CHAPTER FOUR

DEMOCRATIC GOVERNANCE AND CONSTITUTIONAL
RESTRAINT OF PRESIDENTIAL AND EXECUTIVE POWER:
THE CHALLENGES IN AFRICA

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I. INTRODUCTION

A number of African countries are in the process of negotiating new constitutions in response to demands for more democratic political systems or the resolution of institutional crises. In the latter context, constitution-making is largely about rebuilding the political community as well as political structures. Egypt, Kenya, Libya, South Sudan, Zambia and Zimbabwe, among others, are or have recently been engaged in the process of developing new constitutions in the context of both demands for a more democratic system and the need to rebuild the political institutions that have been distorted by political manipulation and violence over the decades, especially before the wave of democratization beginning in the late 1980s. Generally, political parties and civil society agree on the need for democratic reform throughout Africa. Unfortunately, beyond formal changes, democracy and constitutionalism have not deepened in many African states. As Julius Ihonvbere has observed, “it is now being realized that formal compliance with liberal democracy, in the final analysis, changes very little. In fact, it has now been acknowledged that liberalization is much easier than democratization. Formal compliance has been commonplace in the continent, but real changes, evidenced in the drastic and fundamental recomposition of the structures, institutions, patterns, and goals of politics have been very few and far between.”¹ This realization requires us to revisit constitutional arrangements to see how they can be better structured to promote accountability, participation, and transformation of governance in Africa.

The future of democracy in Africa is, among other things, predicated on the development of constitutional arrangements that guarantee viable institutions in which to conduct the business of governance. This means developing a constitutional order that channels conflict into non-violent settlement of differences, preserves the ability of individuals and groups to participate in a continuing dialogue about policy and politics, generates accountable governments, and focuses attention on the commonwealth or on shared aspirations. In this chapter I try to identify the issues that need to be addressed in relation to the presidency and the executive. Contemporary history shows a clear risk that the office and actual role of a strong president may become the starting points for a regime to transform into autocracy. On the other hand, history shows as well that a presidential regime will entail no danger for political freedom as long as there is: first, an effective system of checks and balances; second, undisputed rule of law; third, free and critical opinion; fourth, a fair and democratic electoral system; and finally, a democratic culture. The South African and Kenyan constitutions serve as some of the best models for a constitutional arrangement that provides important safeguards to ensure public accountability, responsiveness to the electorate, and participation of the people in governance. The process followed in the elaboration of both constitutions teaches us that, in order for a people to feel a sense of ownership, the process must ensure extensive consultation with all people and principal stakeholders in the country prior to any constitution being drawn up and adopted. The process must be inclusive, transparent, accessible, accountable, and empowering to ordinary citizens and civil society. However, one has always to be mindful that any constitution-making process must be context-driven, and its product must reflect the circumstances of the country. Important issues in constitution-making are defined by the political context or period in which constitution-building takes place. Yet, context should not be a basis for ushering in undemocratic constitutions and ignoring international norms widely accepted by the international community.

Concern about executive abuse of power and misuse of security forces is a common theme in most constitutional conversations today. As exemplified by recent crises in Guinea, Madagascar, Central African Republic, and Niger, presidential power is inadequately checked in many parts of Africa and is at the centre of most constitutional crises there. Presidents in Africa treat other organs of government, such as parliament and the judiciary, as subordinate to the office of president, routinely undermining them and ignoring the separation of powers. The actions of Zimbabwe's