I. Introduction

I am pleased to be given this opportunity to speak to you. You have chosen as a theme “Building a Capable State.” In the context of where Liberia is today and it wants to go, I think this is a very important topic. As your own announcement of the conference notes The Liberian Civil War weakened the authority of the state, created insecurity and eroded institutions of civil
society. It is appropriate that in this conference you seek to articulate issues, policies, and guidelines to be considered in the design of a post conflict Liberia. Liberia like most African states suffers from crises of national identity that is rooted in the formation of pluralistic states, characterized by gross inequalities among the component groups. Francis Deng in his book: Self-determination and National Unity: A Challenge for Africa, has observed that often times, the state gets captured by a dominant or dominant groups that then define the national identity framework on their terms to give themselves the preeminent status as the favored citizens who enjoy all the rights and dignity of citizenship. Other groups become discriminated against, marginalized, excluded and denied their full citizenship rights. In the case of many African states, the origins of this situation can be traced to the colonial state which merged into a unitary state framework, distinct racial or ethnic groups, many of which would likely have viewed themselves at the time of colonialism as nations in their own right. As the colonial powers applied a preferential treatment to the various groups and regions in their political and economic policies, diversity became correlative to disparities in the shaping and sharing of power, national wealth, social services and development opportunities. In Liberia it can be traced to the evolution of privilege among Americo-Liberians following the founding of Liberia. Instead of seeking to address these disparities through constitutional arrangements that promoted equitable distribution and representation, many African governments imposed monolithic concepts of unity by suppressing diversity, leaving many of their populations disempowered, marginalized and disenfranchised.

The Nations of Africa have all been under the political control of or influence of one European nation or another. Even in cases of countries like Liberia which were never colonized
American influence is clearly discernible. All colonial systems have been authoritarian. African nations inherited from the colonial master a legacy of authoritarian political structures and those like Liberia that did not have a colonial master to inherit such structures created them. An authoritarian regime demands obedience—its laws and decrees must be obeyed. Accordingly the administrative and institutional structure devised is such as can be used for the effective exercise of authority by the state. The colonial system meant the superimposition of a new bureaucracy. Indigenous political systems that existed before colonial rule were either destroyed or radically modified and sometimes perverted. One of the results of this is the general divorce of many people in African villages as well as in towns, from participation in local government and local decisions. In most African countries the only state operatives the people know best are the agents of coercive power—the police and the army. Even where, as in some former British colonies indigenous political organizations were used, the roles were significantly changed. Chiefs and their councils became subject to the authority and direction of district commissioners or agents representing the imperial power, rather than to the will of their own people. The people were expected not to initiate policies, but to obey commands. Perhaps one of the worst legacies of this is the fact that it has left a psychological result which breeds inertia in people which leads them to leave everything to government. As K.A Busia has observed “without the active and massive participation of the people, it is impossible to carry out the required tasks of nation building and development” Typically the population have little share in deciding even on the local matters that touch their own lives. The impressive central legislatures and state houses that exist in Africa very often have no base in local communities, and present only a deceptive facade of political progress. An authoritarian regime does not allow sufficiently for local participation or
control. Its structures are super imposed upon rather than integrated with local communities. Democratic governance requires different structures.

In my remarks I would like to address the challenges faced by African states in realizing constitutional arrangements that promote good governance and managing diversity constructively to promote peace, justice and inclusivity in their national states. These objectives are all prerequisites for national development. The principles of democracy-freedom of speech, including the right to criticize and to propagate against the government; freedom of assembly and association, including freedom to organize opposition parties and to propose alternative governments; freedom of the people to choose their government at general elections, and to change them peacefully; freedom of religion, freedom from arbitrary arrest and imprisonment without trial, and the rule of law. The right to education, health, a clean environment and guarantees for human rights and civil liberties. All these principles are universal. They can be adopted and applied by any nation that chooses to do so. They can be institutionalized in any culture.

But constitutions must extend beyond the provision of basic rights and must extend to issues related to perceived alienation felt by ethnic minorities particularly those about power relations, revenue collection, discrimination in employment, education, which are often the basis of perceived injustices and are often the cause of societal conflicts. African states must establish new institutions. Their cultures must change and grow but they must retain that identification with the past which gives every people its sense of uniqueness and pride. As Byron Tarr has pointed out, the Liberian State has remained faithful to a governance structure originated in the
peculiarities of its founding in the nineteenth century. The current Liberian constitution does not have sufficient mechanisms to ensure the accountability of the executive, its provisions relating to the judiciary do not provide for a method of appointing judges which ensures their independence. Its bill of rights section does not guarantee social and economic rights. It does not adopt any measures to ensure that the composition of government or any of its agencies is carried out in such a manner as reflects the diversity of Liberian society. In the context of modern constitution making, perhaps even more glaring is that it contains no provisions relating to the devolution of power to the local communities. It would seem to me that promoting democratic governance in Liberia will require a fundamental reform of the current constitution.

The reform of the Liberian constitution will be an attempt to achieve the laudable objectives contained in the words of the current Liberian constitution. The Preamble to the Liberian Independence constitution declares” The end of the institution of, maintenance and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights and blessings of life.” Similarly the 1986 Constitution declares “.. the need to establish a framework of government for the purpose of promoting unity, liberty, peace, stability, equality, justice and human rights and opportunities for political, social, moral, spiritual and cultural advancement of our society and for our prosperity.” Clearly both these preambles are inspired and conditioned by the desire to give every citizen, every man, woman and child, the best chance a country can give for a full happy and useful life. This can only be achieved through building a capable state that adheres to the principles of good governance and respects the diversity of the state and can deliver public goods. A major part of the answer to the development of good and accountable governance lies in the development and adoption of
constitutional arrangements that lay solid foundations of respect for fundamental human rights, the rule of law, devolution of power, and diversity. Making a constitution in any country let alone a post conflict one is a major exercise. Fortunately there are a number of models one can look at.

I propose to use the South African constitution as a constitution that has addressed the question of putting in place structures that promote accountability in governance and address diversity. I chose the South African constitution because among constitution designers it is acclaimed to be a well thought out constitution. It has inspired many recent African constitutions such the 2010 Kenyan constitution. Indeed its influence goes beyond Africa to Asian and the Middle East. The inclination for Liberia is to look to the United States. While this is understandable given the history of Liberia, I would argue that although the United States constitution has served the US well, it has little to offer Liberia. A recent study after examining 729 constitutions adopted in the past 60 year, the authors David S. Law and Mila Versteeg concluded, that among the world’s democracies, constitutional similarity to the United States has clearly gone free fall. The trend away from the US constitution began in the 1980s and 1990s but has taken a steep plunge since the turn of the 21st century. The possible reasons given by the authors for the shift are: the 18th century roots and guarantee of relatively few rights; many nations lack the political experiences and cultural traditions that gave rise to the US constitution such as state rights and the concept of federalism; and the absence of broader rights such as right to education, healthcare and food. In a recent interview in Egypt Supreme Court Justice Bader Ginsburg while lauding the Founding fathers grand ideas that have become more effective over the course of time observed that she would not look to the American Constitution if she were
drafting a constitution in the year 2012. She noted that since World War II several other models have emerged that offer more specific and contemporary guarantees of rights and liberties. Pointing to the South African constitution she called it a really great piece of work for its embrace of basic human rights and guarantees of an independent judiciary. She also noted Canada’s Charter of rights and freedoms and the European Convention on Human Rights.

The US constitution does not address the kinds of problems that a post conflict state like Liberia faces. There are several conditions specific to the African situation which Liberia needs to address. In Liberia there is need to have a debate on the type of society the country wishes to create. A clear idea of the type of state envisaged is important if questions of religion, status of minorities, and access to land in the society are not to be problematic. There is need to create sufficient national unity or cohesion to generate social and political power. The state in Africa is an entity newly brought into existence by colonialism, it is an entity different from the sum total of the traditional societies of the component ethnic or racial groups comprised in the state as such it is still in the process of developing its own dynamics. Nwabueze has decreed the existence of states what he calls states without citizens. He observed that the African state is often alienated from its citizens or becomes morbid existing only as a mere geographical expression. There is need to accommodate the vast ethnic diversity that exists in Liberia, address competing identities that could undermine national cohesion and institutionally acknowledge the intensity of the attachment which most Liberians have to their ethnicity. The quest for a viable constitution must anticipate and prepare for the general unfamiliarity that most of the people in Liberia have with the philosophy and machinery of modern democratic governance and its institutions. A viable constitution must accommodate the general economic and social underdevelopment that exists in the country and the consequential need and urgency for development on all fronts.
simultaneously. African constitutions cannot ignore the disproportionate economic and social importance of public office to individuals in the midst of widespread poverty and ignorance. The search must recognize the temptations of arrogance, discrimination, abuse of power and corruption assailing persons in office. There is the issue of cultural values and traditional roles assigned to women that perpetuate the inequality of the sexes and needs to be eradicated so that women can enjoy equal rights with men. There is need to build a free and vibrant press and allow citizens access to information held by government. There is need to create conditions for the functioning of civil society. Nwambueze has observed that accountability of government to the citizenry which is a cardinal element of democracy can scarcely be maintained without civil society that is truly autonomous from the government. Concern about executive and often arbitrary executive power is a common theme in most constitutional conversations in Africa today. The most striking feature of the presidency in African states is its tremendous power and consequent dominance of the political system. Finally a serious search for constitutional arrangements must respond to the need to devolve power to local communities.

Given the economic challenges in Liberia, beyond the essential ingredients of a democracy, a democratic constitution for Liberia should be seen as a liberating document which not only limits the powers of the state and its institutions but guarantees the kinds of liberties and freedoms that will make the pursuit of happiness and self-fulfillment articulated in the 1986 Liberian Constitution become a reality for all the people of Liberia. It should empower and liberate women, minorities and any underprivileged group. It should guarantee equality of opportunity for all citizens irrespective of ethnicity, gender, race, religion, ethnic background, or physical condition. Equal opportunity for all is a mark of true liberation as it ensures that benefits of economic development accrue to the many and not to the few and that all citizens have a
chance to live up to their full potential and to achieve self-fulfillment. As Aziz Rana has appropriated observed, the persistent source of domestic tension in African states continues to be the failure of political institutions to provide much needed basic services and to distribute fairly access to land and other resources. Responding fully to these fundamental material concerns often requires removing authority from historically empowered elites and in the process providing publics -long insulated from power-with a greater role in shaping collective decision making.

I would like to briefly share with you how the South Africa constitution has dealt with these challenges. I am not here suggesting that Liberia adopt the South African constitution. I fully realize that a constitution has to be context driven. Different political, historical and social circumstances dictate that no one constitution model is directly appropriate for Liberia. A constitution is not like a machine which can be transported from country to country and work perfectly well. Nevertheless it is useful to look at what others have done if only not to reinvent the wheel. Besides there are several core essentials that seem to have worked in South Africa that Liberia should consider in any conversation to develop a new constitution for Liberia. In particular I would like to look at the way in which the South African constitutional arrangements manage and protect the nation’s diversity as well as the rights of minorities. The South Africa state is a mix in terms of race, ethnicity, and religious groups. Rather than deny or gloss over the existence of diversity, the South African Constitution acknowledges and adopts strategies for responding to and accommodating such differences. It adopts a strategy of building effective and legitimate state institutions as well as constitutional arrangements that protect diversity and minority rights and promote political tolerance of ethnic and racial differences. National, ethnic, linguistic, or religious minorities, according to international instruments, in states where they
exist, have the right in community with other members of the group to enjoy their culture, and practice their own religion, or to use their language.\textsuperscript{1} Clearly the enjoyment of these rights have to be balanced with the need to ensure that the enjoyment of such rights does not lead to the erosion of the notion of common citizenship and lead to isolationism or fragmentation in a state.

In its constitution, South Africa commits itself to establishing an open society based on democratic values, social justice, and fundamental human rights, as well as proclaims that South Africa belongs to all who live in it, united in diversity. The accommodation of differences is achieved within a liberal democratic framework through the constitutional entrenchment of such notions as the rule of law, equality of citizens, equality before the law, the protection of civil and political rights, social and economic rights, and cultural and linguistic rights and the granting of a limited right to self-determination. It further does this by conferring upon the courts and watchdog institutions the power to mediate competing claims of rights by individuals and the state and the power to evaluate the constitutionality of government policies and practices. The courts and watchdog institutions also examine legislative measures in the context of the civil, political, cultural, and linguistic rights guaranteed by the Constitution. But of course we all know that having the constitutional infrastructure to guarantee human rights is not alone sufficient to guarantee inclusiveness and ensure the accommodation of diversity in a country. Constitutional arrangements have to transform society and they can only do so where there is a conscious effort to make them work backed by a democratic culture. Only then can there develop a state that is inclusive and democratic.

II. THE CONSTITUTION AND APPROACHES TO, DIVERSITY AND INCLUSIVENESS

South Africa under apartheid lacked the institutional arrangements that promoted inclusiveness and legitimate accountability. Mindful of its past, the South African Constitution provides that it is founded on the following values: (a) human dignity; (b) the achievement of equality and advancement of human rights and freedoms; (c) non-racialism and non-sexism; and (d) supremacy of the Constitution and the rule of law. The post-conflict democratic government introduced a constitution that establishes a common South African citizenship, where all citizens are equally entitled to the rights, privileges, and benefits of citizenship. The Constitution attempts to build a new society that is inclusive of all forms of diversity and encourages good governance through transparency and accountability. This is promoted through the rule of law, protection of human rights, equality of citizens, equality before the law, protection of minority rights, doctrine of separation of power, devolution of power to the provinces, protection of minorities and language groups, and the creation of institutions specifically designed to support democracy. A key component to the South African democracy is the promotion of the respect of the rule of law. The supremacy of the Constitution defines the commitment of the South African society to the principle of rule of law. The South African Constitution provides checks and balances through a number of provisions. Section 1 (c) and 1 (d) state that the “Republic of South Africa is one sovereign democratic state founded on supremacy of the constitution and the rule of law, and a multiparty system of democratic government, to ensure accountability, 

2 Constitution of South Africa, article 1(a) (b). The same approach has been adopted in the 2010 Kenya constitution. Article 10 of the Kenya constitution declares that: “national values and principles of governance include: national unity, sharing and devolution of power; the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality human rights no discrimination and protection of the marginalized.

3 Ibid, article 3
responsiveness and openness.” Chapter 2 of the Constitution guarantees both the civil and political rights of every citizen. It guarantees the democratic values of human dignity, equality, and freedom. One of the unique qualities of the Constitution is that it has a bill of rights that includes social and economic rights. The inclusion of socio-economic rights as justiciable rights was an attempt to introduce a substantive element of rights and not merely procedural rights. This is especially important in South Africa given the legacy of apartheid. The government is constitutionally obliged to ensure the progressive realization of these rights. These founding provisions create an environment for checks and balances. Social economic rights provide an additional avenue for promoting accountability of government. The Grootboom and Treatment Action campaign cases in South Africa show how government policies on housing and health were challenged and the government forced to evaluate is policies.

The South African constitution provides for a comprehensive scheme of the devolution. Chapter 3 of the South African constitution deals with the principles of South African cooperative governance and inter-governmental relations. Article 41 (1) provides for national provincial and local spheres of government that are distinctive, interdependent and inter-related. spheres of government and all organs of state within each sphere must among other things: (a) preserve the peace, national unity, and indivisibility of South Africa; (b) secure the wellbeing of all the people of South Africa; and (c) implement effective, transparent, accountable, and coherent government for the country as a whole. Political participation is an integral part of the democratic process and inclusiveness. In South Africa, political participation is guaranteed in Section 16 (freedom of expression) and section 19 of the Constitution (political rights, including

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1 Ibid. 
2 Ibid, article 7 (1) & (2) 
3 Ibid, article 41 (1) (a),(b),(c),(d),(e),(f),(g) & (h)

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the right to form a political party, to participate in the recruitment of members, to campaign, and to vote in elections). The state is obliged to protect, promote, and respect the right of freedom of the individual and the press to interrogate the decisions of government about delivery and compliance with the Constitution. Citizens can protest or litigate in court to advance their views on governance. Parliamentary oversight is provided for in the intervention powers of the Legislature in section 44 (2), and section 55 (2) (b). Section 55 (2) (b) states that the “National Assembly must provide for mechanisms to maintain oversight of the exercise of national Executive authority, including the implementation of legislation; and any organ of state.” In section 44 (4), the National Assembly is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. This gives the legislature independence from other branches of state, especially the Executive. The Executive’s responsibilities are prescribed in the Constitution to which it is ultimately accountable.

The judicial authority in South Africa vests in the courts that must be independent and subject only to the Constitution and law. The independence of the judiciary is secured by ensuring at a minimum that: (a) no persons or organs of state may interfere with the functioning of the courts; (b) judges have security of tenure and may only be removed from office on grounds specified in the constitution and in accordance with the procedure established by the constitution. The appointment procedures for judges must embody two principles: transparency, ensuring that the person appointed to the bench are competent and additionally minimum involvement of the executive. For example in the South African system, in the case of Judges of the Supreme Court the Judicial Service Commission must prepare a list of nominees with more

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7 Constitution of South Africa
8 Ibid, article 33
9 Ibid, article 165. The constitution establishes the following courts: Constitutional Court, Court of Appeal, High Courts, and Magistrate Courts (article 166 (a) (b) (c) (d) & (e)
than the number of judges to be appointed and submit the list to the president. The President shall make appointments from the list and must advice the Judicial Service Commission, with reasons, if any of the nominees are unacceptable. With all the other judges the President must appoint the judges on the advice of the Judicial Service Commission.

To consolidate a culture of accountability, Chapter 9 of the Constitution provides for independent state institutions supporting constitutional democracy—Human Rights Commission; Commission for Gender Equality; Commission for the Protection of the Rights of Cultural, Religious, and Linguistic Communities; and Public Protector. The institutions are designed to strengthen constitutional democracy. The primary objective, for example, of the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities is to (a) promote respect for the rights of cultural, religious, and linguistic communities; (b) promote and develop peace, friendship, humanity, tolerance, and national unity amongst cultural, religious, and linguistic communities, on the basis of equality, non-discrimination, and free association; and (c) recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa. In order to ensure that these entities are independent they are subject only to the Constitution and the law. These institutions fulfill the role of keeping a further check on the state’s conduct. These checks and balances and the forums for mediating disputes arising out of rights violations are important to enhance democratic governance and promote inclusiveness. This is especially important because majoritarian democracy, even without any formal usurpation of power by some faction, can lead to the oppression of individuals who hold unpopular political beliefs or belong to racial or ethnic minorities.

10 Ibid, article 181 (1) (a) (b) (c) (d) (e) (f), (2) (3) (4) & (5), 182, 184, 185 & 187.
11 Ibid, article 185 (1) (a) (b) & (c)
12 Ibid 181 ((2)
The South African approach to language, a matter which is often divisive in multilingual societies, is instructive. It regards language as a national resource that ought to be harnessed for development. Article 30 of the South African Constitution guarantees to everyone the right to use the language and participate in the cultural life of his or her choice. The Constitution grants a limited form of self-determination to cultural and linguistic communities. In Article 31 (1), it provides that persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of their community, to (a) enjoy their culture, practice their religion, and use their language; and (b) form, join, and maintain cultural, religious, and linguistic associations and other organs of society. This allows groups that feel strongly about their language to mobilize and create a language specific heritage. The limitation is that both Article 31 (2) and Article 30 provide that the right granted by the provisions has to be exercised within the framework of the Constitution in that these rights cannot be exercised in a manner that is inconsistent with any provisions of the Bill of Rights or in a manner that promotes isolationism. South Africa has eleven official languages, each of which is the mother tongue for a sizeable portion of the population. Eleven official languages are provided for in article 6 (Afrikanns, English, Ndebele, Sesotho, sa Leboa, SiSwati, Xitsonga, Setswana, Tshivenda, si Xhosa, and isi Zulu). All official languages must enjoy parity of esteem and must be treated equitably.\footnote{Ibid, article 6 (4)} This has both a negative element (the government cannot interfere with a person’s free exercise of his or her language or the formation of associations with other speakers of that language) as well as a positive element (the government must promote equality between the eleven official languages). To promote this equality, a Pan South African Language Board has
been set up, which is charged with promoting the languages and creating conditions for the development and use of the languages.\textsuperscript{14}

The federal character of a constitution empowers regions and can be used to accommodate diversity. As already pointed out, South Africa like Liberia comprises diverse ethnic, racial, and religious groups. Like in any country with such diversity, relations between the various groups are often marked by mutual antagonism and hostility enkindled and fueled by jealousy, distrust, and fear of domination. As Nwabueze has pointed out, the tragedy of tribal or cultural differences, unlike ideological ones, is that the feelings which they engender are not amenable to rational argument and persuasion\textsuperscript{15}. In a devolved system of government, the differing interests and circumstances of the various groups are accommodated. Further, as Cachalia\textsuperscript{16} has observed, in addition to putting procedural constraints on majoritarian decision-making, these arrangements encourage compromise and deliberative decision-making by requiring that decisions at the central level take the interests of opponents and local communities into account in decision-making. Regions can allow local communities to manage a substantial degree of their own affairs and thereby foster a feeling of inclusiveness. It ensures a measure of autonomy for the various provinces in the country, thereby ensuring accommodation of local communities which is a desirable approach to unity in diversity. Under the South African Constitution, Parliament has no legislative competence over matters within the exclusive functional areas of the provincial legislature unless exceptional circumstances set out in Section 44 apply.\textsuperscript{17} Section 44 allows Parliament to legislate in matters under the Provincial set-up, where it is necessary to

\textsuperscript{14} Ibid, article 6 (5)(a)(b)
\textsuperscript{15} NWABUEZE, supra, p.222
\textsuperscript{17} Constitution of South Africa.
maintain national security, economic unity and essential national standards, establish minimum standards for the rendering of services, or to prevent unreasonable action taken by a province which is prejudicial to other provinces or the country as a whole. The provinces have exclusive legislative competence over Schedule 4 matters which include the following: agriculture, casinos, gambling and wagering, consumer protection, cultural affairs, education at all levels except tertiary education, the environment, health services, housing, indigenous and customary law, tourism, trade, traditional leadership, urban and rural development, and welfare services. The consequent reduction of power at the center goes some way to ensure that the center cannot become an instrument of domination.

Devolution of power to local communities reflects the political evolution toward more democratic, inclusive, and participatory forms of government that seek to improve the responsiveness and accountability of political leaders to their electorates and communities. It is premised on the fundamental belief that human beings can govern themselves in peace and dignity in pursuit of their collective wellbeing once they are entrusted with control of their own destiny through the medium of popular local democratic institutions. In economic terms, devolution permits governments to match the provision of local public goods and services with the preferences of recipients. In political terms, devolution provides local minorities with greater opportunities to preserve their distinctive cultural and linguistic identities. It also reconciles diverse cultures, religions, and languages, particularly in large countries where unitary and central administration is difficult. It further, by providing space within which ethnic and language groups can express themselves politically, promotes tolerance - a core value that not only keeps the social structure together but also enables it to function smoothly. It permits the accommodation of local interests within the framework of a stable, central authority.

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18 Constitution of South Africa, article 104(1)
The right to participate in governance is an important opportunity embedded within the framework of decentralization. Participation as a human right is an essential aspect of determining the inclusiveness and democratic content of any political system. The multiple layers of activity at various levels of local councils that result from devolution engender enormous community participation and promote inclusiveness. Since locally-elected leaders know their constituents better than authorities at the national level, they are better positioned to provide the public services that local communities need. When things go wrong, which they will sometimes do, physical proximity also makes it easier for citizens to hold local officials accountable for their performance. Further, in a country that finds itself deeply divided, especially along geographic or ethnic lines, which is the case in most African countries, devolution provides an institutional mechanism for bringing minority groups into a formal, rule-bound bargaining process. A regional system provides channels for the expression of regional sentiments and allows national policies to become more sensitive to regional and local variations within the nation state. It could also provide scope for regional interests on the political stage, and give an opportunity for minority parties, which might otherwise be totally excluded from political power, to exercise an influence and to make their voice heard. Another important political advantage of devolution is that sub-national authorities reduce the concentration of power at the center and thus hinder its arbitrary exercise. In other words, they form an additional accountability mechanism that helps to prevent the “tyranny of the majority or authoritarian rule.” Further, a devolved system of governance can provide channels for the expression of regional sentiments, encourage national policies to become more sensitive to regional variations within a particular country, and provide minority parties, which might otherwise be excluded from political power, with the opportunity to exercise policy influence. In short, a regional
system of government can be more rather than less inclusive than a purely centralized
government system.

There are, however, political dangers in the devolution of power to sub-regional units.
For example, wrongly structured sub-national entities, such as regions, can actually worsen
ethnic and racial tensions in a state. It can provide an opportunity for political mobilization on
the divisive basis of ethnicity or religion, with potential consequences of political oppression,
intolerance, and at the extreme, secessionist movements. A related danger is that a regional
system might frustrate the task of “nation-building.” For instance, a study on Uganda showed
that the power of the districts to employ staff led to a tendency by districts to employ people
regarded as native to the district. Sentiments such as these find expression in the craving for new
districts or transfer to preferred neighboring districts. The creation of a district has a multi-tier
effect as each district created results in new demands from local communities who feel
marginalized. In Uganda, the notion of territoriality and homogeneity embedded within the logic
of decentralization has tended to create an unending chain of marginalization and quest for
autonomy. While regions should build on identity, belonging, and sense of place, the
overriding goal should be to avoid the creation of exclusive ethnically homogeneous units which
emphasize ethnic divisions and undermine the unity and cohesiveness of a state.

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19 JOSEPHINE AHIKIRE, DECENTRALIZATION IN UGANDATODAY: INSTITUTIONS AND POSSIBLE
OUTCOMES IN THE CONTEXT OF HUMAN RIGHTS, INTERNATIONAL COUNCIL ON HUMAN
RIGHTS POLICY DECENTRALIZATION, LOCAL GOVERNMENT AND HUMAN RIGHTS. Project 116-Stage
One: Survey of the Issues, Spring 2002

20 Ibid.
III. THE PROTECTION OF CIVIL AND POLITICAL RIGHTS UNDER THE CONSTITUTION

A democratic constitution must guarantee both the civil and political rights of every citizen.\(^{21}\) It must guarantee the democratic values of human dignity, equality, and freedom. The Bill of Rights, must apply to all law and bind the legislature, the executive, the judiciary, and all organs of state, and must guarantee without qualifications the right to equality before the law, human dignity, and inviolability.\(^ {22}\) It must prohibit all forms of degrading treatment and exploitation, especially slavery, torture, and degrading punishment.\(^ {23}\) It should guarantee the right to a fair hearing, the elements of which include the rights to be heard, to appeal, to a presumption of innocence, to defense by counsel of one’s choice, and to trial within a reasonable time by an impartial court or tribunal.\(^ {24}\) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the relation between the limitation and its purpose; and (d) less restrictive means to achieve the purpose.\(^ {25}\) The rights to life and liberty, the freedoms of conscience and expression, the freedoms of association, assembly, and movement, may only be limited by measures reasonably required in the interest of defense, public safety, public order, public morality, or public health.\(^ {26}\)

\(^{21}\) Constitution of South Africa, articles 7-39  
\(^{22}\) Ibid, article 7 (1) & (2)  
\(^{23}\) Ibid article 12(1) (a) (b) (c), (d) (e)  
\(^{24}\) Ibid, article 35 (3)  
\(^{25}\) Ibid article 36 (1) & (2)  
\(^{26}\) Ibid
Every citizen should be guaranteed the right to participate in government, directly or through freely chosen representatives.\textsuperscript{27} The independence of the judiciary should be protected.\textsuperscript{28} The freedom of movement includes the right of any person to leave the country, enter the country, and acquire a passport should be guaranteed.\textsuperscript{29} The Bill of Rights should guarantee equal access to public services and social services.\textsuperscript{30} Discrimination on the grounds of race, religion, conscience, belief, culture, language, birth, sex, gender, pregnancy, social origin, should be prohibited.\textsuperscript{31} The deprivation of life, liberty, or property without due process of law and servitude should be prohibited. Other protected rights should include the rights to religious freedom and peaceful assembly.\textsuperscript{32} The right to religious freedom includes the right, either alone or in community with others, “to manifest and propagate one’s religion or belief in the form of worship, teaching, practice and observance” – thus implying the right to establish a church as well as a school.

Many of the constitutions in the world recognize that basic human rights and freedoms of the individual are fundamental and inalienable. They are beyond the power of the state to grant. These rights must be respected, upheld, and recognized by all organs and agencies of government and by all persons. As observed earlier, the South African Constitution goes further and includes in the Bill of Rights justiciable socio-economic rights.\textsuperscript{33} The inclusion of socio-economic rights as justiciable rights is an attempt to introduce a substantive element to these rights, not merely a procedural one. The government is constitutionally obliged to ensure the

\textsuperscript{27} Ibid, article 19  
\textsuperscript{28} Ibid, article 165 (2)  
\textsuperscript{29} Ibid, article 21 (1) (3)  
\textsuperscript{30} Ibid articles 27, 29,  
\textsuperscript{31} Ibid article 9 (3)  
\textsuperscript{32} Ibid, articles 17,15(1)  
\textsuperscript{33} Ibid articles 24, 26,27,29
progressive realization of these rights, as a recent South African case involving the right to housing held.  

The South African Constitution further provides for equality of all before the law in spheres of political, economic, social, and cultural life, and in every other aspect. Each citizen is thereby granted equal protection under the law. It recognizes that all legal and political authority of the state derives from the people and shall be exercised in accordance with the Constitution to serve and protect the peoples’ interests. As earlier observed, the South African Constitution contains provisions that entrench the rule of law as simply understood by providing for the supremacy of the Constitution and the rule of law. The provision states that the Constitution is the supreme law of the land; law or conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled. The entrenchment of the rule of law in the Constitution serves to bolster the principle of constitutionalism and the rule of law, which is important because the rule of law means more than mere technical compliance with the law. Legality means lawfulness in the sense that all exercise of power must be authorized by the Constitution and legislation. The rule of law is a foundational value which forbids arbitrary and capricious exercise of power, and it therefore goes beyond mere technical compliance of the law. While these constitutional protections ensure that all citizens enjoy, equally, their civil and political rights under the law, the effectiveness of such protections depends to a large extent on

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34 Republic of South Africa vs. Grootboom, South Africa Constitutional Court 2000(11) BCLR 1169, SACLR LEXIS 126 (2000)
35 Constitution of South Africa, article 9 (1) states: “everyone is equal before the law and has the right, to equal protection and benefit of the law. Article 9 (2) defines equality to include the full and equal enjoyment of all rights and freedoms.
36 Ibid, article 2
37 Ibid, article 2
38 Ibid
39 Tawia Ocran “The Rule of Law as Quest for Legitimacy” in MUNA NDULO (ed) LAW IN ZAMBIA, East Africa Publishing House, Nairobi, 1984, p.303
40 B.O. NWABUEZE, IDEAS AND FACT IN CONSTITUTION MAKING, The Morohundiya Lectures, Faculty of Law, University of Ibadan, Spectrum Books Ltd, Ibadan, p.2
41 Ibid
the ability of citizens to access these rights and the development of a culture of tolerance for
diversity and differing opinions. Empowering citizens to exercise their civil and political rights
must also be seen in the context of government’s larger macroeconomic strategy to target
poverty and create sustainable livelihoods.

The dangers of arbitrary power amply establish the need for constitutional limitations
upon government and for a framework of fundamental principles of humanity and human rights
to control and guide the exercise of governmental power.\footnote{H.L.A Hart, THE CONCEPT OF LAW, 38(1961) at p.38} The need is all the greater because of
the natural tendency for governments to sacrifice long-term considerations in favor of immediate
goals, as was exemplified by the establishment of one-party states in the name of development
and the dire need for national unity in many African countries in the late sixties.\footnote{B.O. Nwabueze, IDEAS AND FACT IN CONSTITUTION MAKING, The Morohundiya Lectures, Faculty of
Law, University of Ibadan, Spectrum publishers, Ibadan, 1993, p. 27.} Before the
birth of constitutionalism, the notion that the individual should be free from coercion by
government – except such as was necessary for the maintenance of peace and order, the
preservation of the security of the state, and the protection of the rights of others – certainly did
exist, but only as a political (as distinguished from a legal) concept dating back to antiquity.\footnote{Ibid.}
Even with the emergence of constitutionalism, constitutional protection by means of an explicit
bill of rights, legally enforceable against the government, was unknown. Protection in the form
of a Bill of Rights as a legal restraint enforceable against both the executive and the legislature
was a later development, becoming a more pronounced and widespread trend only after the
American Revolution.

**EFFECTIVENESS AND ENFORCEMENT OF RULE OF LAW**
In many African jurisdictions, the system of checks and balances consisting of the legislature, courts and watchdog institutions are ineffective. The general feeling is that the executive is too powerful in relation to the legislature and the judiciary. There exists some degree of dependency of such institutions on the executive branch and this does not make them completely impartial in their findings about the overall performance of the government. The watchdog institutions are said to be ineffective because the executive can ignore their recommendations. Part of the explanation is that the appointment of officials to national institutions is often not based on merit; instead, ethnicity and loyalty to the ruling party are often given priority.\textsuperscript{45} Throughout Africa, the dominance of the executive over all national institutions seems to be a recurring theme. This occurs partly because the executive is involved in the operations and appointment of members of all the major organs of government and the autonomy of such institutions is not fully accepted.

A number of factors can be identified as affecting the effectiveness of human rights commissions and other watchdog organizations. These include: independence; defined jurisdiction and adequate powers; accessibility; cooperation; operational efficiency and accountability; the behavior of government in not politicizing the institution, in having a receptive attitude toward its activities, and the credibility of the office in the eyes of the populace.\textsuperscript{46} At the foundational level, national human rights institutions usually cannot fulfill their functions effectively in states that do not have some minimum level of democratic governance. As an accountability mechanism, a national human rights institution will find it

\textsuperscript{45} Human Rights Commission of Zambia, Act, 1996
\textsuperscript{46} HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS INSTITUTIONS, supra, p. 21-22
extremely difficult to function in a state without a democratic system of checks on the exercise of power, where real independence from the ruling power is not possible, and where human rights are not respected in law and/or practice. In contrast, as democratic governance in a state deepens and matures, any national human rights institution established within the state should experience a more conducive environment for operational effectiveness. Maximizing the independence of the institution from government is important for effectiveness and can be achieved through various means. Independence requires that the heads of national institutions are appointed in a manner that gives them independence from influence or control by the arm of government that the institution is designed to investigate—the executive or administrative branch that could influence its activities. The independence of the institution is enhanced by giving the head of the institution security of tenure and the institution freedom in matters such as the investigations and reporting process, the budget, and the hiring of personnel.

Accountability to the public can be enhanced through actions such as making sure the annual and special reports are distributed widely to the public, and ensuring that there is a regular flow of communication between the institution and the complainant during an investigation. Other “effectiveness” factors can be added. It is extremely important to appoint an individual or individuals to head a national human rights institution that has expertise, integrity, and credibility in the eyes of both the government and the populace. The strength of character and the courage needed to operate effective national human rights institutions should not be underestimated. However, political and governmental support must be given to the institution, its work, and its recommendations. A responsive and responsible government is crucial to the effectiveness of a national human rights institution. This is complicated by the extent to which systems for protecting human rights are in conflict with the interests and ambitions of political leaders. If the
work and recommendations of the institution are ignored or unreasonably criticized by government, the effectiveness of the institution will suffer.

Since protection and promotion of human rights also depends upon the human rights commissioners having the necessary education and skills to perform their job, the provision of continuing human rights education would improve their effectiveness. Sensitizing commissioners to human rights issues improves the effectiveness of the human rights commissioners. If commissioners are to fulfill their role effectively, they must have exposure and access to local, regional, and international human rights developments. It is essential to address a situation where, because of traditional education which tends to ignore human rights issues, many have been left oblivious to the remarkable and comprehensive developments in human rights law taking place worldwide. For the practical implementation of these views it is desirable to make provision for appropriate courses, libraries of relevant materials, and better dissemination of relevant materials to commissioners. In the long term, it is vital to engrain human rights principles in the educational curriculum of schools. This will help in the development of a human rights culture. Finally, the role of the courts is crucial in the protection of human rights and ensuring the observance of the rule of law. The constitution is the ultimate source of all law and lawful conduct. The rule of law is an integral feature of a democratic state. The effective operation of the rule of law, however, depends to a large extent on the effectiveness and independence of a judiciary that has the capacity and normative independence to adjudicate disputes between citizens and state. The rule of law can only operate where there is clear commitment by leaders to operate within the law in both public and private interests. Parliament and the executive must obey court rulings. Where the rule of law applies, no one is above the
constitution, not the president, the parliament, or the executive; and every governmental conduct, law, or policy must conform to the constitution.

The accessibility factor requires that the courts and other agencies charged with the promotion and protection of human rights be accessible to the population that the institutions are designed to protect, addressing such issues as public knowledge of the institution’s physical location and diversity of composition. As observed above, one of the principles of the rule of law is access to justice. One cannot talk of the rule of law if people are shielded from justice and have minimal access to the law and the judicial institutions. Access to justice means that justice should be affordable to all and those who cannot afford it should be provided the means through legal aid assistance.
VII. Conclusion

In a democratic state the constitution establishes the parameters of state power and the scope of citizen’s rights and responsibilities. It is the supreme law against which state conduct may be measured or declared unlawful. It establishes the terms of exercising public power, and gives citizens the right to be treated equally in law. At the core of a democratic political environment, therefore, are the overriding constitutional rules that guide state conduct and power. The increase in respect for human rights, the protection of minorities and cultural and linguistic rights, the rule of law, the promotion of inclusiveness, the participation in both local and national state organs, and the guarantee of a degree of local autonomy in the governance of local affairs. Democratic governance depends on societies adopting constitutional arrangements that foster these ideals, but clearly, this is not enough. Steps have to be taken to strengthen institutions that underpin democracy, good governance, participation in governance, devolution of power to local communities and the rule of law—the courts, and the watchdog institutions such as human rights commissions. Political participation should not be limited to elections but should be promoted throughout the governing process. The government should create conditions to enable public participation in the legislative and governance process. There is a critical need to strengthen the human and institutional capacity of the courts and the watchdog institutions to improve their operational effectiveness. It is imperative that there be a wide and popular dissemination of information about human rights and the mechanisms available to protect human rights, and deliberate programs launched to develop a culture of human rights, promotion of tolerance of diversity, equality of all citizens, and the rule of law. There must be real and effective access to the courts, human rights commissions, and other watchdog organizations. While these constitutional protections ensure that every citizen enjoys equally their civil and

Comment [a3]: You use this term without the paper. What does it mean? Is it necessary when you go on to list the other ideals such as tolerance of diversity, etc.?
political rights under the law, such protections depend to a large extent on the ability of citizens to assert the use of these rights. Empowering citizens to exercise their civil and political rights must therefore also be seen in the context of government’s responsibility to tackle poverty and create sustainable livelihoods. The transformation of African governance practices into inclusive and democratic governance cannot succeed unless the economic conditions in African countries improves and develop to a level where the countries are able to have the capacity to sustain the institutions necessary for good governance, the protection of human rights, and the rule of law.

In the end, the success of the project to promote inclusiveness in governance is inexplicably linked to the eradication of poverty which undermines the capacity of institutions charged with the promotion of human rights, the rule of law, equality before the law, and devolution of power to local communities. As Nwabueze has observed, the way to inter-group understanding and accommodation can not be secured by constitutional provisions alone. It lies principally in the minds and hearts of the people. Or as Jon Perkins observed: “No constitution, no court, no law can save liberty when it dies in the hearts and minds of men” and of course women. The foundation and the bricks and mortars upon which a democratic Liberia will be constructed have to cut across people’s mental attitudes and the emotions of their hearts. The foundation must include tolerance; educational institutions that encourage the mixing of citizens from all walks of life; free movement and the right of establishment across ethnic boundaries within the country; and a political culture that is based on justice and grants every citizen and group due recognition, a fair share of the national wealth, and equal opportunity for economic and political advancement.

47. B.O NWABUEZE, supra, p.227