

**INSTITUTIONAL ANALYSIS AND THE ASSESSMENT
OF DEMOCRATIC GOVERNANCE IN AFRICA**

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ACRONYMS

ADEMA	Alliance pour la Démocratie au Mali
ARD	Associates in Rural Development, Inc.
CCAF	Constitutional Administrative and Financial Court
CCM	Chama Cha Mapinduzi
CNID	Comité National d'Initiative Démocratique
CNJ	National Council of Justice
FIDA	International Federation of Women Lawyers
GBA	Ghana Bar Association
ISG	General Inspector of Justice
MNSD	Mouvement National Société de Développement
MP	Members of Parliament
NCHRAJ	National Commission on Human Rights and Administrative Justice
NDC	National Democratic Congress
NGO	nongovernmental organization
NPP	New Patriotic Party
PCP	People's Convention Party
PNDC	Provisional National Defence Council
UR-SDA	Union Soudanaise -- Rassemblement Démocratique Africain
USAID	United States Agency for International Development

CHAPTER 1

PURPOSE, BACKGROUND AND METHODOLOGY

Purpose

The purpose of this study is to illustrate the utility of institutional analysis in the assessment of democratic governance in Africa.

Background

For the United States Agency for International Development (USAID), democratic political development is not only a means to achieving "sustainable development," but it is an end in itself. Toward this end, the Agency policy paper, Democracy and Governance (USAID 1991), emphasizes that Agency strategies must promote democratic political development that conforms to the general principles of democratic governance, while remaining sensitive to the historical realities of individual countries (USAID 1991:13-14). Devising democratic political development strategies that incorporate general democratic principles and are also country-specific requires a systematic conceptual framework that both identifies what those general principles are and specifies how they are to be operationalized in varied historical and cultural contexts. Institutional analysis provides this conceptual framework.

Second, the valuable experience accumulated by the Bureau for Africa over the past three years in conducting its democracy and governance programs in African countries also suggests a need for a systematic conceptual framework. A series of strategic assessments conducted in several countries, which have undergone democratic transitions, to ascertain opportunities and constraints in strengthening democratic political development suggest that both the process of democratic transition and the progress toward democratic consolidation are affected by different combinations of country-specific factors, engendering varied rates and patterns of democratic political development. In this highly dynamic context, strategic intervention to strengthen democratic consolidation becomes ad hoc and reactive in the absence of a uniform set of general principles that can be used to identify empirically verifiable processes and benchmarks for measuring democratic development. A systematic methodology is, therefore, needed for both cross-sectional comparison of countries undergoing democratic development at a single point in time and longitudinal analysis that traces the contraction and expansion of the democratization process in a single country or a group of countries over time. Cross-sectional comparison should locate, in terms of general democratic principles, countries at different stages in the democratic development process (e.g., Ghana has progressed further toward democratic consolidation than Zambia). Longitudinal analysis should identify, in terms of general democratic principles, reversals and progress that inevitably characterize democratic political development. Institutional analysis provides this methodology.

Third, USAID policy not only places democratic development at the center of its development assistance programs, but also calls for its integration into all sectoral development assistance programs (USAID 1991:10-11). This twin emphasis derives from the valid assumption that "political

development is essential to sustained economic and social development" (USAID 1991:5), and correctly recognizes that the organization and conduct of public affairs in the wider polity critically determine the effectiveness of specific policy sectors. Devising development assistance strategies to strengthen the reciprocal relationship between macropolitical structures and processes and sectoral structures and processes requires a conception of the principles and dynamics that constitute, animate, and sustain this relationship. Institutional analysis provides this conception.

Methodology

To illustrate the utility of institutional analysis as an analytical tool, the study draws on democratic governance country assessment reports in five countries: Ghana, Mali, Niger, Madagascar, and Tanzania. The bulk of the discussion in this study draws on the reports of the first four countries, all of which have undergone successful democratic transitions. Tanzania is still in the early stages of transition, with transitional elections scheduled for early 1995. The study will refer to the Tanzania report as necessary.

CHAPTER 2

THE PRINCIPLES OF INSTITUTIONAL ANALYSIS

This chapter has three objectives: (a) to spell out the central proposition and logic of institutional analysis; (b) to apply the insight of institutional analysis to examine the process of democratic transitions, in particular, to uncover the sources of uncertainties inherent in this process; and, (c) to apply the insight of institutional analysis to explore the ways in which political actors in democratic transitions address these uncertainties in crafting sets of rules to establish and consolidate democratic governance.

What is Institutional Analysis?

The central proposition of institutional analysis is that institutions are sets of rules governing human behavior. The logic of this proposition derives from three interrelated processes intrinsic to all human societies. The first process concerns how and why rational actors create institutions to structure their strategic relationships. The second process concerns the influence of the prevailing stock of physical and material resources on the choice of institutions devised by rational actors, and in particular, how changes in these resources impact on institutional change. The third process concerns the influence of institutions as cultural endowments in shaping the commitment of rational actors to them and in constraining their choice of new institutions.

Institutional analysis begins with the proposition that human societies are composed of individuals who are rational actors in the sense that they choose goals, strategies, and behavior in the course of their daily existence from a range of alternative possibilities. This choice, however, is limited by three types of constraints: (a) the limited information individual actors possess about alternative possibilities and about the potential costs and benefits of their choice (psychological constraint); (b) the scarcity of available material resources (resource constraint); and, (c) the network of associated relationships that join all individuals in ongoing patterns of strategic interactions in which the choice of one actor over alternative possibilities is limited by the choice of all actors (social constraints). The combination of these constraints increases the transaction costs of satisfying the individual interests of all actors, enhancing the potential for conflict in human societies, as all rational actors will choose strategies that are cost-effective with respect to their individual interests but not with respect to the interests of other actors or those of the society as a whole. Given these constraints and their potential for engendering continued conflict, rational actors devise institutions to limit the unfettered choice of each actor, to reduce transactions costs, and to stabilize their mutual expectations about future benefits. Institutions are, therefore, the primary means of creating and sustaining order in human societies.

What are institutions and how do they create and sustain order in human societies? Institutions are sets of formal and informal rules or codes of conduct that engender certain "action tendencies" (dominant patterns of behavior) in a society. They structure the strategic relationships

of rational actors and produce order in human societies in three related ways. First, rules define social practices by creating the myriad of social, economic and political situations (family, markets, elections) in which people join to realize their individual and collective interests. Second, rules assign roles to participants in these practices in terms of whom they are expected to interact with (parent-offspring, seller-buyer, voter-candidate). Third, rules guide the interactions among occupants of the roles by prescribing the choices they must, must not, and may make in each social practice. Institutions, as sets of rules, therefore, create and sustain order in human societies by investing rights and obligations on individuals in terms of the roles they occupy in a particular rule-defined social practice. These rights and obligations establish the structure of incentives for individuals to choose their individual goals, strategies and behavior according to the criteria prescribed by the rules, producing the distinct action tendencies in a society.

The traditional example of how an institution structures the strategic relationship of rational actors is the institution of property rights to land. Property rights to land can be organized by different sets of rules, creating different institutions of property rights. In most African countries, for example, the institution of communal property rights invests the community with the right of ownership, and individuals acquire the right to use the land, but not the right to alienate it, in terms of their membership in the community. Order is maintained in the community when its members understand and accept this allocation of rights and responsibilities and choose their goals, strategies and behavior according to them. The institution of private property rights, on the other hand, creates a different set of rights and obligations with respect to both ownership and use of land, investing these rights and obligations, including the right to exclude others, on individuals.

The second process that underpins the central proposition of institutional analysis concerns the importance of physical and material resources in constraining the choice of institutions in a society. Rational actors create rules to structure their strategic relationship in the context of prevailing material conditions, the relatively fixed stock of land, labor and capital that individuals are able to transform into useable goods and services. Because these resource endowments influence the range of economic activities and attendant patterns of social relations in which individuals can engage, they constrain the choice of institutions and shape the nature of those institutions in a society. Thus, institutions in Western industrial economies with high degrees of functional specialization and social structural differentiation result in greater variety and complexity than institutions in peasant economies with low degrees of functional specialization and social structural differentiation. Moreover, changes in existing resource endowments, usually engendered by technological developments, expand both the availability of transformable resources and the means of doing so, thereby engendering political conflicts among individuals committed to the old institutions and those seeking to devise new ones. These conflicts lead incrementally to the creation of new institutions.

In Africa, the creation of markets and the introduction of wage labor under colonial rule transformed traditional institutions such as lineage and kinship, around which rights to land and labor were previously organized, from sources of relative social stability into means of accumulation and class formation, and hence into sources of social conflict (Ensminger 1993; Bates 1989). After independence, the expansion of the state in the economy and the construction of neopatrimonial

regimes created a distinct set of rules for organizing state-society relations that provided institutional incentives for political actors to create hierarchical patron-client networks to secure access to progressively diminishing state resources. And more recently, impoverished treasuries and economic collapse forced African state actors to liberalize their economies, creating new incentive structures that provide new opportunities but also threaten the very interests and patterns of behavior that were fostered and protected by the rules of the now discredited neopatrimonial regimes.

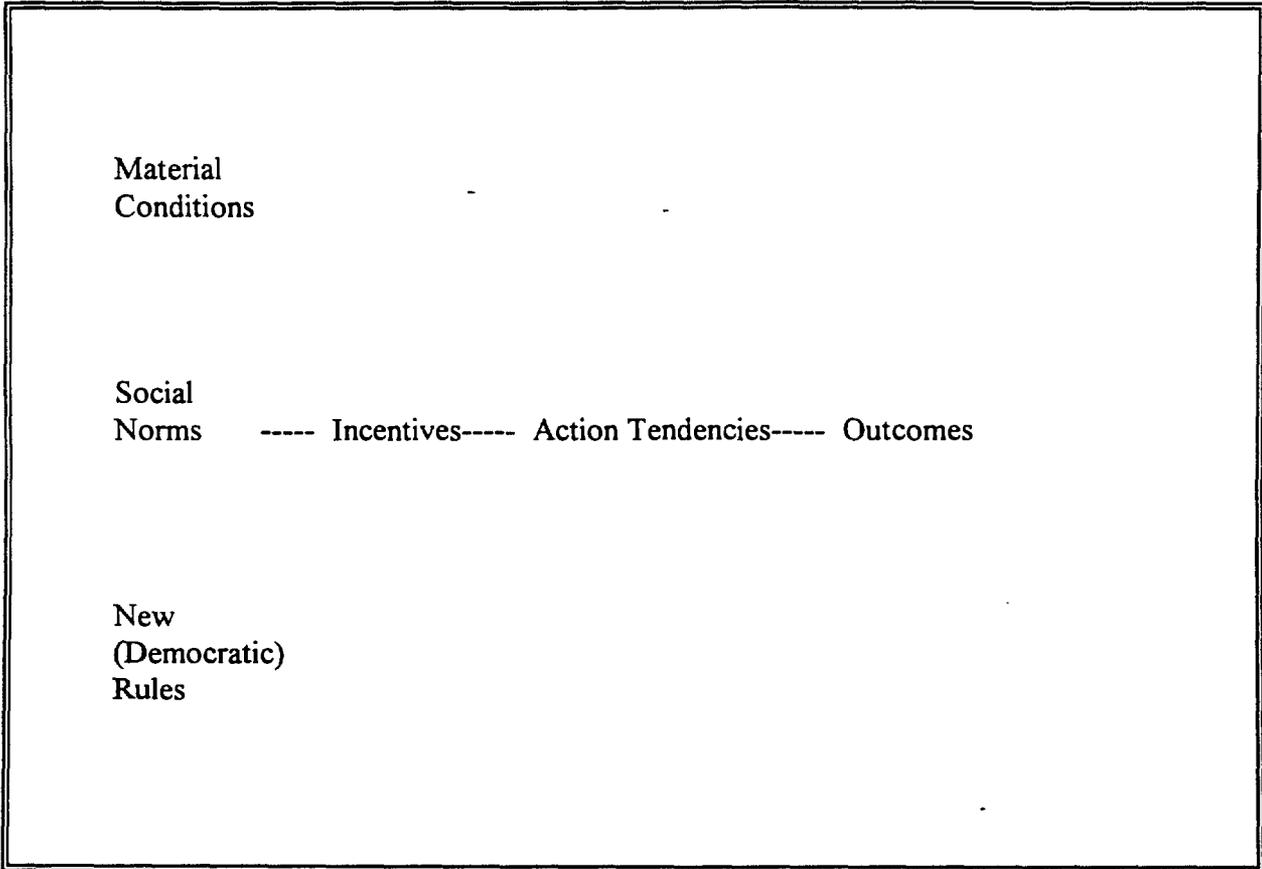
The third process that animates the central proposition of institutional analysis concerns the role of institutions as cultural endowments in both influencing the commitment of rational actors to them and in constraining the development of new institutions. Institutional rules, even as they structure the current interactions of social actors, are ultimately significant in political life as guides to future courses of action. In particular, they stabilize the mutual expectations of rational political actors by linking their current choices to future benefits. The stability of institutional rules thus depends on the actors' shared understanding of them. This shared understanding is reinforced to the extent that prior choices and calculations about future benefits made according to these rules produce the expected benefits in the future. Over time, institutional rules become integral components of a society's cultural endowments, the social capital, embodying norms of trust and reciprocity in the strategic relationships of individual actors. Deeply institutionalized rules, therefore, constitute the stock of social norms that shape the dominant patterns of behavior in a society.

When new rules are introduced in this context, they create new opportunities and incentives for political actors, but they also create uncertainty with respect to the benefits to be derived from the new rules relative to the known benefits derived from customary behavior shaped by established social norms. The effectiveness of new rules, as well as the prospects of their institutionalization, thus depend on the extent to which they provide individuals incentives and benefits that increase the cost of behavior guided by prevailing social norms. It is precisely this conflict between the new democratic rules, on the one hand, and the social norms of defunct autocratic regimes and indigenous cultural traditions, on the other, that animates the politics of institutional choice in democratic transitions and shapes the progress of democratic consolidation in contemporary Africa.

In sum, institutional analysis explains political outcomes, that is, the distribution of burdens and benefits among members of a society, as the result of choices made by individual actors engaged in rule-governed relationships. The rules prescribe the rights and obligations of all actors in terms of which current choices they make and their expected future benefits, thereby engendering distinct action tendencies in a society. Because these rules are crafted by rational actors in given historical and material conditions, changes in these conditions create opportunities for crafting new rules, but they also generate conflicts over the configuration of the new rules as well as over the prospective benefits to be derived from them. Moreover, since rules, once created, become part of a society's cultural endowments, embodying a set of shared social norms, they further constrain the establishment of new rules, as rational actors calculate the trade-off between the uncertain future benefits of the new rules and the known benefits of playing by established rules. This explanation is diagrammatically represented in Figure 1.

Figure 1

**A Conceptual Framework for Analyzing the
Institutional Dynamics of Democratic Governance in Africa**



Institutions and Democratic Transitions

Democratic transitions are episodes of major institutional transformation. Successful exits from autocracy and progress toward democratic consolidation do not simply entail a change in the rules of the game. They require a fundamental reconfiguration of the rules that create an entirely new game. The successful establishment of democracy as a new game means that the incentives provided by democratic rules produce action tendencies that are fundamentally different from those prevailing under alternative rules.

Democratic transitions are also moments of considerable ambiguity. There are two sources of this ambiguity. On the one hand, as moments of plasticity created by the collapse of autocratic

rules, democratic transitions allow political actors considerable autonomy in choosing new institutions. Institutional choice in democratic transitions is a choice among different sets of rules, rather than decisions within a fixed set of rules that are characteristic of normal or routine politics. On the other hand, the autonomy of political actors in selecting from alternative sets of rules, while considerable, is constrained by the legacy of the previous rules, especially the balance of political power between state and civil society actors as well as among civil society actors, and, more importantly, by the continuing influence of the working rules that form part of the cultural endowments of the society. The combined influence of these two sources of ambiguity shapes both the choice of rules political actors are likely to make and the form of institutional arrangements of democratic governance that is likely to evolve.

In contemporary Africa, the degree of plasticity and the relative autonomy of political actors in choosing new institutions of democratic governance vary with the degree of institutional decay of the previous regimes and its relative autonomy from social forces. In Ghana, the speed and, for the most part, the terms of democratic transition were managed successfully by the relative autonomy of the Provisional National Defence Council (PNDC) government with pressures from the fragmented opposition groups. Opposition groups were successful in voicing their preferences about the new institutions, especially competitive democracy, in the series of nationwide consultations organized by the PNDC government, indicating the difficulty of totally managing democratic transitions once political liberalization is introduced. But the fora in which opposition preferences were expressed as well as the terms of the debate were pretty much controlled by the autonomous PNDC government. In particular opposition groups were virtually excluded from the wholly appointed Consultative Assembly which approved the new Constitution.

A similar process of managed transition seems to be evolving in Tanzania, where Chama Cha Mapinduzi (CCM), the ruling party, controls the legislature. As a result, unlike the one-shot lifting of all restrictions on political activity in Ghana, political liberalization in Tanzania is being introduced incrementally, with considerable back-sliding, as the fragmented opposition groups are unable to launch a systematic campaign to limit the authoritarian tendencies of the CCM-government. Also, the choice of democratic institutions, for example, single-member constituencies instead of a proportional representational system, are being made incrementally through amendments to the existing constitution, instead of through a representative Constituent Assembly.

The transitions in Mali, Madagascar, and Niger reflected the pattern elsewhere in Francophone Africa, in which the old regimes collapsed in the face of widespread popular protest, and were replaced with transitional governments. In all three countries, new democratic institutions were negotiated in sovereign National Conferences in which the major political actors were, for the most part, represented. The National Conference in Niger reflected the systematic politics of exclusion. Students and unions, which led the popular protest that overthrew the Second Republic and paved the way for the National Conference, were heavily represented in that National Conference, while women, minorities, and the "rural world," thought to be too strongly associated with the previous regime, were systematically excluded. Interestingly, the Nigerien National

Conference, in which representation was based on corporate groupings, adopted a unitary voting rule, which effectively limited the power of the disproportionately represented students and unions.

In all five countries, also, the social norms inherited from the previous autocratic regimes as well as those embedded in indigenous cultural traditions continue to influence the operation of the new democratic rules. The influence of these social norms is evident in both the practices and orientations of political actors in the new era of competitive democracy. In Niger, for example, the sovereign National Conference was itself represented on the basis of corporate groupings. The influence of this corporatist form of organization, which was introduced by previous Nigerien regimes, is evident in the attempt of leaders of new civil society groups to limit branch autonomy in favor of structuring all associations as "mass movements" heavily controlled by top leadership. And the former ruling party, Mouvement National pour la Societé de Developpement (MNSD), continues to support the previous regimes' corporatist organization of the Societe de Development. And in Ghana, also, former PNDC activists, now serving as National Democratic Congress (NDC) members of Parliament, continue to support the government's policy of organizing small traders in corporatist-type interest groups, consistent with practices of the pre-transition PNDC government. While it is certainly unrealistic to expect such practices and orientations to change so early in the democratic transition, the logic of institutional analysis suggests that the working rules of previous regimes will not only continue to influence the operation of the new democratic rules, but that the democratic rules which are likely to be consolidated will also reflect this influence.

Most importantly, the influence of social norms embedded in indigenous cultural traditions also continues to influence the practices and shape the orientations of political actors in the era of competitive democracy. The Niger Report, for example, lists the following nine "historic socio-communitarian values" of Nigerien political culture (pp. 16-18): 1) Hierarchical authority and unequal social relationships; 2) The importance of seniority and the value of age; 3) Competition for power, but competition was mainly personal; 4) Patrimonial and corporatist political mobilization; 5) Historically, leadership was never defined principally in material terms; 6) Power was never strictly secular; 7) Marginal role of women in authority structures; 8) Power was best exercised paradoxically: win but reconcile, victory is fleeting; and, 9) Ethnicity was a powerful but never an all encompassing identity. These nine values can be summarized as communitarian values, which emphasize the importance of community or group over individual identity as the organizing principle of social, economic and political associations. With appropriate modifications, they also accurately depict the working rules embedded as cultural endowments in virtually every African country. And in Niger, as in every African country, the spread of market economies and the attendant pattern of social structural differentiation (e.g. the rise of the wealthy merchant class), as well as the spread of liberal democratic values, have served to modify these communitarian values. Even so, communitarian values shape the action tendencies in much of contemporary Africa.

With respect to the prospect of democratic consolidation in Africa, the central questions seem to be: (a) to what extent are communitarian values antithetical to the individualism of liberal democracy? and (b) can the two sets of values be reconciled? These two questions usually implicitly, but often explicitly, inform much of the current scholarly literature and policy analysis of the problem

of democratic consolidation in Africa. Based on the current unfinished debate between communitarianism and individualism, and attempts to reconcile their ostensibly conflicting positions, in contemporary political theory, as well as in the practices of American and Western European democracies, especially with respect to the controversy over multiculturalism and group rights, the two questions cannot be answered with any degree of certainty.¹ What is certain is that communitarian values will continue to weigh heavily on the behavior and orientations of virtually all political actors in African democracies.

From the perspective of institutional analysis, however, the two questions are somewhat misconstrued. They are misconstrued because they assume that values that inform attitudes and behavior are fixed and stable. But values acquire meaning for individuals only through their actions taken in relationship to others. Values, in this sense, connect individuals to each other in the context of their relationships and are validated by those relationships. Value formation is an intersubjective process of organizing one's social life in the unfolding future and in relationship to social opportunities attached to the values that form the basis of association. When these values become the basis of continually realizing one's goals, they become socially validated. And since social validation as a source of accrued confidence in one's values derives from one's interaction with others with the same values, it infuses those values with normative meaning and symbolic significance.

Values are, therefore, constitutive of institutions that structure the strategic relationship of individual actors. They constitute institutions as social capital embodying norms of trust and reciprocity and criteria of accountability and obligations. The communitarian values of African institutions compel political actors to secure public resources for their communities, and they also compel them to expend their personal resources in social investments that sustain their social capital in their communities. This linkage not only validates the communitarian values, but, because these values constitute the institutions of kinship and lineage around which access to land and labor is organized, they provide opportunities for political actors to diversify their investment portfolios and

¹For the views of proponents of each position, see Avineri and de-Shalit (1992). For an interpretation of American politics in terms of these debates, see Spinner (1994). On the possible reconciliation of the two positions, written from a liberal perspective, see Kymlicka (1989). For the communitarian argument, see Walzer (1983). For the liberal defense, see Holmes (1993). For a useful, but controversial, discussion of the principles of institutional design for accommodating communitarian and liberal values, see Elkin and Soltan (1993). For an excellent attempt to do the same from the perspective of normative philosophy, see Gould (1983).

thereby secure access to land and labor in economic hard times (Bates 1989, 1990; Berry 1985, 1993). It is precisely this logic that leads National Assembly members in Mali and Members of Parliament (MP) in Ghana to define constituency-servicing as an integral component of their role as elected representatives.²

With respect to the importance of institutional analysis in clarifying the problem of democratic consolidation in Africa, the analytical issue is not that communitarian values potentially undermine the values of liberal democracy. The analytical issue, instead, is how the reciprocal relationship between the two sets of values is incorporated in the institutional design of democratic governance and what institutional mechanisms this design provides for accommodating the potential conflicts the relationship is likely to produce. The relationship between communitarianism and individualism is best characterized as one of structured tension. This tension, of course, is not unique to Africa, but underlies the problem of constituting and sustaining political order in all human societies. All modern democracies contain both sets of values; the structured tension is manifested in the myriad of social, economic and political associations that are organized by correspondingly diverse organizing principles, including communitarian principles, within the broader institutional framework of democratic governance. The central analytical issue, then, concerns the institutional design of democratic governance, especially with respect to how such design can both permit individuals to choose different ways to organize their social, economic and political relationships and accommodate the conflicts that are likely to emerge from these differences.

The analytical issue concerning the institutional design of democratic governance involves both normative and practical issues that have traditionally been articulated in political theory as the constitutive elements of democracy.³ The normative issue is the equal freedom of individuals to organize their social, economic and political relationships in diverse ways. Indeed, denying

²In this respect, African political actors in the era of democracy behave no differently than political actors in such established democracies as India and the United States. In India, patron-client relationships have been quite effective in securing public resources for local communities in return for block-voting for the local representatives and in holding them accountable for potential neglect of constituency interests defined as the interests of the community. In the United States, patron-client relationships were, and continue to be, critical in the effectiveness of urban political machines in mobilizing votes in exchange for public sector jobs and resources. And in local-level politics, as well as in election campaigns for state and congressional offices, candidates place less emphasis on party affiliations than on their personal connections to voters and to the community. And, more recently, U.S. Representatives and Senators are increasingly using the term clients to describe the powerful interest groups who lobby them for preferential treatment. Both the behavior of these groups and the vocabulary used by elected representatives to describe their relationship with them reflect the incentives (disincentives?) of American political institutions.

³Dahl (1989) is the most systemic current articulation of these normative and practical issues.

individuals this freedom violates the very constitutive principle that distinguishes democracy as a radically different system of governance from autocracy. This principle leads to the practical issue of institutional provision of rules that both create opportunities to exercise individual freedom in selecting the form of social, economic and political association and accommodate the conflicts that will inevitably attend the exercise of this freedom. The provision of rules for the exercise of individual freedom in selecting the principles of association involves the incorporation of institutional pluralism into the institutional design of democratic governance. Appropriately designed institutional arrangements of democratic governance that systematically incorporate the principle of institutional pluralism permit individuals discretion over the choice of different associative principles, including communitarianism, at different levels of the polity. But institutional pluralism necessarily leads to conflict, not only among competing associative principles but also between these principles and the broader institutional framework of democratic governance enshrined in the Constitution. Provision of rules for managing these conflicts is, therefore, the second practical issue to be addressed in the institutional design of democratic governance. In appropriately designed democratic institutions, these rules create multiple opportunities for contestation and conflict-resolution. In particular, democracies are distinguished from autocracies by their provision of these opportunities and, especially, by their provision of both constitutional guarantees of these opportunities and of institutional mechanisms for enforcing these guarantees, for example, through rules guaranteeing an independent judiciary as well as citizens' access to it.

The current problem of democratic consolidation in Africa lies not so much in the alleged opposition of communitarian and individualist values, as in the weakness of new democratic rules in resolving potential conflicts between them. New rules take time to become effective, as social actors begin to learn to use them, but both learning and use of new rules assume knowledge, understanding and access to them. It is precisely in this context that recommendations for improving the institutional framework of rule of law in Africa, and especially the internal structures and procedures of the courts and the justice system, as well as citizens' access to them, is well-founded. It is also in this context that recommendations for increased civic education programs for disseminating information on human rights guaranteed in the new constitutions among the largely illiterate population in African countries are also well conceived. The purpose of these programs, however, is not to create individualists, but to create awareness that alternatives to communitarian principles of association exist and to provide opportunities for people to use the available rules to secure the enforcement of basic human rights, especially if such rights are threatened by communitarian values and practices.

To the extent that communitarianism does not violate basic human rights guaranteed in the Constitution, there is no a priori reason to exclude it as an organizing principle of association and as a basis for holding elected officials accountable. Indeed, a strong case can be made for the greater efficiency of communitarian principles on both counts in contemporary Africa. But these principles also have the potential of undermining basic individual rights traditionally associated with liberal democracy. This is the source of the structured tension between communitarianism and individualism noted above. There are two ways to deal with this tension. One is to eliminate it altogether by attempting to create homogenized individuals, a contradiction in terms that social planners never seem

to appreciate. The other, more difficult, way is to create a multiplicity of rules that both guarantee the freedom of individuals to organize their divergent social, economic and political relationships according to their different value preferences and provide mechanisms for resolving the inevitable conflicts that flow from the exercise of this freedom. The first way is the way of autocrats. The second is what democratic governance is all about.

Toward Democratic Governance: Democratic Disciplines, Social Norms, and Institutional Choice

Governance is the management of public affairs, the process by which a society makes decisions about the production and distribution of scarce resources. It involves the exercise of political authority, the institutional capability of one set of actors to make, invoke, apply, and enforce rules that affects the interests of other actors. This institutional distribution of differentiated authority creates fundamental asymmetries between those possessing such authority and those subject to it. Orderly governance, democratic or otherwise, is thus secured through rule-ordered interdependent relationships of organized inequalities (Oakerson 1994; V. Ostrom 1992).

Because organized inequalities contain the potential for tyranny, democratic governance seeks to ensure transparency, accountability, and responsiveness in the exercise of political authority in public affairs. Transparency, accountability, and responsiveness in democratic governance are secured through six related processes that discipline the exercise of political authority in public affairs. These six processes can be conceptualized as "democratic disciplines." In democratic theory, these six processes are also identified with a distinct "type of democracy." These six processes or democratic disciplines are: (1) Constitutionalism (constitutional democracy); (2) An Open Public Realm (liberal democracy); (3) Free and Competitive Elections (electoral democracy); (4) Free and Open Legislative Deliberation (deliberative democracy); (5) Rule of Law (juridical democracy); and, (6) Multiple Levels of Governance (federal democracy).⁴

Constitutionalism is the principle that political authority is to be exercised by both citizens and public officials according to broadly-agreed rules enunciated in a constitution. A constitution embodies the mutual agreements people make when they agree to join in a political community. It spells out the division of authority among different branches of government and between the government and the people, assigning to each a set of rights and obligations as the basis of their actions and relationships. To be effective, a constitution must be treated as fundamental law, the authority for all ordinary laws. It can, therefore, be modified by special procedures requiring more than a simple majority.

An Open Public Realm extends legislative deliberation to the citizens. It also provides opportunities for them to freely associate with each other for pursuing both private and public

⁴These democratic disciplines are elaborated in Oakerson (1994). The following descriptions of these disciplines are, therefore, brief and draw on Oakerson's very useful elaboration of them.

interests. An open public realm is a key source of ensuring transparency in the exercise of political authority.

Free and Competitive Elections are the primary means of imposing popular limits on the exercise of political authority in public affairs. In addition, referendum, recall, and popular initiative are the other means by which ordinary citizens can limit the governmental power.

Free and Open Legislative Deliberation ensure that elected representatives can freely deliberate on policy issues. The legislative assembly is the primary arena in which such deliberation takes place. It also creates opportunities for elected representatives to oversee executive decisions, and hold it accountable.

Rule of Law ensures that disputes among citizens and between citizens and the state are resolved impartially by an independent judiciary. Judicial independence derives from the principle that no one is considered to be a fit judge in her own cause. Impartiality of judicial procedures is ensured by the principle of due process. For rule of law to be effective in disciplining the exercise of political authority, judges must know the law, citizens must have standing to invoke the law and must have adequate access to the courts, and the executive must dependably implement the courts' decisions and use its coercive powers according to prescribed procedures.

Decentralization limits the exercise of political authority by central governing bodies by transferring the exercise of political authority to local bodies that are closer to the people.

These six processes (or democratic disciplines) comprise the principles that inform the institutional architecture of a democratic political order. They indicate that democracy is a multidimensional process of governance, thus offering a useful way to measure the extent of democratization in a society at a particular point in time as well as progress of a society toward democratic consolidation over time. Most democratic transitions, for instance, are preceded by the establishment of an open public realm, which is a cost-effective way for autocrats to accommodate demands for political liberalization, since it requires only the lifting of restrictions on political activity. But as African and other autocratic rulers have learned recently, political liberalization only reinforces the demands for further democratization, that is, for the introduction of the other processes.

Both the extent of democratization (i.e. the degree to which each of the six democratic disciplines are introduced) and the rate of progress of democratic consolidation (i.e. the degree to which these processes become the dominant patterns of behavior) depend on the institutions political actors choose during democratic transitions to set up the democratic disciplines. The six democratic processes, in other words, do not emerge inevitably with the collapse of the old regime. Nor do they evolve automatically in the wake of political liberalization. Nor, when introduced, do they function reflexively in disciplining the exercise of political authority. The six democratic processes are consciously established through institutional arrangements negotiated by contending political actors during democratic transitions. Their effectiveness in disciplining the exercise of political authority

in public affairs and thereby in consolidating democratic governance is, thus, critically affected by the choice of these arrangements.

In principle, these institutional arrangements must be "incentive compatible," that is, they must embody rules that create incentives for all actors to exercise political authority in ways that are consistent with the principles embodied in the democratic disciplines. But, reflecting the process of institutional choice in recent democratic transitions elsewhere, the choice of institutional arrangements of democratic disciplines in Africa is the direct result of the strategic calculations of political actors about their current power relationships and about the future benefits they expect to derive from these arrangements. But these calculations and the choices they produce are not made in an historical or institutional vacuum. History plays a role, but only by defining the context of institutional choice, not determining it. Thus, francophone African countries have usually modeled their new Constitutions after the 1958 French Constitution, and Anglophone countries have usually relied on British and American models for theirs. Yet, the specific constitutional provisions in both sets of countries reflect adaptations of the original models in light of the strategic choices negotiated by political actors in the constitution-making process. Thus, in Mali, constitution-makers were concerned with the parliamentary instability of the Fifth French Republic under the 1958 Constitution, and opted for the stability of winner-take-all single-member districts over the instability of a proportional representation system for National Assembly elections, but selected the proportional representation system for local elections to accommodate the smaller regionally- and locally-oriented political parties. And in Ghana, differences among political actors over the choice of presidential or parliamentary form of government produced a mixed presidential-parliamentary system. Finally, in Niger, the systematic exclusion of women, minorities, and rural groups from the National Conference reflect their relative political weakness in that country.

Political actors' strategic calculations of their current power relationships and of the future benefits they expect to derive from the new democratic rules are also influenced by the social norms of the defunct autocratic system and of the more deeply embedded indigenous cultural traditions. The influence of these social norms enter into the strategic calculations of political actors by defining the goals these actors seek to pursue as well as the strategies they employ to pursue them. Pre-transition social norms, in other words, set the parameters for the choice of new democratic rules. In democratic transitions, therefore, not only do all political actors' orientations and practices reflect the influence of pre-transition social norms, but all political actors are also constrained to pursue the goals and strategies defined by these norms, even as they negotiate and establish new democratic rules to structure their strategic relationships and govern the pursuit of their individual and collective interests in the future.⁵

⁵It should be stressed here that the new democratic rules negotiated during democratic transitions are always prescriptions about future choices, that is, the rights and obligations of the government and the governed and the terms of state-society relations prescribed by the new rules become operational only after the transition to democratic governance is completed. This is precisely why democratic transitions are moments of great uncertainty and why political actors

The new rules that institutionalize the democratic disciplines, therefore, neither replace the pre-transition social norms nor remove their influence entirely. Their juxtaposition with the new democratic rules creates different incentives that are often, but not always, incompatible. This juxtaposition and the conflicting incentives they offer political actors compromise both the incentive compatibility of new democratic rules and the ideal prescriptions of how the democratic disciplines ought to work in practice. The result in contemporary Africa is the conflicting interpretations of the new democratic rules by different actors and the ambiguities in the behavior of political actors in Africa's new democracies.

Conclusion

USAID's objective is to promote democratic political development that conforms to the general principles of democratic governance, while remaining sensitive to the historical and cultural realities of individual countries (USAID 1991:13-14). Devising democratic political development strategies that incorporate general democratic principles and are also country-specific requires a systematic conceptual framework that both identifies what those general principles are and specifies how they are operationalized in different historical and cultural contexts. This conceptual framework is elaborated in the preceding sections of this chapter.

This framework emphasizes the relationship of two components: (a) the democratic disciplines that identify the general principles of democratic governance; and (b) the institutions (sets of rules) by which these principles are translated into practice. It suggests that, in theory, the democratic disciplines will produce disciplined democratic governance to the extent that the institutions through which they are established create incentives for political actors to choose their behavior in ways consistent with the principles embodied in them. But these institutions do not evolve inevitably from a set of axiomatic social structural conditions. Nor do they emanate reflexively from the demonstrative effects of democratic transitions elsewhere. They are products of human crafting, influenced by the history and culture of individual countries, and, more significantly, by the strategic calculations made by key political actors with the comparative advantage of alternative institutional arrangements.

History, culture and the strategic calculations of political actors define the contingencies that influence institutional choice and, therefore, account for the variations in the institutional arrangements that establish the democratic disciplines in individual countries. In contemporary Africa, these contingencies reflect the institutional legacies (the working rules) of defunct autocracies and more deeply embedded communitarian values of indigenous cultures. And since new institutions are crafted in the context defined by old ones, the institutional composition of democratic disciplines reflects the influence of these legacies, producing conflicting incentives for political actors,

struggle to shape the rules of the game that will critically affect their interests in the uncertain future. Democracy, in this sense, is the organization of uncertainty (Przeworski 1991).

engendering ambiguities in their democratic practices, and increasing the prospect for incremental and uncertain progress toward democratic consolidation.

CHAPTER 3

THE INSTITUTIONAL DYNAMICS OF CONSTITUTIONAL LIMITS

A Constitution is the fundamental basis of democratic governance. Its disciplining power rests on the substantive and procedural limits it sets on the exercise of political authority in the management of public affairs.

The substantive limits on the exercise of political authority are embodied in constitutional provisions of fundamental rights and liberties. These provisions are the mutual guarantees that people forming a political community make to each other. Procedural limits on the exercise of political authority are embodied in constitutional provisions that prescribe the structures and relationships of the legislature, executive, and the judiciary, the mode of selecting their occupants, and the scope of their authority.

As an expression of substantive and procedural limits on the exercise of political authority, a Constitution defines the incentive structures for all political actors to pursue their divergent interests and resolve attendant conflicts within the institutional parameters prescribed by constitutional provisions. Crafting Constitutions that meet this demanding criteria remains a fundamental dilemma in all democratizing societies. In Africa, the dilemma is compounded by the fact that, in the past, Constitutions served as a means of augmenting, instead of limiting, state power and of legitimizing authoritarian rule. Under colonialism, Western notions of rule of law and individual rights were introduced in African countries largely as a means of legitimizing European rule, and applied selectively to resident European population and select groups of African elites. They were seldom, if ever, institutionalized as a constraint on the arbitrary exercise of state power. Similarly, ideas about separation of powers did not inform the constitutional definitions of the structure and relationship of the different branches of government.

During decolonization, constitutions were hurriedly modified to include individual rights provisions and ideas of separation of powers. But these provisions were simply grafted onto, instead of replacing, existing provisions that augmented state power instead of constraining it. As African neopatrimonial rulers proceeded to consolidate state power after independence, they either dispensed with the inherited constitutions or altered them to remove the substantive and procedural limits on the exercise of arbitrary state power. Constitution-making in the current wave of democratization represents the first systematic attempt in Africa since independence to include substantive protection of fundamental rights and liberties and procedural limits on the scope and authority of the government.

Constitutional Choice

Because a Constitution expresses the mutual guarantees individuals make to each other in forming a political community, and therefore determines social expectations about future relationships

and benefits to be derived from them, consensus among political actors involved in constitutional choice is essential for maintaining the integrity of mutual guarantees. But because human fallibility precludes knowledge of future contingencies, constitutional rules at the time of their construction must contain prescriptions about the way they are to be changed. Yet, if constitutional rules are changed easily, orderly patterns of social, economic and political relationships are threatened. Hence, carefully crafted Constitutions contain provisions for changing rules, but in appropriately limited ways.

There is virtually never complete unanimity among political actors involved in constitutional choice. Constitutions, therefore, usually reflect compromises among actors with conflicting interests. More important, however, is the degree to which constitutional rules are widely accepted by the general population. This is difficult to measure accurately in contemporary Africa, due in large part to high rates of illiteracy and lack of interest among the masses in arcane debates about constitutional issues. A general public cynicism about politicians and parties also accounts for the lack of interest in constitutional issues. Even so, the process of constitution-making and especially the degree of participation by citizens or their representatives are crucial, albeit partial, indicators of the potential viability of rule-ordered democratic governance. In this respect, wide variations exist in the process of constitution-making accompanying democratic transitions in Africa.

The phenomenon of the National Conference distinguishes the constitution-making process in Francophone countries. In general, this process has involved representation of corporate groups in the deliberation on constitutional issues. But both the degree and effectiveness of these representations have varied according to the prevailing patterns of associational life in individual countries. In Mali, Niger, and Madagascar, on the other hand, the tradition of strong associational life provided a basis for effective corporatist representation in National Conferences (National Forum in Madagascar), even though women and rural groups were selectively excluded in Niger, largely because of their presumed support for the discredited authoritarian regime. For the most part, however, for the first time since independence, the National Conferences offered major organized segments of the population meaningful opportunities to participate in constitution-making in all three countries. And in all three countries, nation-wide referendum approved the new Constitutions.

Constitution-making in Ghana spanned a period of almost two years, from July 1990, when the Rawlings government initiated a series of public seminars in each of the country's ten regions to discuss the form of the democratic Constitution, to April 1992, when the Constitution was approved in a national referendum. In this period, political liberalization helped to launch a national debate on the form and virtues of competing models of a democratic Constitution, with Rawlings publicly opposed to a competitive party system and favoring an American-style presidential government, and the emerging opposition groups, composed mostly of urban professionals, supporting a British-style competitive parliamentary system. The debate produced a compromise of sorts, a competitive party system with a mixed presidential-parliamentary government. After being debated by an appointed and "sociologically representative" Consultative Assembly, which drastically modified some key proposals made by the Committee of Experts appointed by Rawlings, the Constitution was approved in a national referendum in April 1991.

The experiences of Ghana, Mali, Niger and Madagascar emphasize the positive contributions of broad participation in constitution-making through national debate and referendum to enhancing the legitimacy of constitutional rules in democratic transitions. In contrast, the new Zambian Constitution has never been placed before the public for approval. As a result, weak commitment to constitutional rules by both state and civil society actors persists. While political liberalization in Tanzania has encouraged public debate on constitutional issues, albeit among a small segment of the population, the piecemeal amendments to the authoritarian 1977 Constitution, which has been severely criticized by the influential Nyalali Commission, and the CCM domination of the legislative process through which constitutional amendments are made, are also likely to engender a weak commitment by political actors to constitutional rules and could vitiate the prospects of consolidating democratic governance in that country.

Constitutional Amendments

Provisions for amending the Constitution--a key component of constitutional choice--appropriately establish extraordinary procedures. Interesting variations exist in these provisions in Africa. In Mali, constitutional amendments require a two-thirds majority in the National Assembly, followed by a ratifying national referendum. In Madagascar, the President with cabinet support, or the National Assembly (but not the Senate) on a vote of one-third of the deputies, may initiate constitutional amendments. Approval of amendments require a three-fourths majority of both National Assembly and Senate deputies, not just those actually voting, which is a difficult target to reach in the National Assembly where proportional representation assures fragmentation of political forces. Amendments initiated by the President require approval in a national referendum. The aggregation rule requiring a majority for approval in the national referendum leaves open the possibility of constitutional modifications by a simple majority of the people voting. Requiring the approval of only executive-initiated amendments through a national referendum is an innovative proposal in that it subjects executive discretion in constitutional choice to popular opinion.

The Ghana Constitution prescribes a more elaborate set of procedures for constitutional amendments. First, Article 1 establishes the supremacy of the Constitution as fundamental law. Second, all constitutional amendments require an Act of Parliament with two-thirds majority of all Members of Parliament, not just of those voting, sitting in a special parliamentary session. A group of Entrenched Provisions, covering 19 different subjects, 34 Articles, and all Articles related to Fundamental Rights and Freedoms, the Executive, and Amendment procedures, require, in addition, approval in national referendum in which 40 percent of eligible voters must vote by a three-fourths majority. While these procedures remain to be tested, they do provide open democratic, but appropriately cumbersome, procedures that involve key state institutions (Parliament, President, Council of State) as well as voters in the amendment process. Executive authority (Council of State and President) is restricted, respectively, to an advisory and assenting role, while Parliament as the only institution which comprehensively links state and society is invested with mandated authority for initiating and approving all amendments. Its amendment, powers, however, are constrained by the

required prior publication of all amendments in the Gazette, which creates opportunity for public debate, and by the mandated approval of all amendments to the Entrenched Provisions in a national referendum.

Entrenched Provisions appropriately include specific constitutional provisions related to the more important administrative, security, and financial functions of the state. But it also includes the 22 Articles guaranteeing all the Fundamental Rights and Freedoms as well as all 32 Articles dealing with the Executive.⁶ The securing of all the constitutional provisions related to the Executive reflects the continuing statist orientation of Ghanaian political culture, an orientation not unique in Africa. It can be argued that the elaborate procedures for amending the Entrenched Provisions extend undue constitutional security to the considerable powers the Executive already possesses under the Constitution.

Amendment procedures are a key institutional mechanism of constitutional choice. They are not the only ones, however. Others can also be devised, such as the constitutional rules prescribing the constitutional interpretation authority of the judiciary. In the francophone tradition, this institutional form, reflecting the Etat de Droit principle of division of state functions, instead of separation of state powers, is generally embodied in a Constitutional Court as a separate judicial body specifically authorized to ensure the integrity of constitutional rules through a priori review of legislative enactments and a posteriori review of executive decisions. In France, the influence of the Constitutional Court (known as Constitutional Council) has increased substantially in the past 50 years in conjunction with the more general expansion of judicial powers over a wide range of explicitly social, economic and political issues in Western Europe. As a result, deliberations in the French National Assembly reflect increased references to the potential reaction of the Constitutional Council to legislative enactments. In Mali and Madagascar, both with weak traditions of judicial independence, the inclusion of Constitutional Courts in the new democratic constitutions is innovative. In both countries, their authority extends beyond review of legislation and executive orders to ensuring the constitutional probity of international agreements and administrative regulations. Whether their influence will eventually match that of their French counterparts remains to be seen. That they are now an integral component of the institutional framework of democratic governance in both countries creates the opportunity for rule-ordered imposition of constitutional limits on the exercise of arbitrary power by the executive and the legislature.

In the British common-law tradition, the constitutive independence of the judiciary creates the opportunity for courts to modify the parameters of constitutional prescriptions through judicial interpretation in the course of authorized application of these prescriptions to individual cases. In Britain, with a strong tradition of judicial restraint, courts have progressively extended this authority over the past 50 years to American-style judicial review of administrative decisions and regulatory policies. In Ghana, the 1992 Constitution includes explicit provisions for securing the independence

⁶Only two Articles dealing with Parliament, one establishing the legislative supremacy of Parliament (Article 93) and the other establishing parliamentary procedures (Article 106), are secured under the Entrenched Provisions.

of the judiciary. These provisions have been an integral component of all Ghanaian Constitutions since Independence, and provide the necessary institutional incentives for the judiciary to exercise its mandated authority (See Ghana Report for details). More importantly, in several test cases, the Supreme Court has upheld key provisions of the 1992 Constitution related to freedom of speech and assembly.

The Problem of Constitutionalism

Constitutionalism is the principle that the exercise of political authority in the conduct of public affairs is compatible with the incentive structures defined by constitutional provisions. It is a principle that does not develop at the moment of the installation of democratic governance. It develops over time, through progressive application and interpretation of constitutional provisions that clarify the scope and authority of the government as well as the limits on the exercise of fundamental rights and freedoms of the citizens. In Ghana, Mali, Niger and Madagascar, its development is likely to be a slow process, in large part because in all four countries the orientations and behavior of political actors continue to be influenced by an authoritarian tradition that placed greater emphasis on constitutions as an instrument of augmenting state power than on constitutionalism as a principle of limiting state power.

In Mali, Niger and Madagascar, especially, the influence of the statist Francophone tradition is evident in constitutional provisions that deny individual citizens standing with respect to bringing constitutional cases to the courts, unless they are directly affected. That authority belongs to Constitutional Courts charged with the responsibility of deciding on the constitutionality of legislation and executive decisions before implementation.

In Ghana, on the other hand, because of the influence of British legal tradition, the 1992 Constitution does authorize individual citizens to bring constitutional cases to the Courts, while it explicitly invests the Courts with exclusive authority to decide on constitutional issues. Except for several key civil rights cases in the first year of the Fourth Republic, the courts have yet to decide on cases dealing directly with the constitutional definition of the scope and authority of the government.

CHAPTER 4

THE INSTITUTIONAL DYNAMICS OF AN OPEN PUBLIC REALM

An open public realm is usually the first democratic discipline that is introduced in all democratic transitions.⁷ Its introduction is not an indication of the commitment of autocrats either to democratic norms or to embark on further political liberalization. Nor is it necessarily an indication of the systematic commitment of civil society actors to those norms, although it is quite possible that the commitment to democratic norms may be randomly distributed among civil society actors. The introduction of an open public realm is precipitated largely by growing economic crises and political discontent among major political groups facing rapidly declining living standards and frustrated with their inability to affect government policies in closed political systems. The incentive for autocrats is initially to buy time by agreeing to lift restrictions on open political debate and activity. But once introduced, an open public realm leads to further demands for political liberalization, although this process varies according to the relative balance of political power among contending groups in an increasingly vibrant civil society and between them and state actors.

Two interrelated processes mark the progress toward the consolidation of an open public realm: (a) the creation of an enabling environment through constitutional guarantees of basic human rights and provisions for their justiciability and enforcement; and (b) the enforcement of civil rights and liberties through the courts.

The Enabling Environment of an Open Public Realm

The most important indicator of the legitimacy of an open public realm as a democratic discipline is constitutional guarantee of basic human, civil and political rights traditionally associated with modern liberal democracy. In almost all countries, there also are formal laws that enforce the constitutional guarantees by providing for their justiciability, by establishing institutional mechanisms and procedures (e.g. human rights commissions) through which aggrieved citizens can invoke constitutional guarantees and accompanying laws to secure redress, and by prescribing the conditions for the organization and operation of civic associations and political groups.

The last set of prescriptions often set out conditions for registration, such as submission of annual reports detailing membership, activities, and financial statements. While these conditions may seem to restrict the basic constitutional right of free association, the phenomenal expansion of associational life that has followed in the wake of political liberalization suggests that many groups may not be paying much attention to them. While most of the civil society organizations covered by enabling legislation are formally organized, there is a plethora of smaller and informal ones that are not. This is not a problem in countries like Ghana, where constitutional provisions are sufficiently broad to include a multitude of different types of associations. But in places like Niger, where past

⁷The concept of an open public realm is borrowed from Ostrom (1992).

attempts to impose corporatist-type structures led to identifying (and often creating) groups and associations, the Law of Association, which governs the formation and activities of a wide variety of formal identified welfare and development associations, does not deal with a number of small groups formed to meet the needs of rural producers and resource users. The recently passed Rural Code has fostered the growth of cooperatives, credit-unions, and self-governing associations, none of which are covered by law. Similarly, in Madagascar the current Law of Association, originally passed in 1960, does not cover grass-roots environmental groups and development associations, among others. While it can be argued that legal recognition could undermine the autonomy of these groups, it is also true that such recognition offers legal standing that not only guarantees access to courts, but also ensures access to credit in the financial markets. In both Niger and Madagascar, efforts are underway to rectify this legal lacunae.

An important indicator of the effectiveness of the enabling environment in sustaining an open public realm is the extent to which all actors refer to the constitutional and legal guarantees as the basis for civil discourse and holding state actors accountable, as well as the extent to which test cases are filed to preserve these guarantees. While state actors are not particularly likely to initiate dialogue on constitutional provisions that constrain their discretion, civil society actors are certainly in a position to initiate such a discussion and invoke constitutional provisions.

Clearly, the nature and the content of civil discourse in Africa have changed, in some ways dramatically given the repressive environment of erstwhile autocratic regimes. People not only say they feel free, but they also behave and talk as if they were. Perhaps the most dramatic indicator is the rise of the media. While the media in all the countries reviewed here, as elsewhere in Africa, suffers from logistical problems related to poor equipment, inadequate financial resources and lack of skill and experience in investigative journalism, it has emerged as the major countervailing voice in holding state actors accountable. In virtually every country, there is a mix of state-owned media and an independent print media, the latter, at times, attached to political parties. The historical association of journalism with political activism, dating back to the anticolonial movement and the repressive environment of autocratic regimes, has shaped the culture of the media in all four countries. The influence of this legacy is evident in the confrontational style of reporting in the independent media, in which allegations are often made without substantiation. Nevertheless, the media has emerged as a major defender of an open public realm and an important source of disseminating democratic values, both of which are essential conditions to the professional survival of journalists.

Ghana's experience indicates how constitutional rules serve to shape the behavior as well as the orientations and discourse of both state and civil society actors, thus strengthening the discipline imposed by an open public realm in consolidating democratic governance. The country's new Constitution contains broad provisions which guarantee fundamental human rights. Within less than six months of the transition, the Supreme Court upheld key provisions of the Constitution related to free speech and freedom of assembly in two cases brought by civil society actors to challenge the constitutionality of government actions. In one case, the Court explicitly declared as unconstitutional a decree from the old authoritarian order that restricted freedom of assembly. In the other case, the

Court ordered the government to give civil society actors access to the state-controlled media. State actors complied with the Court's decisions in both cases. And in a third case, civil society actors challenged the constitutionality of another authoritarian decree under which the president had exercised discretionary power to appoint local government officials. The Court upheld the position of the plaintiffs and restricted the exercise of executive power. While ambiguities remain in the Ghana Constitution, these cases established important precedents for the application of constitutional discipline in the strategic relationship of political actors, particularly to the exercise of arbitrary power by state officials. They also established important incentives for political actors to enforce such discipline. While Ghana cannot yet be considered a consolidated democracy, these preliminary indicators, at the minimum, emphasize the salience and relevance of constitutional rules and the importance of an open public realm in the progress toward it.

The Enforcement of Civil Rights and Liberties

The guarantees of basic civil rights and freedoms and provisions for their justiciability and enforcement are the distinguishing hallmarks of democratic Constitutions. Basic civil rights and freedoms include standard substantive freedoms of speech, association, assembly and religion, as well standard procedural rights of due process (trial by jury, access to lawyer, etc.). Beyond these basics, the new Constitutions in Ghana, Mali, Niger and Madagascar also include social and economic rights, such as, women's rights, rights of spouses to property, economic rights, and protection from slavery and forced labor. The inclusion of these additional rights represents a response to specific cultural and historical realities of individual African countries, and reflect, more generally, the diffusion of basic universal human rights standards.

Constitutional provision of justiciability and enforcement of basic rights and liberties is essential, otherwise their utility in sustaining the constitutive mutual guarantees that define the normative basis of political order will be severely compromised. That the provision of basic rights and liberties and the provision of their justiciability and enforcement do not always go together is evident from the experience in Tanzania, where four years elapsed between the inclusion of a Bill of Rights in the Constitution (in 1984) and the provision of its justiciability. Moreover, the failure of the CCM-government to bring all laws into conformity with the Bill of Rights, as it was required to do within three years of its constitutional enactment, testifies to the absence of even a broad-based agreement among Tanzanian political actors on the relevance of basic civil rights and liberties as a fundamental basis of democratic governance. This judgement is warranted by the reported position of CCM supporters that the government was not bound to follow the recommendations of the influential Presidential Commission (Nyalali Commission), which, among other things, identified 40 laws restricting fundamental freedoms, criticized the government's failure to bring all laws into conformity with the Bill of Rights, and questioned the constitutionality of subsequent government actions. To be sure, Tanzania is in a pre-transition stage. But at a similar stage in their transitions, Ghana, Mali, and Madagascar all provided full constitutional guarantees of basic civil rights and

liberties as well as institutional mechanisms for their enforcement. The current situation in Tanzania perhaps reflects the continuing influence of the dubious proposition that Western principles of democratic governance are irrelevant for Africa.

Constitutional guarantees of basic civil rights and liberties are accompanied by provisions for their justiciability and enforcement in Ghana, Mali, Niger and Madagascar. But the institutional arrangements for the exercise of these provisions differ in the three countries. In Francophone Mali and Madagascar, these institutional arrangements guarantee individual citizens access to the courts to enforce constitutional protection of basic civil rights and liberties. In addition, they also provide separate Constitutional Courts with constitutional authority to ensure the conformity of legislations and executive decisions with fundamental law. While yet to be tested, this additional institutional arrangement would presumably preempt discretionary implementation of state decisions that violated constitutional protection of basic civil rights and liberties.

In Ghana, the 1992 Constitution explicitly invests the justiciability and enforcement of basic civil rights and freedoms in an independent judiciary. Specifically, Articles 1(2), 11(5), 33, 130, and 133 establish the supremacy of the Constitution, invest authority for protecting basic civil rights and freedoms in the High Court with right of appeal to the Court of Appeals and the Supreme Court, and give original jurisdiction to the Supreme Court over all constitutional matters. This authority of original jurisdiction over constitutional matters enabled the Supreme Court to uphold the provisions guaranteeing freedom of assembly and speech in two precedent-setting cases within less than six months of the inauguration of the Fourth Republic. Finally, Ghana has embarked on a major reform of its court system. Parliament passed a comprehensive act (Courts Act, 1993) for this purpose. While questions about the constitutionality of some of its provisions have delayed implementation, key provisions of the act are aimed at reforming the cumbersome procedures at the lower levels of the judicial system and, when implemented, should improve access of citizens to the courts and democratize the delivery of justice.

In addition to the courts, which form an integral component of the institutional framework of the state, independent functionally-specific commissions also provide additional institutional mechanisms for enforcing constitutional guarantees of civil rights and liberties. Notable among these commissions is the human rights commission, whose title attests to its crucial role in strengthening the constitutional basis of democratic governance. Constitutional prescriptions not only mandate the creation of human rights commissions, but also invest them with extensive authority. The Ghana Commission on Human Rights and Administrative Justice is a good example of such a commission. The institutional arrangements of this commission prescribed by the 1992 Constitution invest it with quasi-judicial status in terms of its membership, scope and authority, and operational procedures.

Conclusion

The importance of an open public realm as a democratic discipline derives from the fact it creates multiple opportunities for civil society actors to check the arbitrary exercise of state power,

both through criticism and direct engagement. In addition, it also creates opportunities for self-governance, opportunities that also contain the potential for the diffusion of democratic values among the citizenry.

The creation and maintenance of an effective open public realm depends on constitutional guarantees of fundamental rights and liberties as well as provisions for their enforcement. In the African countries reviewed here, the effectiveness of these guarantees and provisions remain to be fully tested, although initial evidence from Ghana offer promising indications of the recognition by both citizens and the courts of the significance of the new opportunities to hold the government accountable for its arbitrary actions in limiting basic civil rights and liberties. In general, the introduction of an open public realm has contributed to the efflorescence of civic associations as well as to a change in the nature and terms of political discourse that can only be characterized as dramatic when compared to the repressive atmosphere of defunct autocratic regimes.

CHAPTER 5

THE INSTITUTIONAL DYNAMICS OF ELECTORAL DISCIPLINE

Elections are the principal means for keeping the exercise of power in democratic governance within popular limits. Elections hold elected officials accountable for their exercise of discretion in legislative deliberation and election campaigns expand discussions of policy issues into the public realm. They are also the means by which interests in society are channeled to and represented in the government and aspiring leaders gain access to the state.

The basic institutional arrangements of elections originate in constitutional provisions related to suffrage, freedom to contest elections, modes of representation (e.g. proportional representation, single-member districts), referendum and recall, and the administration of elections (e.g. registering political parties, voter registration, monitoring elections, and handling disputes over elections results). While all of these issues are important in democratic transitions, and Constitutions provide for them, the institutional arrangements of elections related to the administration of elections, political parties, and modes of representation attract particular attention of political actors and are major sources of conflict among them. Widely-agreed and clearly-defined rules for the administration of elections are obviously important for ensuring free and fair elections. Moreover, in transitions from autocratic rule, the legacy of mutual distrust among political actors, as well as the intrinsic uncertainty of elections, make the creation of such rules highly desirable and essential, both to reduce the opportunity for losers to disavow the election results because of faulty rules and to legitimize the results for the winners on the basis of rules previously agreed upon by both losers and winners.

The rules governing the organization and behavior of political parties are important for similar reasons. In contemporary Africa, they are also important in view of the corruption (alleged and real), mismanagement, and demagoguery that seriously undermined the reputation of political parties in the past. The validity of this unfortunate legacy is borne out by the fact that African political actors, incumbents and opposition, commonly agree (albeit grudgingly in some cases) on some stringent conditions on the organization and behavior of political parties.

Finally, the choice of the mode of representation is important for several reasons. First, rules governing modes of representation create incentive structures that shape the preelection and postelection strategies of political parties, and influence the prospect for establishing stable governments, both single-party and coalitions. Second, the choice of institutional design reflects the relative balance of power among contending political actors. Where contending political groups are highly fragmented, with no prospects for one or two groups winning a clear majority, institutional choice is likely to produce a proportional representation system; where political actors are roughly equal, institutional choice is likely to produce single-member districts. Third, institutional arrangements, once selected, shape future distribution of burdens and benefits among political actors.

Thus successful progress toward the consolidation of democratic governance depends critically on how the political conflicts over the choice of institutional arrangements are resolved in the early phase of democratic transitions.

In democratic transitions in contemporary Africa, as elsewhere, these three issues have attracted most of the attention of contending political actors involved in negotiating the institutional arrangements of democratic governance. And as elsewhere, differences among African political actors on these issues also originate in the uncertainty of democratic transitions associated with the change in the rules of the game. Their resolution reflects the prevailing distribution of political power among contending actors and the self-interested concern of all actors to constrain the options of opponents and secure favorable outcomes for themselves. The process of arriving at this resolution thus vividly reflects the political dynamics of institutional choice in democratic transitions in Africa.

The following analysis focuses on the institutional arrangements of (a) the administration of elections, (b) political parties, and (c) modes of representation.

Administration of Elections

In democratic transitions in Africa, as elsewhere, the Constitution is the authoritative source for the organization, conduct and the role of elections in democratic governance. Constitutions prescribe elections as the primary means of representation and usually include provisions for drawing electoral constituencies, administering and monitoring elections, and registering political parties. They also mandate specific laws (collective-choice rules) to translate the constitutional prescriptions into practice. Both the substantive content of these provisions and their implementation vary with the mode of democratic transition and the accompanying pattern of constitution-making.

In Ghana, despite Jerry Rawlings' attempt to manage the transition and his expressed preference for a no-party democracy, the Constitution, which was written by an appointed Consultative Assembly after an extended series of nation-wide consultations that revealed the opposite popular preference for a multi-party democracy, invested in an independent electoral commission, the institutional authority to organize and conduct elections, and register political parties. The independence of the Commission is explicitly guaranteed by the Constitution (Art. 46). The enabling legislation establishing the Commission reinforces its independence by assigning to Parliament the authority to remove Commission members, who are appointed by the President in consultation with the Council of State, from office in accordance with prescribed hearing procedures that require, among other things, a two-thirds vote in Parliament. The Constitution also provides for appeals of the Commission's decision to the courts.

In view of these strong institutional safeguards against political interference in the Electoral Commission, the often vitriolic criticisms levelled by the opposition parties against the Commission after the results of the December 1992 presidential elections had more to do with the alleged bias of the Commission Chairman and low-level Commission officers in favor of the governing party than with the Commission's institutional authority. The creation of an advisory body composed of all

parties, in April 1994, to advise the Commission on the registration exercise for the next round of elections in 1996 and to coordinate with it on the execution of this exercise helps to alleviate opposition concerns. An inter-party advisory body, meeting under the auspices of the Commission, also reached a compromise solution to the opposition demand for the issuance of photo-identity cards for Ghanaian voters. The creation of such a body had been a major demand of the opposition since the beginning the Fourth Republic, and these recent events seem to reinforce the institutional authority of the Electoral Commission and remove major impediments to free and fair elections in 1996.

In contrast, the democratic transition in Tanzania is being undertaken through incremental modifications to the country's 1977 Constitution that established a one-party state. With the ruling party, CCM, dominating the transition process, and opposition parties fragmented and organizationally weak, a National Election Commission has been established by constitutional amendment with standard authority for organizing and supervising elections. But the unqualified appointment and oversight powers of the president with regard to the Commission and its placement as an independent department in the President's office staffed by civil servant raises obvious questions about its independence.

In both Mali and Madagascar, where National Conferences drafted the Constitutions, there is a general consensus among political actors about the framework for the administration of elections. In both countries, the courts are vested with important powers in deciding disputed elections. Through the exercise of judicial independence, courts have validated several disputed results, leading to the acceptance of the decisions by all parties. In Mali, the initial round of local, assembly and presidential elections were held under the Transitional Government, which served to facilitate the consensus among all parties about the probity of these elections despite some irregularities. Opposition parties are still, however, discussing ways to amend the existing provisions to increase the independence of the election apparatus from potential interference by the governing party. In Madagascar, authority for managing the elections is somewhat ambiguously combined in the Ministry of Interior and Decentralization, which raises concerns about potential executive interference when the National Electoral Commission, created after the approval of the Constitution in a national referendum, and the High Constitutional Court. The cooperation of all three bodies was crucial in ensuring what is generally regarded to be relatively free and fair elections for the presidency and the National Assembly. While the source of this anomalous tripartite distribution of authority for administering elections remains unclear, to date, no serious concern has been expressed by Malagasy political actors about this institutional arrangement.

The extent of agreement among political actors at the initial stage of choosing institutional arrangements is one measure of the legitimacy of the rules for managing elections. Another is the extent to which political actors blame those arrangements for unfavorable electoral outcomes. It is not possible to make this assessment in Tanzania even though opposition forces have voiced serious concerns about the independence of the newly-created National Election Commission, because the country is in a pre-transitional stage. In both Mali and Madagascar, all political actors and independent observers generally give high marks to the management of the elections. And in Ghana,

for reasons given above, opposition criticism after the elections was directed specifically to the workings of the Election Commission, not to its institutional authority in administering elections or its internal administrative structures.

With the exception of Tanzania, then, the institutional arrangements for the administration of elections in the other three countries seem basically sound. As in all democratic transitions, the true test of any institutional arrangement rests on its capacity to cope with the conflicts that are surely to appear in the first post-transitional elections. The deficiencies noted in Tanzania pose serious questions at this time, but it remains to be seen if the incumbent and opposition political actors are able to work out a solution. That these deficiencies exist is not surprising in a system where incumbents remain in power to manage the transition. But elsewhere, the institutional advantage of incumbency has been moderated by the organization and effectiveness of opposition forces outside the government. Tanzanian opposition parties seem to possess neither.

Political Parties

A central feature of democratic transitions is the effervescence of political parties. Political parties have always played a major role in African politics, even under authoritarian regimes, which either coopted them or sent them underground without suppressing them altogether. In all four countries under review, lifting the ban on political parties was a crucial indicator of the incumbent's commitment to institute the process of a democratic transition, although in both Ghana and Tanzania, this commitment has involved attempts to preempt the political space likely to be occupied by other political parties. These attempts were not entirely successful in Ghana. And in Tanzania, the evolving institutional arrangements that are progressively separating the governing party (CCM) from its familiar reliance on the state are likely to make it vulnerable to the vagaries of electoral contest, although its success in that contest will depend just as much on the ability of currently weak opposition parties to either coalesce or launch effective individual campaigns to convince a largely alienated public that they offer a viable alternative.

In all four countries, constitutional provisions guarantee the right of citizens to organize political parties. In all four countries, also, the enabling legislation implementing these guarantees establish quite stringent conditions for the organization, internal governance, operational procedures, and financial requirements for political parties. Many of these provisions reflect attempts to control the corruption and mismanagement, as well as what many considered to be "irresponsible" behavior, of previous political parties. That most parties seemingly accept such stringent provisions, albeit reluctantly with respect to limits on private financial contributions (a major concern of opposition parties in Ghana), suggests the possibility of a learning process on their part. At least, in the early stages of democratic transition, after years of autocratic rule during which many operated as private

associations and clubs, there is an incentive for all parties to take advantage of the opportunity created by the new dispensation to prove themselves.⁸ Whether they will be able to do so is unclear, especially since many parties reflect old-style factional and personality conflicts.

These conflicts reveal a key weakness of African political parties, their inability to articulate a sustained policy position that is widely received by the general population, especially the poor. The problem lies partly in low levels of literacy among the general population, and partly in the high cost of attending to arcane policy issues. This also points to the narrow social base of most parties among the educated class in the urban areas, although, in Mali, at least half of the parties are exclusively locally or regionally based (Vengroff 1993). Part of the problem also lies in the cynicism of the general population with all politicians, a cynicism validated by past experience with political life and manifested in the rise of nongovernmental organizations (NGO) as mechanisms of local self-governance. That voter turnout has been low in recent elections is, therefore, not surprising in this context.⁹ Transforming this attitude of the population remains a major challenge which few African parties are inclined to confront seriously. In this respect, African political parties face the perennial dilemma of political parties in modern democracies, voter apathy, which propels them to entice voters with promises of quick-fix solutions or recourse to ethno-regional prejudices (as in Tanzania) at the risk of neglecting serious macroeconomic problems, solutions to which require sacrifices by the population. The danger of democratic rules creating incentives for strategic rent-seeking behavior cannot totally be discounted, therefore. In Africa, the dilemma is compounded by severely diminished resources with which to respond to the immediate material demands of the population.

In all four countries, also, political parties are hampered by logistical and financial problems in sustaining their organizational effectiveness, although the parties seem to have no problems in fielding slates of candidates for elections. In this respect, the experience of the opposition parties may very well be typical. All Ghanaian opposition parties, while expressing reservations about the legal limit of one million cedis in private contributions, also admitted that such contributions declined after

⁸In this respect, the resurgent political parties in Africa are fundamentally different from the political parties in the new democracies in Eastern Europe and similar to the ones in Latin America. The totalitarian communist regimes in Eastern Europe simply demolished any vestiges of alternative party organization, forcing the opposition to go underground and operate clandestinely in a highly risky environment. After the demise of communist rule, political parties had to be created from scratch. The authoritarian regimes in Latin America, on the other hand, suppressed political parties without totally destroying them. With the onset of democracy, many of these organizations were revived.

⁹Voter turnout is, at best, only a rough measure of democratic consolidation or the deepening of democratic norms. In the United States, voter turnout is notoriously low, seldom exceeding 60 percent in post-World War II presidential elections and falling as low as 10 percent in local elections. Given the virtual absence of competitive elections in Africa, one can argue that a 40 percent turnout is nothing short of miracle, a full 40 percent jump in countries with electoral history.

the elections. That decline could be attributed to the fact that many contributors financially supported several parties to ensure backing a winner. Also, since many contributors in the private sector rely on government contracts, they are unwilling to endanger those contracts by openly supporting opposition parties, especially in view of President Rawlings' urging of his supporters to boycott the products of three firms whose proprietors had supported opposition candidates.

In sum, the constitutional rules and the enabling legislation (collective choice rules) provide an effective institutional framework for the administration of elections and political parties, again, Tanzania excepted. The problems, to date, reside in the operational rules that structure the incentives of political parties. These rules, related both to the internal organization of the parties and to the broader political culture, the debilitating legacies of autocratic rule, in particular, militate against the functional effectiveness of political parties beyond merely contesting elections. A quick-fix to these problems is neither possible nor feasible.

Modes of Representation

Modes of representation refer to the institutional arrangements that transform votes into seats in the legislature. There are two modes of representation in electoral systems: proportional representation and majoritarian (or plurality) systems. Each is organized by distinct sets of rules for transforming votes into seats. In a proportional representation system, eligible political parties submit lists of candidates for each constituency, votes are cast for parties instead of individual candidates, and the party receiving a percentage of votes above a prescribed minimum is the winner. In majoritarian systems, eligible parties file lists of candidates for each constituency, votes are cast either for the party or the candidate, and the party or the candidates winning either a majority or a plurality of the votes cast is declared the winner. In a single-member district system with majority rule, if no candidate wins a majority, a second run-off election is held between the two parties receiving the most votes in the first round, with the party receiving a majority as the winner.

A central lesson in studies of recent democratic transitions is that the choice of modes of representation is of critical importance to political actors engaged in negotiations over the institutional arrangements of democratic governance (Colomer 1991; 1994; Geddes 1992; Przeworski 1992). This choice is of importance to political actors because the distinct sets of rules that organize the two modes of representation create different incentive structures which have different impacts on the campaign strategies of political parties, on the prospects for establishing stable government (whether single-party or coalition), and on the post-election strategies of the political parties in the next round of elections. Consequently, the choice of electoral arrangements is perhaps the most important institutional choice contending political actors make during democratic transitions, because that choice determines their political future in a democratic system. This choice is an important indicator of the relative balance of political power among contending actors as well as of their expectations about electoral outcomes. In sum, the institutional choice of a proportional representation system or single-member districts is shaped by the combination of the balance of political power among contending actors prevailing at the time the choice is made (i.e. their respective capacities to impose a preferred choice) and their expectations of their electoral chances.

Several interesting patterns seem to be emerging in the institutional dynamics of electoral and party politics in the four countries. One interesting pattern is the post-election strategy of opposition parties in Ghana. After initially disavowing the results of the 1992 presidential elections and boycotting the subsequent parliamentary elections, the New Patriotic Party (NPP), the largest and the best organized of the opposition parties, has embarked seriously on a path of constructive opposition. It has established 18 "sectoral committees" for monitoring the activities of relevant ministries and has formulated party positions on major policy issues. It made a reasoned critique of the government's recent budget in January 1994. Its 1993 position paper presented a list of electoral reforms that formed the basis of subsequent negotiations with the government over the prospect of creating a level playing field for the 1996 elections. And the party's sectoral committee on legal and constitutional affairs has mounted a series of successful challenges in the Supreme Court, upholding the constitutional guarantees of freedom of speech and association. A second aspect of party behavior in Ghana concerns the efforts by several of the previously independent Nkrumahist opposition parties to consolidate into the People's Convention Party (PCP).¹⁰ These efforts at unifying the diverse interests and personalities laying claim to Nkrumah's mantle is still in its early phase. While they may be motivated by ideological considerations, they quite possibly reflect a response to the incentive of the winner-take-all single member districts, in which a unified party stands a better chance of winning with one candidate than with separate candidates, as the various Nkrumahist parties found out in the 1992 presidential elections in which all their candidates suffered embarrassingly heavily losses.

A second interesting pattern of political party behavior is the strong party discipline witnessed in the Nigerien National Assembly. The Nigerien constitution prescribes proportional multi-member elections to the Assembly, and also explicitly proscribes candidacies independent of party slates.¹¹ An unusual feature of the Nigerien Assembly election rules is that each deputy is elected with an alternate who automatically replaces a deputy who dies. A by-election is prescribed only on the death of the alternative deputy. This unusual feature, perhaps the only one in Africa, eliminates the use of by-elections, which give voters the opportunity to pass judgement on the government's performance between regular elections.

The proportional multi-member system, not surprisingly, resulted in a plethora of smaller parties winning seats in the National Assembly. What is interesting is that party discipline has been quite strong with respect to voting patterns in the Assembly. The analysis in the Niger Report

¹⁰Given the constitutional proscription on using the name of earlier parties in Ghana's political history, the choice of this name seems quite ingenious in seeking to evoke Nkrumah's populist orientations without violating the constitutional provisions. Nkrumah's party was called the Convention People's Party.

¹¹The Nigerien Constitution prescribes elections in proportional multi-member districts for 75 seats in the National Assembly, with eight seats set aside for the election of specified minority groups through single-member districts.

accurately attributes this discipline to the continuing influence of the legacy of prevailing social norms which define electoral victory not as a means to carry out broad policy programs, but to share in the "spoils" and secure them for one's supporters. The implications of this type of behavior are obviously quite serious for consolidating and sustaining effective democratic governance. But the problem (if that is an accurate characterization) does not lie in the inability or the unwillingness of Nigerien politicians to behave in accordance to some idealized view of political life. It resides in the combined effects of the incentive structures of the inherited working rules and those created by the new rules of electoral politics. The pre-election negotiations and the bargains struck by the different parties over post-election power-sharing arrangements seem perfectly rational, given these incentives.¹²

A third interesting pattern concerning the relationship between electoral rules and modes of representation is in Mali. In that country, the National Conference expressed serious concerns during constitutional debates about the instability of the French government under the 1958 French Constitution, the model for the new Malian Constitution. As a result of these concerns, it broke with the Francophone tradition in Africa and opted for a complicated two-round winner-take-all majority system for National Assembly elections.¹³ In this system, each party presents a complete list of candidates (candidates can legally appear on one list only) equivalent to the number of deputies in a district. A party winning a majority is declared the winner, but if no party receives a majority, the two parties with the highest vote totals compete in the second round one week later. The parties losing in the first round can opt to support either of the two parties in the second round, but cannot join them to produce a new composite list representing a coalition.

This complicated system reduced the prospect of a plethora of smaller parties winning seats in the National Assembly. But, reflecting considerable political acuity, the National Conference also opted for a proportional multi-member system for local elections to accommodate the greatest diversity of interests and parties possible in the councils. The result of this two-tiered system has been that, while Alliance pour la Démocratie au Mali (ADEMA), the best organized of the national parties, won a substantial 73 out of 116 seats in the National Assembly, and also won a plurality of 214 out of 751 (28 percent) of the seats in local councils, the smaller parties captured 537 (72 percent) of local council seats. Hence, the electoral rules selected in Mali have distributed the representation of the people among a number of different parties representing a variety of interests.

¹²It should be noted, in this context, that the quite valid concerns expressed in the Niger Report about the implications of strong party discipline for democratic governance is at odds with the concerns expressed in the Madagascar Report for exactly the opposite reason, that the proportional representation system has made it difficult to form stable governing coalitions in the National Assembly.

¹³Presidential elections in Mali, as in Madagascar and Niger, is the standard two-round majority election. In this system, if no candidate in a more than three candidate race wins an outright majority in the first round, the two top vote-getters in the first round run against each in the second round, with the other smaller parties retaining the option to throw their support behind either candidate.

In particular, the domination of ADEMA at the center is counterbalanced by the control of almost three-fourths of local council seats by the opposition. While expanding electoral representation, however, the system has also fragmented the smaller parties, with ADEMA retaining substantial control of the center and control of a plurality of local councils. One way to counter-balance this favorable distribution for ADEMA, is to introduce meaningful decentralization of authority, something which, as in the other countries, has not proceeded far enough in Mali.¹⁴

Conclusion

Several broad conclusions can be drawn from the preceding analysis. First, like their counterparts elsewhere in recent democratic transitions, African political actors engaged in choosing the institutional arrangements of democratic governance spend a great deal of time on selecting the rules that will govern political party organization and behavior and the electoral process. The reasons for this have been elaborated above. In all four countries examined in this study, political actors recognized the importance of political parties as linkage mechanisms between state and civil society actors, and moved early in the pre-transition phase to install multiparty systems. The ensuing emergence of a plethora of parties, while varying by country, reflects the fragmentation of the social forces. Substantive policy differences are few, which is not surprising in view of the severe economic conditions and donor pressures for economic liberalization. As a result, other sources of conflict become prominent and politicized, such as personal and factional conflicts, some with origins in the pre-authoritarian era, and ethno-regional cleavages.

Second, there is a correlation between the mode of transition and the acceptance of the election results by the defeated party. In Ghana, the largely managed transition produced an immediate rejection of the results of the presidential elections and the boycott of the subsequent parliamentary elections by the opposition. The opposition parties have since accepted the legitimacy of the election results and have begun to play a constructive role. Recent successful negotiations between the government and the opposition over a range of issues, including, especially reforms of the electoral system, have helped to reestablish the integrity of the electoral system. Whether the opposition in Tanzania's managed transition will accept electoral defeat in next year's transitional elections is difficult to predict.

¹⁴This discussion of the Malian electoral system draws on two useful studies by Vengroff (1993, 1994) and on materials in an earlier Associates in Rural Development, Inc. (ARD) assessment of democratic governance in Mali in 1992 (Mali Report). In an interesting simulation exercise comparing the relative effects of the current majority-rule system and the alternative proportional system on the seat distribution in the Malian National Assembly, Vengroff (1994) has shown that, assuming the current vote distribution under both systems, the latter system would have produced the following results: ADEMA, currently with 73 seats would have won 43 seats (a net loss of 30 seats). Comité National d'Initiative Démocratique (CNID), currently with 9 seats would have won 13 seats (a net gain of 4 seats); and Union Soudanaise -- Rassemblement Démocratique Africain (US-RDA), currently with 8 seats would have won 21 seats (net gain of 13 seats).

In contrast, transitions through National Conferences, with broad participation by representatives of major social forces, and transitional governments in Mali, Niger and Madagascar translate into acceptance of the election results by all parties concerned, despite some inevitable irregularities. Moreover, in all these countries, the support of all parties for the election results, was facilitated by the defeat of incumbents, which served to validate the democratic legitimacy of the elections. In this respect, the first post-transitional elections will be a crucial test in all countries of both the democratic credentials of current incumbents, especially if they lose, and the potential strength and continued legitimacy of the electoral process.

Third, party capacity also varies across countries, but with certain discernible patterns. In both Ghana and Tanzania, the ruling party is still closely attached to the state. In Tanzania, the CCM-led government has taken steps to reduce the party's dependence on the state, forcing it to rely increasingly on its own organizational capacity and policy positions to secure popular support. Its success will depend as much on its own capacities as on the ability of the fragmented opposition parties to launch a united campaign. In Ghana, the NDC still reflects its origin in the PNDC and the personal influence of Rawlings as a unifying force for diverse interests dependent on state largesse. The former PNDC organization, however, does help the current NDC to maintain strong grassroots linkages, something which the largely urban-based opposition parties have begun to establish only recently, a strategy into which they were perhaps forced because of the large losses they suffered in rural areas in the 1992 presidential elections.

In Mali, Niger, and Madagascar, political parties are also largely urban-based. But, because of the absence of any connection with the state, and also due to their mobilization efforts during popular movements that toppled the autocratic governments and paved the way for democratic transitions, they established useful linkages with the grass-roots. These efforts paid off in the transitional elections for the Forces Vives, which began as a social movement, in Madagascar, as well as for ADEMA, which has strong historical roots and organizational resources throughout Mali. Both parties won the transitional elections and formed the new governments. Political parties in Niger are fragmented along various personal, factional, and ethno-regional cleavages, but most of the well-organized ones made an attempt to campaign in the rural areas during presidential and national assembly elections.

Defining the appropriate role of the party in democratic governance remains problematic in all countries. Whether political parties are a means to govern with systematic policy programs or are another source of strategic rent-seeking, this time legitimized by the veneer of democracy, remains unclear. Niger offers the most systematic support for the latter role. And in Ghana, where major policy decisions are made by the executive, the ruling NDC has been accused by the opposition of favoritism in awarding license and contracts. Distinguishing representation from strategic rent-seeking is difficult in the best of circumstances, but it is particularly so in African countries, given the incentives of the working rules that sanction rent-seeking.

Finally, the differences in electoral rules combined with differences in the mode of transition correlate with the stability of the government, as already noted. The managed transition and the

domination of parliament by the NDC has facilitated the establishment of a stable government. But the National Conference initiated transition with broad-based participation has produced relatively unstable governments. The party discipline in Niger is precarious, as the government is reluctant to embark on major policy initiatives or engage in major policy discussion, lest these actions alienate its coalition partners. The latter are also unwilling to take policy initiatives or criticize the government on substantive issues, lest the coalition falls apart and they lose access to valuable public resources.

Given the strategic calculations that produced the institutional arrangements of elections and political parties, the ambiguous results described above are not surprising. They also derive, however, from problems intrinsic to the electoral process, itself. Ideally, elections serve as a referendum on the performance of the government, holding elected representatives accountable for their actions. Also, election campaigns create an opportunity for public debate on major policy issues, providing at least some broad guidelines for the government to follow on policy issues.

But as the recent experience in the United States suggests, these ideals are just that, ideals at best. Political actors, both citizens and politicians, are motivated by incentives that are not readily accommodated in these ideals. There is a fine line between representation and rent-seeking, and it is easily crossed. Representation means paying attention to constituency interests, which means bringing home the pork. But to bring home the pork, politicians have to get elected. This reciprocal relationship between constituency expectations and politicians' responses is reinforced in modern mass democracies by retrospective voting based on voters' evaluation of politicians' past performances instead of prospective voting based on voters' evaluation of politicians's expected performances after the elections (Arnold 1990). Finally, the perennially high cost of voting also militates against elections as an effective process of accountability.

Elections, therefore, may be intrinsically unsuited for securing the ideal of principled democratic governance. But elections are not the only means of participation in democratic governance. What distinguishes democratic governance from its alternatives is the institutional provision of a multiplicity of opportunities for political participation. The other democratic disciplines provide these alternative opportunities.

CHAPTER 6

THE INSTITUTIONAL DYNAMICS OF LEGISLATIVE DELIBERATION

Legislative deliberation disciplines the exercise of political authority by subjecting policy issues to considered discussion as a basis for making laws. The legislature occupies a distinct position in the institutional framework of a democratic polity. More than the executive and the judiciary, the legislature in its structure, operation, and responsibility straddles state and civil society. As a law-making body, it is an integral part of the state. As an elected assembly, it is directly linked to divergent social and economic interests in civil society. As a deliberative body, it facilitates and mediates the peaceful expression and debate of these divergent interests. In modern democracies, it is traditionally vested with constitutional responsibility over national finance. This responsibility, combined with its law-making powers and its role as a deliberative body, enables the legislature to impose fiscal discipline and accountability on the executive. The legislature, in other words, is the only branch of government that combines legislative, representative and oversight functions, functions that impose contradictory demands on legislators.

The extent to which these contradictory demands are reconciled and the legislature is able to perform its assigned institutional role in democratic governance depends on three interrelated institutional factors: (a) the relationship of the legislature with the executive; (b) its internal organization and procedures; and (c) its relationship with civil society actors. In contemporary Africa, as elsewhere in recent democratic transitions, these institutional factors reflect the combined effects of history and the strategic calculations of political actors involved in making institutional choices during democratic transitions.

Historical Legacies, Strategic Calculations, and Institutional Choice

Historically, legislatures have played a marginal role in initiating and deliberating legislation in Africa. The legacy of executive supremacy, inherited from colonial times, was instrumental in the establishment and consolidation of autocratic regimes, as well as in shaping the orientation and practices of political actors, after independence. Most autocratic regimes either dispensed with legislatures entirely or consigned them into rubber-stamps to legitimize the unfettered exercise of executive power. Where autocracies were based on strong single-party regimes, as, for instance, in Kenya, Tanzania, and Zambia, controlled in-party competition provided a semblance of representative legitimacy to elected legislatures that was sustained by distributing state resources to party loyalists to service their local constituents in return for their support of enhanced executive power. Both processes undermined any incentives for legislatures to perform their traditional law-making and oversight functions.

The constitutional deliberation that followed the demise of autocratic regimes began a process of reevaluation of the appropriate role of legislatures in the institutional framework of democratic governance. This reevaluation was influenced by the need to strike a balance between reestablishing

state authority with constrained executive power on the one hand, and the strategic calculations of contending political actors related to the creation of opportunities for conflicting interests in society to secure representation in and access to the state on the other. The progressive diminution of the capacity of authoritarian states to carry out basic governance functions not only contributed to their collapse, but also engendered the pressure to introduce democratic regimes. These twin processes defined the context for rebuilding the state with constrained executive authority. Constrained executive authority is essential for securing democratic governance. But it is also important for ensuring that, should opponents and their allies end up controlling the executive through electoral victory, always a possibility in democratic elections, they would be hamstrung by the limited institutional authority of the office. Creating opportunities for conflicting interests in society to secure representation in and access to the state is, of course, essential to the continued viability and legitimacy of democratic governance, but it also serves to balance the prospect of electoral victory by opponents.

Historical legacy and more immediate strategic calculations of political actors, therefore, have combined to produce semi-presidential or mixed presidential-parliamentary governments in Ghana, Mali, Niger, and Madagascar.

Legislative-Executive Relations in Mixed Governments

In mixed governments, the institutional distribution of authority prescribed by constitutional provisions creates overlapping jurisdictions between the legislature and the executive. In Mali, Niger, and Madagascar, where the Constitutions were modeled after the 1958 French Constitution, the ambiguities inherent in such overlapping jurisdictions were reinforced by the adoption of a compound government comprised of a President with considerable constitutional authority and a Prime Minister with administrative responsibility for running the government. In these three countries, the President's considerable constitutional authority includes calling and dissolving the national assemblies, ministerial appointments, governing by executive decrees, and requesting national assemblies for obligatory second readings of legislation. While constitutional provisions constrain the exercise of these powers by requiring consultation with the Prime Minister and approval by the national assembly, they nevertheless reinforce the inherent institutional advantage that the executive branch derives from its organizational centralization vis-a-vis the fragmentation of legislative assemblies.

Constitutional provisions create the formal institutional basis for the exercise of political authority by the two branches of government. But the actual exercise of that authority also depends on the political alignments of both branches that result from the electoral rules. For example, when the same party wins a legislative majority and the presidency, and the elected president is also the party leader, party discipline can secure stable government, as in the cases of Ghana and Mali. But when different parties control each branch, either a French-style "cohabitation" or deadlock is likely. While this situation has yet to occur in any of the four countries under review, it is not beyond the realm of possibility, given the institutional distribution of mixed governments and the configuration of electoral rules in all of them. Finally, proportional representation systems reduce the prospect of creating stable governing coalitions, as in Madagascar. And in Niger, party discipline sustains a

precarious governing coalition, but at the expense of neglecting serious legislative deliberation of important policy issues.

Finally, in Ghana, NDC victory of the presidency followed by its overwhelming victory (183 out of 200 seats) in parliamentary elections, which was facilitated by oppositioned boycott of those elections, has sustained a stable government. But constitutional restrictions on its financial powers, weakens Parliament's authority as well as its capacity to hold the executive accountable for its management of the nation's finances. Parliament can not introduce new taxes, increase existing rates, or increase expenditures. Although it can alter line item expenditures, Parliament cannot shift expenditures from one area to another.

Internal Organization and Procedures

The effectiveness of the legislature also depends on its internal organization and procedures. All four legislatures possess independent authority to determine their internal organizations (e.g. committee system) and standard operating procedures (e.g. rules of debate). All four also possess investigative authority. In Ghana, parliamentary committees have used their subpoena powers, with good effect, to hold public hearings, bring in expert advice to review and amend the government's legislative proposals, and build consensus before they are debated. Advocacy groups, as well as the opposition, which has no legislative representation because of its decision to boycott the parliamentary elections, have used these venues to express their policy positions and criticize the government. This important deliberative role of parliamentary committees is facilitated by the operational rule requiring a two-week interval between publication of a government bill in the Gazette followed by up to three months in committee before the first floor debate.

Despite their independent authority to control their internal organization and procedures, the four legislatures are severely hampered by the lack of adequate resources, such as staff, equipment and office space, to undertake systematic investigation and analysis of the executive's legislative initiatives. Inadequate material resources also affect the ability of individual deputies and MPs to initiate legislation, as they have to defray the cost of paper, printing and duplicating. In at least two cases, the Parliament in Ghana and the National Assembly in Madagascar, individual members have taken their own initiatives to contact outside experts for advice and information. While such initiatives are commendable, they do raise the cost in time, energy and effort and detract from attending to legislative business more efficiently.

The lack of material resources only partly accounts for the lack of legislative initiative. The absence of a tradition of legislative initiative is also a factor. But more importantly, the executive monopoly of legislative initiative is rooted in the institutional arrangements that privileges the executive, investing it with the authority and the capacity to initiate legislation and control the legislative agenda. Legislatures do possess the authority to amend executive proposals, but the exercise of this authority is vitiated by the dictates of party discipline, as in Niger, or by the control of both branches by one party, as in Mali and Ghana. Lacking any meaningful way to check the government's initiative, legislatures are consigned to criticizing the executive's legislative proposals,

although even this role is compromised by political considerations. As a result, responsibility for holding the government accountable has fallen, by default, to an undisciplined press. In Ghana, however, there is the interesting anomaly that some of the most constructive criticism of government policy has come from opposition parties outside the legislature.

Political considerations also tend to weaken the impact of the legislature's internal organization and procedures on its capacity for effective legislative deliberation. The consequences of one party controlling both branches of government in this regard has already been noted. But in the case of Niger, a coalition government not only means that different coalition partners are given control of different ministries, but also that different positions in the same ministry are allocated among them. The result is that, since the legislative position of each individual and, therefore, also his ministerial portfolio is dependent on maintaining party discipline, there is less incentive to identify with the ministry than with the party. This problem is connected to the larger problem of the lack of incentive to defend the institutional interest of the legislature against encroachment by the executive. Without such an incentive, it is difficult for the legislature to develop an independent capacity for both effective legislative deliberation and effective oversight of the executive.

Relationship of the Legislature With Civil Society

The electoral system is the formal institutional mechanism that connects civil society to the legislature in a democracy. But it is not the only one. The organization of the relationship between the legislature and civil society actors, outside of elections, can be conceptualized in terms of two ideal-type patterns. One pattern involves the traditional relationship in which organized interest groups, such as labor unions, business groups and bar associations, serve as an important source of valuable policy advice and information. This can provide valuable information that is not readily available to legislators, but which they can use to enrich legislative deliberation as well the substantive content of legislative proposals. It can also be used to gauge the degree of public sentiment for legislative proposals. In this respect, the internal organization of the legislature into functional committees (commissions in the Francophone countries) can be useful venues to exchange information. Ghana represents the most successful example of this type of linkage among the four countries reviewed here.

A second pattern is the standard patron-client relationship rooted in personal connections between legislators and their constituents. This pattern is reflected in all four countries, which is not surprising in view of the cultural orientation and practices of African political actors. In this pattern, legislators are not only constrained to bring home the pork, but also called upon to play the role of ombudsmen, interceding on behalf of their constituents with local authorities who traditionally have a reputation of behaving like local "potentates." Legislators are also called upon to provide financial assistance for such daily needs as food, school tuition, and medical care. In Ghana, MPs report having to provide for overnight lodging and return bus fare to constituents visiting the capital from their districts. Ghanaian MPs report feeling pressured by the incessant flow of constituents demanding solutions to what one MP described as "their petty personal problems." And in their regular visits to their districts, many reportedly are asked repeatedly "Where are the jobs?" Yet, few

MPs are willing to turn their constituents away. In Mali, faced with heavy pressure for constituency servicing, deputies on the same party list divide up their districts so they can respond to constituency demands better.

These two patterns suggest that the relationship between the legislature and civil society need not be restricted to the standard Western model of organized interest group lobbying. That such lobbying exists in Africa is not in doubt, as the first pattern suggests. What is important is that the second pattern is compatible with the social norms and the underlying pattern of social structural differentiation of contemporary African societies. Analytically, the two patterns raise the important issue of examining the many organizing principles of African civil society and how these principles both reflect the values of indigenous cultural traditions and structure the pattern of state-society relationships. In particular, they suggest that differently organized civil society actors will relate differently with state actors. Thus, well-organized professional interest groups are likely to engage in more formal types of linkages based on liberal norms that justify instrumental exchange of information and political support for legislative backing of their interests. On the other hand, fragmented groups and individuals, residing mostly but not exclusively in rural areas, are likely to develop traditional hierarchical patron-client relations based on communitarian norms that define the role of legislators not in instrumental terms but in terms of social obligations. That legislators do not readily renege on these obligations and actually incur, however unwillingly, the cost of fulfilling them indicates the importance they attach to these obligations and the social capital and political support they generate for them. The communitarian norms that justify this pattern of reciprocal relationship, then, serve as powerful incentives for state actors to be responsive to civil society groups.¹⁵

Conclusion

In all four countries, the introduction of mixed parliamentary-presidential systems has weakened executive supremacy. But the influence of this institutional change on effective legislative deliberation is vitiated by several factors. First, weak organizational resources hamper the ability of the legislature in all four countries to secure their own information that is necessary for effective legislative deliberation. Second, confronted with the imperative of maintaining the current structural adjustment policies to revive weak economies, as well as with donor pressure for such policies, government and opposition leaders are constrained from considering and debating major policy alternatives, with the result that legislative deliberation is limited to criticizing government actions. Finally, legislative deliberation is also compromised by the continued centrality of the state as the allocator of valued resources. As a result, there is little incentive for legislators to engage in sustained deliberation of government policies that are especially directed at distributing state resources to local

¹⁵It should be stressed that the two organizing principles of state-society relations described here are ideal-types. They set limits to the ways in which state and civil society actors organize their relationships. Between these limits there exists a great of variety and combinations. As even a casual observation of the African political landscape will attest, formal organizations structured along Weberian rational-legal principles are suffused with informal but structured personal and patron-client relations.

constituencies. In Niger, for example, party discipline in a multi-party coalition government is maintained by the distribution of ministerial portfolios to accommodate the interests of coalition members in securing benefits for their constituents. The continued centralization of state power, therefore, acts as a major institutional disincentive for law-makers to engage in legislative deliberation.

CHAPTER 7

THE INSTITUTIONAL DYNAMICS OF RULE OF LAW

The rule of law disciplines the use of authority by both citizens and public officials in the exercise of democratic governance by ensuring that the use of this authority is consistent with constitutional provisions and with general laws made according to them to govern social, economic and political relationships. Since these relationships cover an extraordinarily wide range of transactions, the enforcement of the rule of law involves the application of general laws to specific cases. This necessarily involves some disparity between law as prescribed and law as applied. But to the extent that the provision of general laws account for this disparity by giving judges discretion to interpret them with reference to individual cases, and to the extent that the exercise of this discretion remains within institutionally prescribed limits, the discipline of rule of law vitiates the opportunity to apply laws arbitrarily and reduces uncertainty in the conduct of democratic governance.

Three analytical criteria can be used to examine the institutional arrangement of the rule of law.¹⁶ The first criterion relates to the broad institutional framework of democratic governance that defines the institutional relationship of the judiciary with the other branches of government and establishes the scope of its functions and responsibilities. This criterion addresses the institutional authority of the judiciary which ensures its independence and impartiality in securing due process and procedural fairness in the administration of justice. The second criterion relates to the internal structures and procedures of the judiciary, such as professionalization and administration, both of which influence its operational effectiveness in delivering speedy and inexpensive justice to a broad section of the citizens. This criterion addresses the capacity of the judiciary to function efficiently and effectively. The third criterion relates to citizen access to the judiciary in terms of both legal guarantees and the means of access.

The Institutional Framework

The role of the modern judiciary in the conduct of democratic governance in Africa has an ambiguous legacy dating back to colonial rule. On the one hand, the colonial judiciary introduced Western precepts of the rule of law into Africa. On the other hand, it functioned as an arm of a bureaucratic state that was almost exclusively concerned with maintaining law and order. As a result, the traditional role of the judiciary in restraining the arbitrary exercise of power by the state in European countries was only weakly institutionalized at independence. With the installation of autocratic rule in much of Africa after independence, the judiciary was either suppressed by neopatrimonial rulers or used to legitimate the arbitrary exercise of state power. While the domination of the executive over the judiciary was almost complete in Francophone Africa, due largely to the influence of French statist tradition, the judiciary in Anglophone Africa retained a semblance of

¹⁶These three criteria are adapted from Blair and Hansen (1994).

autonomy, albeit in compromised form. In Anglophone countries, also, autocratic rule weakened, but never totally removed, the influence of the more liberal British legal tradition on the professional orientations and values of jurists.

In the current efforts to consolidate new democracies in Africa, the emerging institutional arrangements of the rule of law reflect these ambiguous legacies. Thus, in Francophone Mali and Madagascar, the judiciary remains an integral component of the state, occupying a distinct but complementary, instead of an adversarial, position with respect to the executive. Consistent with the French tradition of Etat de Droit, that emphasizes the separation of the functions instead of the powers of state organs, thus signifying the essential unity of the state, the gawker is charged with ensuring the constitutional probity of all legislative enactments and executive decisions. In both countries, the new Constitutions introduced a variety of institutional devices to effectuate a precarious balance between the imperative of judicial independence and the essential unity of the state signified by the Etat de Droit principle.

In Mali, these devices have produced an ambiguous institutional relationship between the judiciary and executive. Other than the newly-created Constitutional Court, charged with ensuring the constitutional probity of legislative and executive enactments, and provisions for the "immobility of sitting judges," there are no formal institutional guarantees of judicial independence. In fact, the President of the Republic is charged to be the guarantor of judicial independence with the assistance of a newly-created Supreme Council of the Magistrate. This Council is composed of the most senior and the most junior of all magistrates, the majority of whom must be elected by the professional corps, but the President of the Republic serves as Council President and the Minister of Justice as Council Vice-President, both of whom participate in disciplinary and career matters but are excluded from doing so in issues of appointment. Judicial independence in Mali is further compromised by the lack of autonomous control by the judiciary over its administration and budget, responsibility for both of which now resides with the Minister of Justice.

In Madagascar, the 1992 Constitution reflects the strong sentiments expressed during the constitutional debates in favor of judicial independence. Thus constitutional assertion of judicial independence is backed up with several institutional guarantees. First, sitting judges cannot be removed except by a judgement of the Superior Council of the Judiciary. Second, in a radical break from the past, a new Constitutional Administrative and Financial Court (CCAF) has been created with explicit responsibility to ensure the independence of the judiciary. Third, in contrast to the previous practice of executive appointment of the Chief Justice of the Supreme Court, appropriate bodies of professional magistrates now elect the Chief Justice of the Supreme Court along with the President of CCAF. And fourth, the constitutional mandate of a single six-year non-renewable term for the Head of CCAF and for all members of the High Court also serves to reduce their vulnerability to political interference.

In addition, largely in reaction to the prevalence of corruption and abuse of power in the judiciary, the Constitution mandates the creation of two regulatory bodies. The National Council of Justice (CNJ), composed of representatives of all three branches of government and of court officials

and lawyers, is a consultative body charged with recommending laws and procedures for regulating the organization and the administration of the courts. The General Inspectorate of Justice (ISG), with similar composition as the CNJ, is an oversight body charged with developing a professional code of ethics for all judges and personnel of the court system. Finally, consistent with French legal tradition, a Constitutional Court has the responsibility for ensuring the constitutional probity of legislative and executive enactments. Both bodies are designed to create a new structure of incentives for ensuring the professional integrity and behavioral probity of the judiciary, both of which were seriously undermined by the institutional incentives inherent in autocratic governance.

But as in Mali, the judiciary's autonomy is compromised by a lack of control over its administration and budget. Budgetary control rests with the Minister of Justice. Administrative control over organizational and career matters continues to rest with the Ministry of Justice, which under orders from Presidents of previous Republics, is used to its authority to ensure a compliant judiciary. Moreover, legislative interference in the judiciary is reinforced by legislative control over appropriations and also by legislative authority to name judges to the Supreme Court of Appeals. Finally, the failure to enact and implement five laws (on the Supreme Court, the Constitutional Court, CCAF, CNJ, and the High Court), all of which are designed to reform the existing structures and procedures of the judiciary in conformity with the provisions of the new Constitution, continue to impede the prospect of creating an independent judiciary in Madagascar.

In contrast to both Mali and Madagascar, constitutional provisions for and institutional guarantees of judicial independence in Ghana are substantial. The 1992 Constitution provides for this independence in the jurisdiction and exercise of judicial powers, in the administration and financial control of judiciary, and in the appointment, removal, and remuneration of judicial officers. It also explicitly proscribes the executive or any body from interference in the organization and operation of the judiciary.

The Chief Justice as the head of the judiciary is responsible for the administration and supervision of the courts. The judiciary has jurisdiction in all civil and criminal matters, including all matters related to the Constitution, and such other jurisdiction as Parliaments may by law confer on it. Operationally, the judiciary, in both its judicial and administrative functions, including financial administration, is subject only to the Constitution. The judiciary's budget is charged to the general Consolidated Funds, but is submitted separately by the Chief Justice to the President, who is constitutionally proscribed from making any changes in the budget, although he is entitled to recommend them.

Clear legal and procedural criteria are specified for the appointment and removal of judicial officers. These reflect an appropriate balance between the imperative of judicial independence and the imperative of ensuring the organizational coherence of the judiciary and the professional integrity and behavioral probity of judicial officers. The arbitrary exercise of executive authority in judicial appointments is constrained by constitutional provisions for consultations with the Chief Justice and with the Judicial Council, a constitutionally mandated autonomous consultative body composed of legal professionals from within the government and from the wider legal community. In addition, the

Constitution also requires the involvement, in only an advisory capacity, of the Council of the State in the appointment and removal of judicial officers.¹⁷ Finally, salary and retirement benefits of judicial officers, which are constitutionally protected, are much better than other public servants.

In addition to the organizational aspects of the institutional arrangements of the rule of law, provisions for the exercise of judicial review are a central component of judicial independence. In both Mali and Madagascar, newly-created Constitutional Courts, in the French tradition, are charged with ensuring that legislation and executive actions are consistent with organic law. In Madagascar, in addition, provision for the creation of a Financial Chamber, to be attached to the Constitutional Court, will make the judiciary the only state organ outside the executive to monitor government expenditures on an ongoing basis, thereby undertaking independent auditing functions.

In Ghana, five different provisions of the 1992 Constitution (Articles 2[1], 11[5], 33, 130, 133) guarantee the review powers of the judiciary. These provisions: establish the Supremacy of the Constitution over all other law; invest protection of human rights in the High Court with right of appeal to the Court of Appeals and the Supreme Court; entrust the judicial powers of the state on an independent judiciary; and, invest original jurisdiction to the Supreme Court over all matters pertaining to the Constitution.

With the centrality of human rights issues in donor policy as well as in the concerns of civil society actors in countries undergoing democratic transitions, constitutional provisions for protecting human rights have become an important feature of the institutional arrangements of the rule of law. Of the three countries reviewed here, only Ghana has embarked on a comprehensive program of institutionalizing autonomous structures and procedures for guaranteeing human rights. In Mali and Madagascar, provisions of human rights guarantees are assimilated with standard constitutional provisions of fundamental civil and political rights. In both countries, the enforcement of these guarantees reside in the judiciary, specifically in the Constitutional Court. No independent organ, similar to Ghana's National Commission on Human Rights and Administrative Justice (NCHRAJ), exist in either country.

In Ghana, the 1992 Constitution mandates the establishment of a NCHRAJ comprised of a full-time Commissioner and two full-time Deputy Commissioners, who are appointed by the President in consultation with the Council of State. The enabling legislation establishing the NCHRAJ, one of

¹⁷The Council of State is akin to a body of Eminent Persons. Its existence, composition and jurisdiction (only advisory) are constitutionally mandated. While the body, in effect, seems somewhat superfluous and an unnecessary drain on the treasury, since, as a constitutionally prescribed state organ, its members are entitled to emoluments from the national treasury. Since the President is charged with responsibility to appoint Council members, in consultation with Parliament, and since Council members are required to take an oath of secrecy, the potential for political mischief in the work of the Council cannot be entirely dismissed. The rationale for the Council remains a mystery, although Ghanaian political actors have, to date, not voiced any concerns about its existence.

the first pieces of legislation passed by the new Parliament, invests the Commission with broad powers to investigate, mediate, and take legal actions on complaints and incidents of violations of fundamental human rights, corruption, abuse of power, and unfair treatment of persons by public officials as well as by private enterprises. The legislation also invests the Commission with quasi-judicial powers as well as autonomy to set procedures for carrying out its functions. Both the Constitution and the enabling legislation guarantee the independence of the Commission and the Commissioners by establishing the same terms and conditions of service as those governing judges of the Court of Appeal and of the High Court.

There is some concern that, since the Commission is not required to make its decisions public, unlike a court, and that since it is also not required to deliberate in public, it has the potential of becoming a "Star Chamber," an arbitrary secret body. The safeguards against this are the independence of the Commissioners and the right of the Commission to take any case to the courts. The Commissioner has reportedly suggested that decisions of the Commission should be registered in court in order to become part of the body of law, which would be an important protection against arbitrary and inconsistent rulings.

Financial constraints have limited the mandated nation-wide coverage by the Commission's offices and activities, as well provision of adequate staff and infrastructural resources (office space and equipment). Even so, the operation of the Commission as well as the dedication of its officers and staff point to a promising start for an important instrument of sustaining democratic governance.

Internal Structures and Procedures of the Judiciary

Constitutional provisions and guarantees are necessary constitutive elements of the institutional arrangements of an effective rule of law system. A second important element concerns the organizing principles and operational procedures internal to the judiciary and the legal system. These principles and procedures involve the presence of a corps of well-trained professionals, supported by adequate incentives in the form of salaries, support staff, and infrastructural resources.

Measured on these counts, Mali, Madagascar and Ghana all suffer from a severe institutional deficit, albeit the scope and depth of the deficit varies among the three countries. The lesson one learns from the Mali report is of a judicial system in a state of virtually total collapse, although the situation portrayed in the Madagascar report is not much better. Much of this institutional decay is, of course, the legacy of erstwhile autocratic regimes in both countries, whose institutional arrangements offered few incentives to invest in and sustain an effective court system. Yet it is difficult to be optimistic about the progress of democratic consolidation in both countries absent fundamental reforms in the internal structures and procedures of the judiciary.

The Ghanaian situation is somewhat analogous, but not entirely similar. While the internal structures and procedures of the Ghanaian court system are also in disarray, which diminishes the ability of the judiciary to deliver justice speedily and inexpensively, the new government has embarked on a major attempt to reform the legal system. This attempt is embodied in the Courts Act of 1993,

a major focus of which was on reforming the lower levels of the judiciary to facilitate access to the justice system by ordinary citizens. But the implementation of the provisions of this Act ran into strong opposition from the legal community led by the Ghana Bar Association, in response to which the government has proceeded to modify some of its original proposals but without eliminating their major thrust toward a more democratized system of delivering justice. The problems have not yet been resolved, as both the legal community and the government continue to work out a negotiated settlement of their differences over a workable court system. In this essentially political context, donor assistance programs aimed at more fundamental structural reforms in the court system must wait. Other problems in the Ghanaian judiciary are of the more practical type. For example, the Law Review is 12 years behind in publishing new laws and judges' opinions; the Attorney-General's office has yet to revise the existing body of laws to make it consistent with the new Constitution; judges and courts operate with little or obsolete equipment and ill-trained staff; and, new laws do not reach judges as they do private lawyers. Donor support for these activities, such as updating the Law Review, provision of new and existing Ghanaian and foreign law journals, and programs on current legal issues, can assist to alleviate, if not entirely remove, some the existing deficiencies.

Access and Enforcement

In principle, an effective system of rule of law must create institutionalized opportunities for access to the justice system for ordinary citizens and for responsible enforcement of legal decisions by state authorities. That both opportunities are seriously lacking in Ghana, Mali, and Madagascar is not surprising, given the disincentives provided by the organizational and procedural weaknesses of the court system and the arbitrary behavior of law-enforcement agencies in all three countries.

All three countries have embarked on steps to rectify these problems. Again, Ghana seems to have undertaken more systematic steps in this direction, with some visible success, than Mali and Madagascar have undertaken, for reasons elaborated above. In Ghana, standing access are not problematic in theory. The business community does use the courts to settle contract disputes, although the litigation process is correctly viewed to be cumbersome, lengthy and expensive. For ordinary citizens, public-funded legal aid is available, but not widely-known. Moreover, it is available only for the near destitute. As a result, private NGOs, such as the International Federation of Women Lawyers (FIDA), with more generous means-tests have been overwhelmed with requests for legal representation. While the police harassment and extortion in Ghana, as well as in Mali and Madagascar, have not entirely abated, there have been some improvements in Ghana with the implementation of a policy on hiring first degree law graduates into the police force. Moreover, the Ghana Bar Association (GBA) as well as the NCHRAJ are continuing their civic education activities with respect to raising the awareness of both citizens and police officers about the importance of basic civil and political rights and due process in law enforcement.

Conclusion

The preceding discussion portrays mixed results and ambiguities in the progress toward democratic consolidation in Ghana, Mali, and Madagascar. That this should be so is not surprising. Ambiguity, uncertainty, and plasticity are the hallmarks of all democratic transitions.

In most respects, a broad institutional rule of law framework has been established in all three countries, although the situation in Mali is somewhat precarious by the absence of institutionalized guarantees of judicial independence. In Madagascar, useful laws have been drafted, but have not been enacted. Ghana has advanced the furthest in establishing a strong institutional foundation for an effective rule of law system.

The internal structures and procedures of the court system in all three countries remain weak, which seriously diminishes the capacity of the judiciary to deliver speedy and inexpensive justice to a broad segment of the population. Correspondingly, access and enforcement also remain weak. Again, Ghana exhibits a more systematic attempt to rectify these weaknesses than Mali and Madagascar.

These ambiguities point to a more fundamental institutional fault-line between the constitutional rules that undergird the new rule of law system and the operational rules that structure the organization and procedures translating these rules into practice. As indicated above, this bifurcation resides in the structural features of the judiciary and the disincentives they provide for effective access and law enforcement. But they also reside from a deeper gap between the prevailing social norms system and the incentive structures created by the new rules. This gap can be clarified in terms of the distinct legal cultures of Mali and Madagascar on the one hand, and of Ghana on the other.

Reflecting the influence of the French legal tradition, which defines the judiciary as a distinct yet integral component of the state, the judiciary's role in checking the exercise of executive authority in Mali and Madagascar remains ambiguous. In both countries, the authority of the Constitutional Courts to rule on the constitutional probity of legislative enactments and executive decisions give them considerable formal discretion either to impose substantive limits on the other two branches, or to limit itself to ruling on the content of the enactments, leaving considerable discretion to the other two branches. If the increasing influence of the Constitutional Court in France in preempting legislation in recent years is used as measure, then certainly the members of the Malian and Malagasy Constitutional Courts can learn an important lesson from their European counterparts about the potential for extending their authority. Whether they will choose to do so is uncertain.

In Ghana, on the other hand, the continued influence of the more liberal British legal tradition invests the judiciary with autonomous powers of interpretation and judicial review that could potentially be employed to limit the discretion of both the executive and the legislative branches. But it remains to be seen to what extent the Ghanaian judiciary, with its ingrained habit of judicial restraint inherited from an earlier British legal tradition, will exercise its considerable powers of judicial review

over broad constitutional issues involving the other two branches of government. In the past, when the Ghanaian judiciary has been confronted with this choice, as it was in several important cases under the 1957, 1960, 1969, and 1979 democratic Constitutions,¹⁸ it chose to interpret its judicial powers narrowly, limiting itself to rulings that simply constructed and interpreted various statutes instead of dealing with broad constitutional principles, such as rule of law, human rights and natural justice, especially in cases where the courts found themselves directly confronting the authority of the executive. To date, under the 1992 Constitution, the Ghanaian Supreme Court has confronted the executive over the relatively innocuous issue of presidential nominations of district chief executives, which it declared illegal. The other test cases decided by the Supreme Court, while upholding important constitutional principles of fundamental human rights, do not really challenge the substantive powers of the executive.

This tradition of constitutional restraint is symptomatic of the norms of the wider legal culture in Ghana that emphasize a restrictive role for the judiciary in constitutional matters. Such cultural norms, reflected in the views of legal professionals, represent a classic case of social norms that develop over time and influence the professional attitudes and behavior of political actors within the framework of formal institutional arrangements. While some of these working rules derive directly from the overarching formal rules, others develop informally in the course of adapting the broader set of rules to solve routine problems on a daily basis. When new institutional arrangements are devised to expand the range of alternative possibilities, such as broad authority for constitutional review and interpretation, the more familiar social norms continue to influence actors' orientation and behavior, compromising the efficiency of the new rules. Over time, actors learn to accommodate the structured tension between the two sets of rules. In the short run, however, this tension is likely to constrain rapid progress toward the consolidation of effective democratic governance.

Finally, civil society actors in all four countries continue to remain skeptical about the commitment of state actors to the rule of law. A combination of past experience with autocratic rule and unrealistic expectations of quick attitudinal changes on the part of those unaccustomed to being constrained by law account for this skepticism. That such skepticism exists, and, especially, that they can be voiced without fear of reprisal are themselves important indicators of the importance of rule of law in the new political dispensation.

¹⁸These cases are listed in the Ghana Report, p. 23.

CHAPTER 8

THE INSTITUTIONAL DYNAMICS OF MULTIPLE LEVELS OF GOVERNANCE

The conduct of governance at multiple levels of the polity is a crucial discipline on the exercise of political authority in the management of public affairs. The principle underlying the organization of multiple levels of governance is the principle of subsidiarity, the idea that governance functions should be devolved to the smallest possible units able to perform them efficiently.

In the context of the current wave of democratization in Africa, there is a growing recognition of the need to devolve increasing authority over governance activities to local units. Prompted in part by the manifest inability of centralized states to govern local communities, in part by their inability to respond to local demands for benefits and resources due to diminishing central resources, and in part by the proven ability of many local communities to withdraw from state control and provide goods and services locally, governments across Africa have embarked on comprehensive attempts to reform the existing institutional arrangements of local governance.

In Mali, Niger and Madagascar, comprehensive reform proposals have been formulated. These proposals, however, have yet to be implemented, in large part because such implementation involves fundamental changes in the organization and demarcation of local units. Limited financial resources also militate against the full implementation of these proposals. Finally, the *tutelle* mentality noted in Niger, coupled with the colonial and post colonial legacy of authoritarian rule also engender opposition to such comprehensive reform proposals.

Of the countries reviewed here, Ghana has proceeded the farthest in respect to decentralization, because it embarked on a systematic reform program in 1988, well before its transition to democracy. In fact, the initial PNDC plan for democratic transition was to eschew a multiparty democracy in favor of a no party democracy, in which the local assemblies elected in 1988 would form an electoral college to elect representatives to the regional and national assemblies. This plan, however, was short-circuited by widespread opposition, including the National Commission on Democracy which was appointed to review and recommend plans for a democratic polity. This opposition was then reinforced by the Committee of Experts appointed to recommend constitutional proposals.

The 1992 Ghanaian Constitution explicitly mandates the creation of local governments and authorizes Parliament to pass appropriate enabling legislation with financial allocation to implement this mandate. To date, these constitutional provisions and enabling legislation have devolved substantial amounts of authority to the 110 local units created in 1988.

The assessment of the operation of these units show mixed results. On the one hand, both local assemblies and the population see local governments as important arenas to solve local problems. This perception is informed less by abstract notions of democratic governance and concern

with the relative benefits of local versus central governance than with provisions of direct material benefits to local communities, such as schools, roads, markets, and health clinics. In the first local elections to be held under the new Constitution, for example, local councilors who were viewed to secure these benefits fared better than those who were not.

On the other hand, the combination of limited financial resources and administrative inertia continues to hamper the effective devolution of governance authority to local units. Authority of local governments to generate revenue locally is limited, and the transfer of central funds comes with conditions that leave local units little flexibility in determining how and where the money will be used. Bureaucratic inertia reflects the continuing influence of the authoritarian legacy of the centralized state. In this respect, there may be some compatibility between the orientations of central state officials who are reluctant to devolve too much authority too quickly to local units and the social norms of both councilors and citizens at the local level who define local governance in terms of securing benefits, instead of securing local autonomy and limiting the power of the center.

A related factor influencing the organization and practice of democratic governance at multiple levels is the role of traditional authority structures in local areas. The impact of these structures on effective local governance is ambiguous, however. On the one hand, when these structures have been brought under state control in corporatist-type organizations, as in Niger, they are seen by local people as agents of the state. On the other hand, when these structures are able to maintain their autonomy from state control, they can potentially serve a useful function in the organization of effective local governance. Of course, there is always the potential that the traditional hierarchical authority patterns of these structures are likely to undermine democratic norms and practices.

In Africa today, the spread of democracy has introduced the additional problem of political control of different levels of government. A party or ruling coalition at the center is almost invariably concerned with opposition control of local governments. In Mali, for instance, the different electoral rules for the National Assembly and local councils have produced precisely this result. While ADEMA won decisive control of the center and a plurality of local councils, the smaller opposition parties won control of almost 73 percent of the local councils.

More generally, there is a pervasive mind-set that some degree of central control is essential for effective democratic governance at local levels. This mind-set results in reform proposals that provide a uniform framework within local units which are expected to assume authority for self-governance. This approach, however, obscures the importance of institutional pluralism in the organization and conduct of democratic governance at multiple levels of the polity. The idea of institutional pluralism connects directly to the meaning of democratic governance. Democratic governance is, in the final analysis, based on the fundamental assumptions of human fallibility. The intellectual hubris of autocracies is the assumption that it is not only possible but desirable to plan the future. The central principle of democratic governance is that for individuals to be free, they must create opportunities for self-governance consonant with their diverse needs and capabilities. The logic of institutional pluralism is consistent with this principle.

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