Recognising and Empowering Homegrown Constitutionalism: The Challenges and Opportunities Accompanying the Changing Global Order

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Abstract: In midst of unpredictable geopolitical changes accompanying the end of the post-Cold War convergence around liberal-democratic-capitalist ideas, it is difficult to predict what the next global order would look like. What is however very likely is that multilateral agreements on constitutional design for countries emerging from conflict will no longer be within easy reach. Not only will there be deep disagreements over the blueprint of settlements among members of the international community—especially from those in the West, but there might not even be any political interest and will to be involved. This presents an opportunity for non-Western ideas on constitutions and constitutionalism to increase their international presence and pull. Recognising and empowering homegrown traditions of constitutionalism in Africa is not a straightforward uniform process. The continent has three different legal systems and a multiplicity of indigenous systems of traditional law and governance. Promises and pitfalls coexist, projected consequences and unexpected complications blend into each other. The article rests on three sections. The first one examines the potential impact the changing global order will bring to constitutions and constitutionalism in Africa. The second section looks at the fate of different homegrown systems of traditional law and governance in Africa under three different legal systems. And the final section identifies five distinct categories of challenges and opportunities depending on the choice of the legal and political path to recognising and empowering homegrown constitutionalism.
Keywords: Africa; Constitutions; Constitutionalism; Received (Western) Constitutional Traditions, Homegrown (Endogenous) Constitutional Traditions; Changing Global Order; Constitutional Design; Traditional Law and Governance; Developing World / Global South

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A. Between the Outgoing and Incoming Global Orders

I. We Know What Is No Longer With Us

Future historians will know how all this ends, but at the moment of writing it is not clear what type of global order will eventually emerge from the current tectonic changes the entire world is going through. It is evident that the pieces of the previous order are now being disassembled, but as the academic community of comparative constitutional law and governance, we are not certain as to which pieces will be discarded, which new ones will be added, and the way all that will be re-assembled into a new global order that will set the course for the coming decades. Various broader political, military, and economic changes had in fact been underway for a while, and various geopolitical developments—be it the failure of the coordinated international intervention in Afghanistan or the changing security landscape of the Sahel—had been taking place, but it was the inauguration of the new US President, Donald Trump, in January 2025 that brought every seemingly disconnected dynamic together. While trying to make sense of various different things happening in different parts of the world as they unfold, there is now a growing realisation that all are in fact related. President Trump has just reminded students of law and governance, perhaps a little forcefully and explicitly, what was already simmering away for a while. One era of world politics is now over, we are seeing the last bits of the afterglow. This presents an opportunity for non-Western ideas on constitutions and constitutionalism to become more visible. The article posits how homegrown African constitutional traditions might become beneficiaries of a changing world, yet potential pitfalls coexist with promises, projected consequences and unexpected complications blend into each other. The focus of the coming pages rests on the fate of the different homegrown systems of traditional law and governance in Africa and the different legal systems within which they are embedded. There are five distinct categories of challenges and opportunities depending on the choice of the legal and political path to recognising and empowering homegrown constitutionalism. But what sets the stage for all this is the potential impact of the changing global order.

The Western-led global order which defined the three decades following the collapse of the Soviet bloc in the early 1990s, the discrediting of communist ideology, the triumph and triumphalism of the West, and the universalisation of the liberal-democratic-capitalist ideas, has now completed its shelf-life.[1] In the midst of what is likely to be labelled a change to the global order by future historians, it might be a bit premature to reflect on the exact face of the new world to emerge from the current uncertainty. The whirlpool of current geopolitical dynamics might need more time until things settle into something more permanent. The new global order will take some time to fall in place, so it is impossible to foretell the type of regional geopolitical dynamics it will engender across the African

1 For a more detailed look at the impact of the Cold War in constitutionalism in Africa, see *Martin Chanock*, Constitutionalism, Democracy and Africa: Constitutionalism Upside Down, Law in Context: A Socio-Legal Journal 28 (2010), pp. 126-144.

continent. Unshackled from the constraints and priorities of the previous global order, there is bound to be uncertainty as the pieces of the new international order are rearranged into their new positions, with the addition of a few new pieces while some of the older ones are disposed of. Once the frequency of the fits-and-starts of change subsides, the new dynamics will establish more permanence and predictability, and a new global order will then set the course for the coming decades. We do not exactly know what is awaiting us, but we can safely predict a few things regarding the future of constitutions and constitutionalism in Africa.

What will emerge will surely be marked by Western geopolitical retrenchment—and indeed, by the divisions within what was until recently seen as a unified global alliance. The new global order will have to acknowledge the continuing geopolitical strength of China—a country that is likely to be around the table of whatever new global order emerges albeit with demographic, social, and economic challenges that awaits attention at home. Changing global economic patterns will coexist with unprecedented environmental challenges. While some of the older ones pack up and leave, new international actors will set their gaze on Africa. Friends in one region could end up as adversaries in another. In the meantime, a variety of new coalitions and alliances will pop up and unravel with dizzying speed. Writing in the middle of a critical juncture between an outgoing and incoming global order, we cannot know what the face of the new world will look like in precise terms, but this does not mean we are devoid of any inkling as to the things the future might have in stock for us.

II. And We Can Predict Some of What Is Coming

While the type of global order that awaits us is not predictable, it is clear that the post-Cold War consensus is gone for good, and this has a direct impact on how we see constitutions. In the first immediate phase of change, the world is likely to see disruption. With the expiration of the previous global convergence over liberal-democratic-capitalist ideas, multilateral efforts to agree, devise, and implement constitutional solutions to divided societies will be the first in line to disappear, soon to be followed by the discontinuation of existing policies on cooperation and development. Both international interest and money is already drying up. And this is not because of President Trump. Before his shock therapy on the world, there were already signs along multiple fronts that the once unchallenged Western ability to define constitutions and constitutionalism was sputtering.

Years before Mr. Trump's second term had started, there were multiple indications that the post-Cold War wave of liberal-democratic-capitalist confidence was showing cracks—often challenged by popular disillusionment in many places where decentralised and federal constitutions of the mid-1990s had arrived with promises of democracy and development.[2]

2 In his overview of the preceding two decades of federalism reforms across the continent, the author contrasts the lofty promises that accompanied the reforms in the mid-1990s and their varied, complex, and often unintended, consequences which started to become visible in the mid-2010s. *Jan*

The July 2020 riots in the Province of KwaZulu-Natal had exposed how vulnerable South Africa was to explosions of social upheaval. In other parts of the continent, authoritarian practices, crony capitalism, and ethnic favouritism had infiltrated and taken over the workings of formally democratic constitutions. Despite receiving more than two decades of various international reforms promising to fix their failed states, South Sudan and Somalia were still nowhere close to stability. Ethiopia has been reeling from the after-effects of a civil war between its federal government and one of its constituent regional states, which flared up after Tigray decided to hold regional elections in September 2020 without the federal government's approval. Instability has now engulfed the country's other regions. Various states of the Sahel were experiencing growing insurrections, sometimes carrying religious and sometimes ethnic colours, but none of the Western-led international initiatives to combat this were able to restore stability to the region.[3] One after another, the states of the Sahel have disengaged from military cooperation with the West and have sought new international friends.

There are new non-Western players in African geopolitics, particularly China, Turkey, and some Gulf States, but until now they have not shown much interest in the internal constitutional issues of the countries with whom they engage. Besides, there is so far little permanence in the shifting dynamics of cooperation and competition. While the scale of Western interest and involvement in Africa subsides, it is not clear how long and structured the interest of new non-Western powers in Africa will be. Regardless of how things will look once the dust of global geopolitical change settles, there are two—closely related—things that we can safely predict: we are unlikely to witness the same scale of coordinated multilateral initiatives towards constitutional reforms. But we will witness the declining ability of the West to, first, influence the type of constitutionalism to be adopted, and then, to politically and economically prop up the chosen constitutional model.[4]

Erk, Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution, Regional and Federal Studies 24 (2014), pp. 1-18.

3 In a new piece, the author provides an overview of the recent developments in the Sahel – particularly the creation of a new confederation bringing together Mali, Burkina Faso, and Niger. The article addresses the tendency of the comparative federalism literature to limit its analytical focus to the national and subnational levels, and by extension, leave out the regional and international ones. It is only when these two neglected levels of analysis are integrated into federalism studies will we be able to spot some of the recent patterns across non-Western federal systems. *Jan Erk*, Africa's Contributions to Comparative Federalism: Levels of Analysis, Geopolitics, Ideas, Publius: The Journal of Federalism (forthcoming).

4 Some believe that our mainstream ideas on democracy represent but a Western variant of constitutionalism only; see *James Tully*, The Imperialism of Modern Constitutional Democracy, in: Martin Loughlin / Neil Walker (eds.), Paradox of Constitutionalism: Constituent Power and Constitutional Form, Oxford 2008, pp. 315-337.

III. From Received to Homegrown Constitutionalism

The collapse of the Soviet-led Eastern Bloc in the early 1990s and the triumph of the West unleashed a wave of momentous political and economic changes. Socialist satellites states, allies and clients of the West which did not have liberal-democratic constitutions, and the third group of authoritarian states who had managed to flirt with both sides and sail through the Cold War geopolitical currents, almost in unison underwent constitutional reforms. The post-Cold War universalisation of liberal-democratic-capitalist ideas and Western triumphalism inevitably influenced the contents of the new constitutions. The United States played an outsized role in all this.[5] There was also much support from international aid agencies and donors, as well as technocratic advice from international experts. The conditions international donor agencies asked in return for their help added to the convergence around a number of general themes. Decentralisation was a defining component of almost all of these constitutional reforms, and to a lesser extent, also was federalism.[6] This was also the period that federalism was chosen as the path towards rebuilding conflict-torn Somalia and the newly-created South Sudan

The new world that comes next will surely be marked by a decline in the proselytising liberal-democratic-capitalist spirit which defined the post-Cold War international order and the post 9/11 developments which further consolidated the global community under the US-led Western block. Currently reeling from the shock therapy administered by President Trump, it is not yet clear whether the future would see the former allies of the US join forces in an alternative Western alliance. In the midst of all the current uncertainty, we can be certain that fewer international actors would be willing and capable to initiate, support, and finance political, economic, and military reforms across the continent. The practical limitations on the ability to project and maintain Western-led international initiatives, combined with a declining political interest in the problem-spots in the Developing World / Global South, means that the reform-initiatives in post-conflict societies will increasingly rely on more local/regional actors – and perhaps new international actors. And this will likely open up more room for Africa's homegrown traditions of constitutionalism to join the received models in the search for self-sustaining solutions that can function without international help. Out is the post-Cold War confidence that copy-pasting constitutional best practices from the West to the rest will bring democracy, development and stability. With

5 Perhaps one of the leading examples of looking at the world through the narrow lens of the United States constitution is the work of Bruce Ackerman. Ackerman projects his interpretation of American constitutionalism to the rest of the world under what he labels his 'grand claim'. *Bruce Ackerman*, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Cambridge MA 2019.

6 In his work examining the causes and consequences of decentralisation reforms, the author challenges the tendency of international experts and organisations to cut-and-paste 'best practices' in decentralisation from the West onto the African soil without an attention to the local context. *Jan Erk*, Iron Houses in the Tropical Heat: Decentralization Reforms in Africa and their Consequences, Regional and Federal Studies 25 (2015), pp. 409-420.

the universalisation of liberal-capitalist Western model of law and politics now dented, we are likely to see more variety in both scholarly and applied approaches to federalism. Such variety is not going to be only about who gets involved in federal design, but also about the variety in the ideas on constitutions and constitutionalism.

B. Recognising and Empowering Homegrown Constitutionalism

I. The Legal Systems of the Continent

One of the first signs of increased openness towards homegrown constitutionalism is the recent embrace of the idea of injecting an African identity into constitutions. Yet there is no one single African identity, nor is there one uniform homegrown tradition of African constitutionalism.[7] Plus, a country's political history means that different received models of constitutionalism have taken root in different parts of the African soil, over different periods of time. Colonial rule installed either a Common Law or a Civil Law system, but colonies also changed hands, new states were sometimes formed by amalgamating territories with different constitutional statutes and thus different legal systems, (the way Protectorates, Dominions, and Mandated/Trust territories were merged), and sometimes new states were formed by separating from bigger territories and adopting the legal systems of the new colonial supervisor.[8] In some federal states, different legal traditions defined the different constituent units to the federal union. For example, one part of federal Cameroon came from the British Common Law tradition, the other part from the French Civil Law tradition. Postcolonial politics added newer constitutional imports like socialism or religious fundamentalism. Put simply, there is no single path to recognising and empowering African constitutionalism. There are various promises and pitfalls associated with these paths, the legal complications that accompany the different processes of recognition representing with the different paths, and the attending long term social and political consequences.

For a continent with fifty-four countries, hundreds of ethnic communities and languages, a multiplicity of religions and belief systems, variations in economic wealth, and a

7 In a recent piece, the author challenges those who believe the injection of an overarching general reference to an undefined 'African' identity would bring constitutions closer to the people. In his historical and comparative review, he identifies two distinct forms of constitutional identity, an aspirational one seeking future economic and political goals and a representative one that captures the existing national demographics, history, and culture. Both come with a different set of challenges for African constitutions. *Jan Erk*, Aspirational and Representative Constitutional Identity in Africa, Global Constitutionalism: Human Rights, Democracy, and the Rule of Law 12 (2023), pp. 154-173.

8 This process accelerated in the years following the end of World War II and just before independence. The author's study of the failed East African Federation reveals in detail how colonially supervised amalgamation in preparation for federalism failed to meet the expectations of local populations who wanted nothing short of self-rule through majoritarian democracy. *Jan Erk*, Federal Design and Supranational Integration Plans for East Africa: Regional Geopolitics, the Changing Global Order, and the Imperial Constitutional Repertoire, Ethiopian Journal of Federalism Studies 10 (2024), pp. 1-18.

complex history, no generalisable and stylised classification scheme of legal systems can do full justice to the details of what is nationally unique. What is more, even in the context of individual countries, throughout history there could be reversals and detours along the legal paths chosen earlier and multiple paths can come to crisscross each other. The mainland part of Tanzania is a case in point. Tanganyika used to be a German colony and thus had a Civil Law system, but it then became a League of Nations Mandated territory under British rule where Common Law replaced earlier German practices. With the aid of some very broad brushstrokes, we can categorise the received legal systems on the continent under three general labels: Civil Law systems, Islamic Law systems, and Common Law systems. The fourth distinct legal tradition, i.e. the Socialist one, was influential, especially in the early days of independence capturing the hearts and minds of a new generation, but with the collapse of the Soviet Union its short lifespan came to a sudden halt. Within the three main legal traditions, there are naturally multiple different national experiences representing the timing and the processes of recognising and incorporating indigenous forms of African constitutionalism. Plus, different combinations of legal systems might exist in different regions of the country in question.

II. The Subjugation of African Law in Civil Law Systems

The first legal tradition of the continent is also the one that has had the most pervasive impact mostly because it happened to be the legal system bequeathed by a multitude of Western powers who had colonies in Africa; namely Portugal, France, Belgium, Germany, Italy, the Netherlands, Denmark, and Spain. By definition, Civil Law systems are not open to legal pluralism and customary law. This natural characteristic of the codified Napoleonic/Roman law tradition was compounded by the colonial policies of these powers favouring direct rule and the imposition of laws from the metropolitan capital – in contrast to the British colonial policy of indirect rule we will cover in sub-heading III below.

Some colonial regimes, particularly the Portuguese in present-day Angola and Mozambique, had tried to directly control homegrown traditions of African law and governance, subsequently robbing both of the sense legitimacy in the eyes of the locals. But during the course of their long engagement with Africa going back to the 15th century, the Portuguese had also brought in linguistically, culturally, and religiously assimilated locals into the colonial system of governance, thereby creating a new social class with homegrown roots which ensured the continuation of their African colonial holdings.

The French in their self-styled *mission civilisatrice* had first tried to erase; and when failing to do so, had tried to subjugate local laws and leaders. Their playbook in governance was similar to what was happening at home in metropolitan France.[9] Following

9 The British were similarly playing from the same rulebook they used at home. In his study comparing anglophone and francophone policies towards traditional authorities, the author shows how what was prescribed to the colonies was informed by the national practices at the time. *Jan Erk*, Constitutionalisation of Traditional Authorities and the Decentralisation of Governance: Anglophone and

the French Revolution, feudalism and the political powers of the Catholic Church were dismantled. The Republican revolutionary social engineering took on a new vigour with the Third Republic in the latter half of the 19th century. Minority languages and cultures were replaced by standardised French-language and Republican culture through education and conscription which sought the creation of free and equal citizens in a jurisdictionally uniform France. The citizens were to be part of a nominally egalitarian national *volonté générale*, which, in turn, would legitimise the one and indivisible constitution of the Republic. The quest of this ideal sometimes came with centralist domination and heavy-handed state policies as citizens often had to be made "free" against their wishes. The closer one was to metropolitan France on the continent—across the Mediterranean in North Africa and in West Africa relatively accessible by maritime means—the social engineering had more success in creating a new social class of French-speaking locals.[10] In Equatorial Africa further away, French colonialism frequently fell short of its self-styled progressive ideals. While there was no formal recognition of indigenous law, Jean-François Bayart notes that many of the traditional leaders drawn from the existing indigenous governance structures were co-opted into the ranks of the colonial state.[11] Just as was the case in Portuguese colonies, this ensured continuity.

In the Belgian King Leopold II's personal property of the Congo, the Belgians were under no such illusion that they were force for good and refused even most basic forms of acknowledging the existence of indigenous law and governance. The formal constitutional status of the colony belied the real extractive ambitions behind. Leopold's colony was in fact nominally called the Congo Free State was under the tutelage of an entity called *Association International Africaine*, which in fact was a private commercial company in which the Belgian King was a majority shareholder. When the Belgian state took over the governance of the Congo from the King and his private company in 1908, there was more of an attempt to follow the French lead of the colonial *mission civilisatrice*, but indigenous forms of constitutionalism had been fatally damaged. At the end of the First World War, Belgians had taken over the control of Rwanda and Burundi as League of Nations Mandate territories, but prior to this these two had been part of the German colony of Tanganyika and had seen the erosion of indigenous colonialism.[12]

Francophone Africa Compared, in: Charles M. Fombad / Nico Steytler (eds.), Decentralisation and Constitutionalism in Africa, Oxford 2019, pp. 459-484.

10 For an overview, see *Patrick Manning*, Francophone Sub-Saharan Africa 1880-1985, Cambridge 1998.

11 *Jean-François Bayart*, L'État en Afrique : La Politique du ventre, Paris 1989. Sèbe expands on Bayart's historical account on local leaders and the French colonial establishment and argues that it was the Masonic Lodges which played a big part in the co-optation. *Berny Sèbe*, From Post-Colonialism to Cosmopolitan Nation-Building? British and French Imperial Heroes in Twenty-First Century Africa, The Journal of Imperial and Commonwealth History 42 (2014), p. 956.

12 *Margaret L. Bates*, Tanganyika, in: Gwendolen M. Carter (ed.), African One-Party States, Ithaca, New York 1962, pp. 395-483.

Germany was a late 19th century addition to colonialism in Africa and was in the midst of an industrial/military competition with France and Britain. Its African policies in Tanganyika (mainland part of present-day Tanzania) and South-West Africa (present-day Namibia) were nakedly geopolitical and economic, and seemed to display no desire of granting recognition to indigenous forms of law and governance.[13] According to one observer of pre-independence Tanganyikan history and politics:

> *"Instead of letting Africans choose their chiefs and headmen, as they had always done, [Germans] nominated them. These nominees were rightly regarded as 'Wadachi henchmen'. The Germans feared any chief who had an independent mind, because he could mobilise his tribe against them. To lessen the position of these strong chiefs, they appointed pliable men, mostly arabs or swahilis, called akidas or liwalis […]. In some areas their activities were so damaging that the British, when they had become the Mandatory Power, were just not able to bring the Native Administration back to life".*[14]

In German Togoland (present-day Togo and parts of Ghana) and German Kamerun (covering present-day Cameroon, Gabon, and Congo-Brazzaville), which were later transferred to Britain and France as League of Nations Mandate territories, the relatively short presence of German colonialism had been driven mostly by private commercial companies operating under imperial charter.[15] Despite the different historical trajectories of the different countries discussed above, by definition Civil Law systems have been the most difficult environments for homegrown systems of traditional law and governance to survive.

III. Homegrown Customary Law Incorporated in Islamic Law

Colonialism was not within the monopoly of the West. Most of North Africa and the coastal areas along the Red Sea and the Horn of Africa had been brought into the Ottoman Empire through military conquest or tributary treaties.[16] The constitutional status of their various North African territories ranged from directly governed imperial provinces to vassal states and tributary allies. Along the Gulf of Aden and the Horn of Africa, the coastal African holdings of the Ottomans lacked a land link to imperial territories in the north of the continent and were thus more similar in status to the colonies of Western powers.

13 *John Iliffe*, Tanganyika under German Rule 1905-1912, Cambridge 1969.

14 *Judith Listowel,* The Making of Tanganyika, London 1965, p. 51.

15 *Ralph A. Austen*, Varieties of Trusteeship: African Territories under British and French Mandate 1919-1939, in: Prosser Gifford / W. M. Roger Louis (eds), France and Britain in Africa: Imperial Rivalry and Colonial Rule, New Haven, Connecticut & London 1971, pp. 515-541.

16 For more on the legal basis of Ottoman imperial expansion, see *Fatih Öztürk*, Ottoman and Turkish Law, Bloomington, Indiana 2014.

Along the East Coast of Africa and the Horn, Omanis had joined the Ottomans with their fair share of colonialism.[17] Islamic Law played a role in the colonial expansion of both countries. Without the codified rigidity of Western Civil Law, Islamic Law was able to incorporate a variety of indigenous legal traditions into its loose, complex, and regionally varied collection of, ostensibly Islamic but often indigenous, customary law.[18] The multiplicity of overlapping and cross-cutting varieties of Islamic approaches to jurisprudence made the integration of indigenous law easier. For example, the Somali system of indigenous law known as *xeer* was recognised and applied in Islamic courts nominally under the tutelage of the Ottoman sultan.[19] The fairly thin military and bureaucratic presence along the Gulf of Aden, in the Horn of Africa (and also in the Sudan) meant that an Ottoman version of indirect rule was practised through the co-optation of local leaders and indigenous governance structures – be it ethnic, tribal, or clan-based.[20]

The Omani followed the same path of using the regionally varied nature of Islamic customary law in the islands of Unguja and Pemba and the Kiswahili speaking coastal regions of East Africa. Omanis themselves had historically adopted the relatively uncommon Ibadi approach to Islamic jurisprudence which predated the consolidation of various Shia and Sunni schools of jurisprudence. They were also a seafaring nation of traders who had traditionally crisscrossed the various shores of the Indian Ocean. This meant that throughout history they had interacted with, and found ways to accommodate other traditions of Islamic jurisprudence of their neighbours and trade-partners.[21] The tradition of using ambiguity to deal with local diversity was something that was replicated in their East African colonies. At the time of its inception, incorporation of local customary laws into Islamic law was a very pragmatic form of recognition practised by both Ottomans and Omanis. In the eyes of the locals this ensured the continuation of the homegrown laws and brought popular and religious legitimacy to what was in effect more of a variety of foreign rule. In time however indigenous customary law lost its distinctiveness and—notwithstanding regional variations—was subsumed under the broader category of Islamic law.

17 *Norman R. Bennett*, A History of the Arab State of Zanzibar, London 1978.

18 *John Miles*, Customary and Islamic Law and its Development in Africa, African Development Bank Law for Development Review 1 (2006).

19 For more on the Somali system of indigenous law and governance *xeer*, see *Michael van Notten*, The Law of the Somalis, Trenton, New Jersey 2005.

20 For an account of Ottoman imperial politics in the Gulf of Aden, see *Thomas Kuehn*, Empire, Islam, and the Politics of Difference: Yemen 1849-1918, Leiden 2011.

21 *Raymond Dennis Bathurst*, Maritime Trade and Imamate Government: Two Principal Themes in the History of Oman to 1728, in: Derek Hopwood (ed.), The Arabian Peninsula: Society and Politics, London 1972, pp. 89-106.

IV. Recognition, Manipulation and Resilience under Indirect Rule

As the only Western colonial power with the Common Law legal system, it is difficult to separate the historic impact of this legal tradition from the colonial policy of indirect rule practiced by Britain. This was a policy quite different in spirit from what other Western colonial powers practised. In British Protectorates, day-to-day governance remained in the hands of indigenous political authorities, be it kings, princes, paramount chiefs, emirs, and sultans.[22] This was not the result of a principled respect for indigenous constitutionalism, but of more pragmatic concerns of outsourcing the day-to-day governance of distant territories to co-opted local leaders.[23] Practices on the ground ranged from empowering legitimate and powerful traditional rulers to handpicking weaker and docile pretenders, so the consequences of indirect rule were not everywhere identical. The process of recognition was frequently manipulated to political ends. Whatever the local variation, however, indirect rule recognised and consolidated the office of traditional leadership, even if only in name.[24] Local autonomy also ensured the overall continuation of indigenous systems of law (as long as it did not contradict colonial prerogatives).

There was jurisdictional heterogeneity across Britain's colonial holdings, however. What were formally labelled as Colonies under the imperial constitution were under London's direct rule, while in Dominions settler communities controlled the levers of the local legislature and government as part of the system of "responsible" government, and Protectorates (and later Mandates /Trusts) were under the portfolio of the Foreign Office. The constitutional status of the Protectorates rested on the formal recognition of homegrown systems of law and governance. There was a degree of internal autonomy under the imperial constitutional umbrella mostly unavailable to other indigenous communities in the Colonies and Dominions. Indirect rule went hand in hand with the adoption of the Common Law system for dealing matters beyond the internal affairs of the indigenous community. While mostly silent on African customary law, the Anglo-Saxon system of law was also, at least theoretically, more open to uncodified laws and practices.

While acknowledging its inherent openness to the local legal traditions, one should also point out how the Common Law system also distorts the homegrown as it tries to pigeon-

22 For a more comprehensive overview, see *Michael Crowder*, Indirect Rule: French and British Style, Africa, Journal of the International African Institute 34 (1964), pp. 197-205.

23 Indirect rule was always the case in the Protectorates but the policy also existed in parts of land controlled by Royal Chartered Companies, Dominions, and League of Nations Mandates / United Nations Trust territories. In his contribution to a recent volume covering the transition from the Empire to the Commonwealth, the author unpacks the various colonial statuses used within the British Empire, and how the transition to the Commonwealth was influenced by the particular status a territory held within this imperial constitutional order. *Jan Erk*, From Dominions to Protectorates in Sub-Saharan Africa: Imperial Constitutionalism Setting the Stage for the Commonwealth of Nations, Memoria e Ricerca 31 (2023), pp. 411-428.

24 *Thomas Spear*, Neo-Traditionalism and the Limits of Invention in British Colonial Africa, The Journal of African History 44 (2003), pp. 3–27.

hole it into Western legal categories. The classification of indigenous law and governance into distinct items based on the Western concepts and the related legal categories has a historical lineage that goes back to early colonial bureaucratic practices in the British Empire. Martin Chanock has studied the impact of colonialism on local laws and governance structures in Malawi and Zambia. In his book *Law, Custom, and Social Order*, he provides the following observation: "the development of an area of customary law depended on a correspondingly appropriate image of being available in the legal repertoire of the colonial rulers".[25]

C. Promises, Pitfalls, Complications, Consequences

I. Moral and Practical Concerns for Recognising the Homegrown

In and of itself, there are moral justifications for the constitutional recognition of the homegrown. Indigenous systems of law and governance with their roots in a community's own history and culture are part of a country's unique foundations, or put differently, of its "constitution"—to use the non-legal original meaning of the term. Independent of such moral, and more philosophical, considerations, there are also pragmatic justifications for recognition. One is to ensure constitutional longevity—a common deficiency across the continent.[26] Only a handful of observers had questioned the reformist zeal of the 1990s and warned that it was the homegrown that had more chances of longevity.[27] But recent history had not been kind to Africa's traditional systems of law and governance. Kwasi Prempeh labels this "the postcolonial exclusion of Africa's homegrown customary institutions from the formal structures of local representation and governance".[28]

Even when constitutions fall short of some of the liberal democratic constitutional blueprints deemed ideal in the West, citizens are more likely to relate to what they come to see as their own political system. A sense of national ownership of the constitution makes it more likely that the basic law laying the foundations of the nation withstand the known, and yet unknown, legal, political, social, and economic challenges ahead successfully. As

25 *Martin Chanock*, Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia, Cambridge 1985, p. 219. The same statement also exists in *Martin Chanock*, A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Africa, Journal of African History 32 (1985), p. 76.

26 *Sauda Nabukenya*, Why Constitutions in Africa do not Stand the test of Time? Lessons and Perspectives from Uganda, in: Jaap de Visser, Nico Steytler, Derek Powell, and Ebenezer Durojayé (eds), Constitution Building in Africa, Baden-Baden 2015, pp. 293-326.

27 The study is mostly based on Skalnik's three decades of research in northern Ghana and the adjacent regions of neighbouring countries. *Peter Skalnik*, Authority versus Power: Democracy in Africa Must Include Original African Institutions, Journal of Legal Pluralism and Unofficial Law 28 1996), p. 109.

28 *Kwasi H. Prempeh*, Africa's 'Constitutionalism Revival': False Start or New Dawn, International Journal of Constitutional Law 5 (2007), p. 495.

Sammy Adelman argues in his study of constitutionalism, pluralism, and democracy in Africa "it is only from the grassroots, from bottom up that democracy can emerge".[29] And it is homegrown constitutionalism is the one which has the deepest the roots of course.

There are also rather more prosaic justifications for recognising and empowering homegrown forms of law and governance such as familiarity and simplicity. According to one of the leading names in the comparative study of African law and governance – and the main investigator of the pan-African initiative to record the multitude of unofficial and uncodified forms of indigenous law, i.e. the "Restatement of African Law Project" (RALP) of the 1950s and 1960s—Anthony Allott, lays out the reasons why recognition of the homegrown is good for the legal system. To paraphrase: 1) justice was popular, understood, and people participated; 2) justice was local and speedy; 3) justice was simple and flexible.[30] What is familiar to the grassroots will work better; such familiarity means that the locals will have the inside knowledge to oppose and challenge those who challenge those who might attempt to manipulate constitutional clauses and procedures. Put simply, familiarity breeds accountability.

II. Intentions vs. Capacity

Not everything put on paper can be achieved. Action might fall short of what is promised in a letter of intent. Declarations of clearly articulated action-plans could be followed by confusion and inertia. And the goals enumerated in constitutions might be beyond reach. These are not because there is a hidden agenda to thwart things but because of a multiple of unanticipated shortcomings in capacity and capability which might hinder the realisation of the announced aims. And this is not unique to Africa. Many constitutions around the world are indeed defined by their aspirations.[31]

But to sharpen the focus a little more, under this subheading we look at the possible mismatch between idealistic reforms toward the recognition of homegrown forms of law and governance on the one hand, and shortages in the various resources to deliver on these intentions on the other—be it personnel, infrastructure, funding, knowledge, or training.

The cleft between declared intentions and the structural capacity of legal systems deliver on these is particularly pronounced in terms of the training of legal professionals who are not naturally proficient in indigenous law (that is, those who do not speak the language, who are unfamiliar with the culture in question, and lack knowledge of the oral history of the community). There are no neatly demarcated, precisely enumerated, clearly listed items of law which would correspond to existing comfort zones of legal professionals. One needs broader knowledge of indigenous law and governance, both in general in terms of

29 *Sammy Adelman*, Constitutionalism, Pluralism and Democracy in Africa, Journal of Legal Pluralism and Unofficial Law 42 (1998), p. 86.

30 *Anthony Allott*, The Future of African Law, in: Hilda Kuper / Leo Kuper (eds.), African Law: Adaptation and Development, Berkeley 1965, p. 232.

31 *Erk*, note7, pp. 154-173.

the foundations and workings of non-Western law, and also in terms of the specifics of the community in question. Falling short of such knowledge, court systems often lack the capacity needed implement the very indigenous laws that have formally been recognised.

The distance between intentions and capacity was one of the important warnings that had been articulated by various observers during the 1950s and 1960s as part of the pan-African "Restatement of African Law Project" (RALP).[32] Since then others have continued to call for ways to deal with this problem afflicting the legal profession. But shortages in knowledge of indigenous law and governance—not only the specific details of the laws of different communities but on the foundations of different legal systems continue. Law curricula still underplay the (non-Western) sources of law in contemporary legal systems. Most of our students seem to be unaware that not all laws are derived from constitutions, from the legislative passing of statutes, or from judges deciding cases. One way to start addressing this deficiency is to incorporate more comparative approaches into the curricula.[33]

III. Lawyer's Preference for Uniformity and Certainty

Even when the political will for recognising and empowering homegrown constitutionalism exists—together with the broad support of the legal profession, the court system and legal training might present hurdles along the way.[34] That is, intentions for recognition on paper might diverge from the structural capacity of legal systems to deliver on these very intentions in terms of the training of legal professionals and the necessary knowledge available to the court systems to implement very indigenous laws that have formally been recognised.

When concerns for professional training and qualification are paramount, it is only natural that expectations of certainty are prevalent. Both teaching and practice will thus be marked by preference for legal uniformity, coherence, regularity, and most importantly,

32 *Laurance C. B. Gower*, Independent Africa: The Challenge to the Legal Profession, Cambridge MA 1967.

33 In the special issue bringing together the former editors of Regional and Federal Studies to celebrate the journal's 30th anniversary and provide reflections on the state of federalism literature, the author calls for a broader and more inclusive definition of federalism studies instead of a narrower and more specialist one. *Jan Erk*, A Better Scholarly Future Rests on Reuniting the West with the Rest, the Present with the Past, the Theory with Practice, Regional and Federal Studies 31 (2021), pp. 50-72.

34 In his comparative study of federalism across the African continent, the author has observed a similar preference for uniformity and certainty in federal design. While formalisation and symmetry on paper make life easier for lawyers, bureaucrats, and international experts in the short run, when federal constitutions are cut-and-pasted from abroad and then superimposed on diverse societies, they rarely deliver on their promises of democracy and development in the long run. *Jan Erk*, Lessons from the Law and Politics of Federalism in Africa: Federalism Is Bigger Than Federation; Constitutions Are More Than Single Mega-Documents; the International Trumps the Domestic; and the Past Continues to Matter, World Comparative Law 56 (2023), pp. 633-654.

predictability. Yet all the preceding discussion highlights the inherent complexity, and even indeterminacy, of indigenous law. And such complications multiply when indigenous law coexists with other legal systems, be it Common Law, Civil Law, or Islamic Law. To add to the complexity, the laws of each constituent ethno-linguistic community (and even within sub-tribal branches of a single community) customary laws are likely to show differences. Legal pluralism is costly, complex, it does not lend itself to quick and immediate answers, and it thus does not come with much financial remuneration for those who practice law within the narrowly defined branches of law in which they received their professional qualifications. But such preference for legal uniformity is not something that only applies to practising lawyers.

For long, policy coordination, standardisation, harmonisation of laws, centralisation, were seen as paths to modernisation and development—not only by those practising law but also by those theorising about law and governance. Writing in 1965, MG Smith called this "the traditional preoccupation of Western sociologists with legal uniformity and centralised administration".[35] The fact that preference for uniformity is a policy choice was overlooked and instead it was conceptualised and presented as the only available path to progress—even while scholars of indigenous law and governance where warning that the position "that legal systems ought to be uniform and centralised" was indeed a value stance.[36] An approach epitomising such centralist preference for uniformity happened to be influential among academic and policy circles right at the time of African countries were becoming independent. It is alternatively labelled "Law and Modernisation", "Law and Development", or "Legal Unification" movements. Almost all African countries had started their new lives with "a plurality of legal systems within the bounds of the individual state".[37] But this would not last for long. Influenced by the prevailing modernisation and development theories of the time, following a very brief period of openness to the coexistence of different systems of law, most post-colonial constitutions throughout Africa rejected legal pluralism in favour of legal unification. Nation-building was the buzzword of the times, and there was no room for what came to be seen as dated and disappearing traditional cultures in this project. The influence of modernisation theories entrusting the central state with a developmental vanguard role further underpinned the rejection of legal pluralism.

Modernisation and development came to be associated with homogeneity and uniformity.[38] New post-colonial constitutions almost always represented modernist and nation-build-

35 *Michael G. Smith*, The Sociological Framework of Law, in: Hilda Kuper / Leo Kuper (eds.), African Law: Adaptation and Development, Berkeley 1965, p. 38.

36 *Thomas W. Bennett*, Application of Customary Law in Southern Africa: The Conflict of Personal Laws, Cape Town 1985, preface.

37 *Arthur Schiller*, Introduction, in: Thomas W. Hutchison (ed.), Africa and Law: Developing Legal Systems in African Commonwealth Nations, Madison / London 1968, p. vii.

38 One of the observers of the prevailing mindset of the time prefers the label 'law and development movement'. *Francis G. Snyder*, Law and Development in the Light of Dependency Theory, Law and Society Review 14 (1980), pp. 723-804.

ing aspirations and a principled rejection of legal pluralism. Traditional structures and customary laws were left out of the constitutional architecture of most of the newly independent African states. The move toward legal unification was often seen as the fast-track to modern development by the new generation of political leaders who came to power during decolonisation; it was an approach also supported by various international agencies of the time.[39] Letting go of legal uniformity and certainty will need the wide-ranging endorsement of the legal profession.

IV. Individual Human Rights vs. Collective Group Rights

A little earlier we had discussed the ambitious but ultimately unsuccessful post-Second World War attempts to identify, recognise, and apply the various homegrown systems of law and governance across the entire African continent. Many of the common reference points we see in constitutional reforms nowadays, such as individual human rights had not yet entered the repertoire of the legal profession but the pan-African restatement of African Law project (RALP had other encountered other challenges.[40] The Cold War brought in ideological polarisation to the project. There was little in common across the various partners to keep things on track. In contrast, the various different national initiatives of constitutional restructuring of the 1990s shared a number of characteristics—political democratisation, electoral reform, economic liberalisation, and the promotion of individual human rights. While all laudable goals, there was an underlying dynamic that seemed to hope that instant solutions were achievable through a rewrite of constitutions. There are uncanny echoes of the 1960s here when the social scientists and lawyers were advocates of quick top-down fixes. TW Bennett has been comparing the two time-periods and spots parallels between the promotion of human rights defining the 1990s and what he calls the "heady days" of "law and development" and "law and modernisation" movements defining the 1960s, as both believed that "customary law was primitive and backward and should be swept aside to make way for a brave new legal order imported from the West".[41]

The shared emphasis around individual human rights defining the 1990s, and clearly delineated and neatly articulated formal laws to protect these new aspirations, did not translate seamlessly into Africa as these aspirations met the messier complexity of legal pluralism defined by the coexistence of the various indigenous conceptualisations of law

39 *Martin Chanock*, Signposts or Tombstones? Reflections on recent works on the Anthropology of Law, Law in Context 1 (1983), p. 113.

40 The four challenges were whether one needed integrated or separate legal systems for the received and the homegrown; whether one should codify, record, or restate traditional laws; how one could reconcile the different legal/bureaucratic models associated with different colonial regimes; and lastly, how the law was to work outside the traditional territory of the community in question. *Jan Erk*, The Challenges of Formalising African Traditional Law: Comparative Lessons from the Restatement of African Law Project, African Journal of Legal Studies 17 (forthcoming 2025).

41 *Thomas W. Bennett*, T W, The Compatibility of African Customary Law and Human Rights, Acta Juridica 18 (1991), p. 32.

and governance. And there was one thing common across the two time-periods. Most of the legal profession and academia continued to see traditional authorities and customary law as illiberal and backward.[42] Particularly problematic was the collectivist inclinations inherent in traditional law and governance. Homegrown laws were seen to be "imbued with the principle of patriarchy".[43] Traditional structures, customary law, legal pluralism, and local variation of laws and policies were used as shorthand for reactionary politics and inefficiency. This is not to dismiss the legitimate concerns individuals and minorities (be it ethnic, religious, or sexual) who feel disenfranchised in indigenous communities. Most indigenous systems of law and governance are defined by their inclination to prioritise communal concerns and collective rights and obligations. But the opposite dynamic also exists; that is, most human rights legislation tends to prioritise the individual over the community. This difficult moral tension between the protection of individual human rights on the one hand and the constitutional recognition of collective group rights is something that cannot be wished away.

V. Empowering the Homegrown vs. Justifying the Illiberal

In this final sub-heading of section C, we juxtapose two ends to the discussion on the constitutional recognition of indigenous law and governance. And it is perhaps the hardest tension to resolve in a logically consistent and philosophically principled way. Like our conclusion to the previous line of discussion above, what we can best hope is an awareness of such an underlying tension so that both competing dynamics are acknowledged as we move forward with the constitutional recognition of indigenous forms of law and governance.

What we mean by the underlying tension is ways to empower the homegrown without writing a blank cheque for all things traditional. As we did in all the preceding sub-headings, we contrast two opposite positions. Full-scale recognition of indigenous constitutionalism comes with the risk of moral relativism, that is, the unintentional justification of the illiberal, reactionary, and patriarchal. This might be an unintended consequence, but it is a real possibility and therefore could not be portrayed as unanticipated.[44] Good intentions alone do not justify policy choices so both sides of the discussion deserve legitimate hearing. This is not only something that applies to indigenous constitutionalism in Africa.

42 Others—including the author—believe that traditional authorities could serve democratic stability through their deep roots in the society and their subsequent power to hold the centre to account. He develops this argument in the context of the traditional kingdoms of Ghana's Asante, Uganda's Buganda, and Zambia's Lozi. *Jan Erk*, Traditional Kingdoms and Modern Constitutions: Parochialism, Patriarchy and Despotism vs. Indigenous Safeguards against Absolutism, in: Tom Ginsburg / Rosalind Dixon / Adem Abebe (eds.), Comparative Constitutional Law in Africa, Cheltenham 2022, pp. 329-360.

43 *Bennett*, note 41, p. 23.

44 *Robert K. Merton*, Unanticipated Consequences of Purposive Social Action, American Sociological Review 1 (1936).

It has been a concern in other parts of the world going through similarly difficult processes of recognition. Canada is a prime example. The country's leading champions of indigenous legal traditions do not shy away from the difficult questions, as Val Napoleon and Hadley Friedland put it: "how do we [access and articulate indigenous laws] without romanticising the past or avoiding the tough issues of violence and internal oppressions on the ground."[45]

D. Conclusion

Whatever the precise nature of the incoming global order, we can safely predict that it will be one where the capacity, willingness and commitment of the Western-led international community to initiate and sustain constitutional reforms in the Developing World / Global South will be much more limited than what we have become accustomed to. Despite the entry of new international players, no return to something akin to the Western-led global community of collective action appears likely. But conflicts within and across states will continue of course. With the international taps mostly turned off, workable constitutional solutions will now have to run on as little as possible. What better way to address conflict than through bringing in homegrown traditions of law and governance, which have sustained themselves over periods of neglect and manipulation by the modern state.

The changing global order also presents an opportunity for non-Western ideas on constitutions and constitutionalism to increase their presence and pull. But there is no one single path to recognising and empowering homegrown constitutionalism in Africa. Political will and constitutional expertise have to meet shortcomings in capacity and capability; structural bottlenecks in personnel, infrastructure, funding, knowledge, or training will complicate things. In many ways, the challenges and opportunities are inseparable from each other. And most importantly, none of these are technical matters of policy but are political choices that contain conflicting moral and philosophical considerations. One is the protection of the human rights of dissenters or minorities within traditional systems of law and governance of the continent which tend to put collective interest above that of the individual. The other one is the risk of inadvertently legitimising the archaic and illiberal leftovers in traditional law and governance. None of these are technical legal matters. Different paths to recognition and empowerment come with different pluses and minuses for all concerned. As academics, we can best hope to identify and expose all the promises, pitfalls, complications, and consequences associated with the choices available to decision-makers. They are the ones accountable to the people for whom the decisions are made. We just try to map out the twists and turns on the road ahead.

45 *Val Napoleon / Hadley Friedland*, And Inside Job: Engaging with Indigenous Legal Traditions through Stories, McGill Law Journal 61 (2016), p. 733.