bay and yet needing its coercive

power to ensure that the lawful expectations of individuals and corporations, based on contract or ownership of property for example, are protected, by courts and other mechanisms. This element of predictability is critical in the market economy, as it is based significantly on promises of future performance.

Although the rule of law is an important component of western ideology, it played little role in the colonies, for reasons given in the preceding section on the colonial state. The discretion of colonial officials was more critical than the predictability or protection of law, certainly more flexible and less prone to legal challenge. The framework and contours of colonial economy were established by administrative policies and acts, and often conflicted with fundamental values of constitutionalism. Large areas of the economy, particular peasant production and other rural activities, were often, and much of it still is, informal (within the broad colonial framework of administrative regulation) and dependent on traditional or administrative networks, minimising the role of law.

Post-colonial economies have a more elaborate legal framework and are more integrated globally, but they are by no means free economies. Many are based on minerals (including oil) with the state playing a central decision and management role. Most post-colonial economies are best described as “administered economy”, which depend on some market mechanisms but the key elements depend on regulation or monopolies. They are (despite some liberalisation and privatisation) dominated by permits and licenses, exemptions (from tax or other impositions), price controls, state contracts, state ownership and management of sectors or industries, and aid negotiations. As with planned economy, the administered economy requires a state which is subordinated to politics, the directly ruling class. The discretion vested in ministers and bureaucrats necessitates the cultivation of political and bureaucratic elite, mutually beneficial relations lubricated by money. The link between state and economy is corruption.

At first the political elite required payments from the economic class, a species of feudal dues, in return for some concessions and protection. Later it insisted on a share of equity and profits, from foreign enterprises, content with the role of sleeping partners. Later still, it decided on investments and management. Its relationship with the economic, particularly foreign, class has thus shifted, and is now quite complex: there is collaboration as well as competition and consequent tension--collusion with a limited number of that class sustains the relationship, being mutually productive, but more generalized corruption threatens the cosy relationship as does the direct entry of the political class in the market. But through these transitions, the role of the political class depends on its hold of the state. For these reasons (especially as the regulatory framework is tightened and political and discretion narrowed, under pressure from the west and international economic institutions) there is a massive evasion of the law. This is only possible with the collaboration of several officials and institutions, creating a network dedicated not only to corruption and thefts, but also to suppressing information of the irregularities. This is not a straight forward case of mercantilism of the 19th century in Europe which brought capital and state together in close partnership.

Thus a very large amount of business is criminalised. Trade unions, which often played a critical role in the struggle for independence, have been marginalised, if not co-opted by the state. And as political alliances shift considerably due to temporary conveniences, there is honour among thieves. Thus politicians torn by occasional conflicts, sometimes quite serious, as in Kenya's post election violence in 2008, are nevertheless united by a common interest in

both the plunder of, or through, the state and suppression of information about their devious ways. So the political class is formed, making the adoption of reform or at least its implementation extremely unlikely.

V Society

The relationship between constitution and society is complex and contradictory, and it is not easy to answer the frequently asked questions: does the constitution have any effect on society; how does society mould the constitution and accept or resist it? In the previous discussion on the state, attention was drawn to the relationship between the evolution of society and the changing state forms, and some indication given of the historical role of society (or more accurately, particular groups in society) in taming and democratising the state. In European countries the constitution has been adapting to social and economic changes over a long period, and so there has been a significant congruence between the purposes and institutions of state and society. Despite some ruptures, the growth has been organic, and there has been a broad acceptance of the powers and procedures of the state.

In Africa the introduction of the colonial state responded almost entirely to the concerns and powers of an outside force. It brought about a major rupture in political, economic and social organisation. As we have seen society was too weak to resist it. Because the state did not reflect values and structure of local society, it had to rely on considerable use of coercion. Consequently the state has had a much greater impact on society than the other way. I intend now to examine three aspects of the relationship between constitution and society. The first is the impact of societal forces on constitutional reform and practice, the other is the constitutional agenda of societal reform itself, and the third is the passivity of much of society confronted by the state.

At first, in some African countries, civil society was relatively undifferentiated; where there were social hierarchies, one colonial strategy was to co-opt local rulers, such as sultans and chiefs. Since then there have been major changes in society, influenced in large degree by the relationship of different communities or groups to the state. The society has become more differentiated, in different ways; competing and sometimes contradictory interests have emerged; but the centrality of the state to political, economic and even social management has remained. The question is whether new societal forces are likely to influence the shape of the constitution, and thus the distribution of power. I have already discussed the impact of the logic of the post colonial state and the organisation of the economy which suggests that for the time being the important elites are content with the post-colonial constitutional order. To determine whether this is a short transitional period, and new forces will compel significant changes, it is necessary to sketch in the degree of cohesion in society, to which I now turn.

Major divisions are not social or class but ethnic, it is ethnicity which has dominated political strategies, alliances, allegiances and discourse. Elites depend on the state for largesse (society is still in the stage of primitive accumulation). They find it easy to mobilise ethnic support, and in this way also to exclude other groups from access to state power. The persistence and mobilization of ethnicity are facilitated by vulnerabilities produced by both economy and state, through disruption of the rhythm of traditional life style and pattern; and the emergence of clientistic type of politics grounded in access to the state. Politicians have no interest in state reform which might jeopardise their favoured access to it. This exclusionary approach extends to most of the political class; it has profound impact on social cohesion and the way

people perceive the state. My analysis below is drawn largely from recent experiences and developments in Kenya.

Here again it is pertinent to draw upon the western experience of the development of the state. From the eighteenth century onwards, as the political map of Europe came to be redrawn, the homogeneity of the people (defined by their cultural, particularly linguistic, affiliation) became the basis of the creation of new states. Congruence between a cultural community and the boundaries of the state became the major principle of the re-organization of states (“nation-state”). This approach was justified on the grounds of the preservation of both culture and democracy, and subsequently social welfare (arguing that redistribution of resources implicit in welfare programs was possible only if there is social solidarity, dependent on a common history and culture). The rise of ethnic consciousness and its political mobilization (for which phenomenon I use the term “ethnicity”) has challenged many of these assumptions, including the concept of a homogenous people.

Heterogeneity renders difficult the emergence of a sense of nationalism that encompasses the whole country. There are often stronger allegiances to the community or the region, and perhaps various, and often conflicting, world views within the country. Competing ethnic claims hinder social solidarity. In states where society provides cohesion, common values and stability, the role of the constitution is secondary, concerned more with law making and administration than with promoting national unity (taken for granted). In post-colonial multi-ethnic states, on the other hand, “nation building” in this sense is an essential task of the constitution. Almost everywhere this has proved an extraordinarily difficult task, because of the diminution of the value of citizenship, human rights and the rule of law (in the pursuit of ethnic advantage).

The combination of the dominance of ethnicity and the centrality of the state for accumulation leads to intense competition for the capture of the state. This leads to the abuse or subversion of artefacts of democracy built into the constitution: such as publicly financed political parties, independent electoral systems, operational independence of the police, freedom of expression and association, and the impartiality of judges.

In many former colonies, the rise of a commercial, economic class is built on the foundations in ethnicity. It relies for favours of the state dominated by its clan or tribe. So the state continues to be exclusionary. Due to its dependency on the state, the new commercial elite does not want, as capitalists might normally be expected, a respectable distance between itself and the state. Close connections and alliances between this class and the state continue to be critical, despite considerable accumulation and building of enterprises. Primitive accumulation is followed by an alliance of capital and state, a new form of post-colonial mercantilism. As the business class rises on the back of an “ethnic” state, it in turn funds the electoral campaigns of its sponsors. Both these factors, the favours of the state on ethnic basis and the alliance between this type of capital and state, militate against the generalised rules defining relations between the state and market economy (or at least the even handed application of general rules). The more overtly political consequences of ethnicised politics include the weakening of commitment to human rights and the evasion or distortion of the artefacts of democracy as mentioned above.

The second aspect of civil society I want to discuss arises from the social reform agenda of many new constitutions. The violations of the rights of various groups arise not only from oppression by the state but also, and often more vigorously, by society. Typical forms are the

lowly position of women (including widows), exploitation of low caste groups, child labour, marginalisation of occupational groups like forest people or pastoral communities. Poverty is now widespread in Africa, with, on the one hand, the appropriations of property by a few and the landlessness of many. Some constitutions seek to redress this imbalance or provide for affirmative action for past injustices. The African problems of societal discrimination, exploitation or exclusion are less pervasive than in India or Nepal, but they do exist. The solutions are harder because the groups who benefit from these discriminations are allied to the state. But my concern here is with the prejudices of and resistance by societal forces. A common form of resistance includes arguments based on cultural relativism, that the constitutional reform agenda is drawn from western values which undermine the authenticity of indigenous values and systems. This can lead to wide scale disregard or violation of the provisions of the constitution.

A constitution operates within *society* and seeks to influence its development. The distinguished Indian sociologist, Andre Beteille, believes that a constitution can provide directions for the national development, but whether, and the pace at which, the development takes place depend on society. The constitution may set out guidelines for the exercise of power and the aspirations that the state must fulfil. A great deal of constitutional agenda of social reform (characteristic of contemporary constitutions) challenges societal values and prejudices, which for the most part favour elites. The assumption sometimes made by constitutional reformers that society is uniformly supportive of reform is not justified.

Different sectors have different interests, often clashing. The political order intended to be set up by the constitution competes with other models and realities (for example, in some societies the constitutional notion of the impersonalisation of power is negated by traditional notions and practices of the power of the “chief”, reflecting perhaps in the strong man syndrome that often dominates the structuring of the executive).

While the state is strong in its subjugation of civil society, it is weak in its capacity to direct the movement of society. Most politicians have little desire for progressive development of society, pre-occupied as they are with their predatory practices, and the political fragmentation and ethnicization of society. In this vortex of constitutional values and mandates and the ambitions and predations of politicians and bureaucrats, there seems no place for moral values, equality under law, and settled legal principles or practices. Both this type of “strength” and weakness/incapacity are harmful for growth of constitutionalism. The “strength” can lead to the disregard of values and the “weakness” to the failure to implement them.

The final point I want to make is that despite the post-colonial rise of an incipient bourgeoisie and other social forces, the overwhelming factor is the passivity of the majority of the people. By passivity I do not mean that they do not care—they do care, because they are at the receiving end of the predatory practices of the state, including violence. Although the peasants and workers constitute the majority, they are unable to translate this into political clout or pressure. They allow themselves to be fragmented by the politicisation of ethnicity, which prevents the growth of class consciousness. There are few political parties in the classical sense of aggregating, articulating and protecting the interests of key sectors of the public. Massive unemployment heightens the vulnerability of the workers. Trade unions, once of considerable political significance, now wield little power, in part because of globalisation which tilted the balance in favour of capital. Peasants once organised themselves into co-operatives, but now have few institutions through which to express their concerns and demands. The youth find themselves powerless despite their education, and are

easily recruited into militias by gangsters or politicians. Non-governmental organisations, particularly those concerned with human rights, funded exclusively by western governments, are largely urban based and do little to raise the consciousness of the marginalised and dispossessed. But western government also act as censors, insisting that NGOs stay away from politics, thus denying the close link between rights and politics, crucial to the effectiveness of rights strategy.

These major weaknesses of civil society make it difficult to put any effective pressure on the state. Politics then becomes the occupation of a few professional politicians, fluid parties few of which are based on membership. Few other voices are given expression by the media, falling increasingly into ownership of corrupt politicians.

Implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, the participation and empowering of the people. Ultimately the people have to be guardians of the constitution. To perform this role people have to understand the constitution and know their rights. They have to know how to use the machinery of the constitution and the law to hold public authorities accountable. They should be involved in the conduct of public affairs. They can also act as agents of accountability: for example by providing alternative budgets or analysing draft state budgets publishing annual assessments of the record of government and corporations of human rights, social justice, environment and natural resource policies, etc; providing alternative reports to regional and international human rights supervising bodies on the national record undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law.

Civil society is a long way from the political and technical skills or organisation to promote and protect constitutionalism. But as the wealthy establish an independent base and ease their dependence on the state, as modern economy develops and the number of workers, and the effectiveness of trade unions, increase, as professions establish their associations and codes, and also as the degree of coercion increases, there may arise forces advocating adherence to constitutional values, including rule of law. Exactly how this will happen and what direction it will take is hard to predict in view of very diversified economy, divided into the traditional and the modern, and fluid political forces.

VI Conclusion

I have tried to present a picture of the state of constitutionalism in most countries of Africa, using a political and sociological framework drawn from the experience of the west. Against this approach it might be argued that it disregards the specificity of the African context. I do not disregard the African context but I do examine it from the perspectives of the development of the state in the west. The state is the lasting legacy of the west, and I have tried to show how it has affected state, society and economy in Africa. Its constitutions are premised on the western theory of constitutionalism, and a critical examination of social forces surrounding the constitution leads one inevitably to the kind of issues identified in this lecture .

It might also be argued against my methodology that it overlooks the dynamics of change that Africa is going through. This would be unfair since dynamics of change is a major theme of my argument. It is certainly true that the bulk of the lecture is devoted to the present circumstances of Africa, which will undoubtedly change. And if the broad framework of the lecture is right, we shall have a way to analyse the impact of these changes on constitutionalism. Others might accuse me of being overly influenced by the dynamics of political and economic change in Europe; there is no reason to suppose that Africa must go through the same processes and sequences. I have used European history because state and markets were major influences there as they are now in Africa. But this criticism requires a more careful and detailed response—and perhaps modification of the framework of this paper—but this is not the time for that.

Finally, I revert to Lonsdale's point about the factor which brought about fundamental political change in Europe. He says that "the English commercial and industrial bourgeoisie first demanded an end to the royal commercial prerogative--but then went much further, in the nineteenth century, in demanding not only the end of the gentry-protecting corn-laws (and the gentry being then the political class) but also, not only the extension of the franchise but the wholesale reform of access to state and military office, from 'influence' to exam-determined merit." The incipient bourgeoisie in Africa, preoccupied by its own self-interest in unsettled political circumstances, has little interest in this scale of reform—which may be seen as bringing its own privileged status to an end.

In considering the prospects of fundamental change being triggered off by workers and marginalized groups, one is confronted with the dialectics between class and ethnicity. The deprived groups who have most to gain from class politics and action are driven much more by considerations of ethnicity than their common misery. People living in slums sharing an existence of great deprivation, poverty, insecurity, have many common interests, including in a fundamental change—yet at critical times they take ethnic positions, and are willing to kill their neighbours. In the conflict between class and ethnicity, ethnicity seems to win. Those who play the ethnic card have significant resources so that they can bribe the people, just as they can inspire fear in them against another tribe. As proletariat, they resemble Marx's sack of potatoes, who, in his [*Eighteenth Brumaire of Louis Bonaparte*](#) (1852), said of the French, particularly the peasants: "the great mass of the French nation is formed by the simple addition of homologous magnitudes, much as potatoes in a sack form a sack of potatoes". In other words, there is no common conscious of their interests, no sense of solidarity, though they may share same space and the same disadvantages.

Will the constitution in African states, with growing hardships of every day existence of millions of people, mould people's consciousness, an awareness of the mechanisms of domination and oppression, and the promise of a better future through commitment to new values and the restructuring of the state? Despite my earlier pessimism about the potential of a constitution, it is just possible that the constitution will begin the process of progressive change. It is quite likely, as has been the intention in many African countries, that the constitution would weaken the political-cum-business class, and strengthen social groups. The political class is both united and fragmented, united in their pursuit of profits through the exploitation of state and society, but weak because of their internal, often bitter, competition, based on ethnicity, for access to the state. So the change of state authority from one political group to another does not portend a real change. For the time being, it is perhaps the dialectics of ethnicity and class that may hold the key to real change.

