

CONSTITUTIONALISM, ELECTIONS AND DEMOCRACY IN AFRICA: THEORY AND PRAXIS

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Abstract

The paper reviews and interrogates the meaning and interrelationship between constitutionalism, elections and democracy in terms of theory and the diversity of practices. International and African regional norms and standards, as well as illustrative national norms, standards and practices, are identified and analysed. The main arguments and conclusions are that -

- (i) modern national constitutions are mediated by sub-regional, regional and international agreements;*
- (ii) constitutionalism has a broader meaning than constitutions;*
- (iii) constitutionalism implies governance within the framework of the rule of law, justice and respect for fundamental human rights and freedoms;*
- (iv) elections are not an end in themselves but constitute important components of modern democratic values and systems of governance;*
- (v) democratic governance refers to a minimum core of values, processes and institutions that facilitate maximum citizen participation and benefit in civic, political, economic and social and cultural spheres of human life;*
- (vi) democratic governance requires commitment as well as financial and other material resources needed to ensure effective management of the core institutions and mechanisms; and*
- (vii) improvements in the conditions of life of the broad masses is essential to the legitimacy and sustainability of constitutionalism and democratic governance in Africa.*

Overall, democratic systems and practices that manifest genuine constitutionalism and popular choice and renewal of leadership are conducive to sustainable social cohesion, and to peace and security.

Africa and constitutions with the international system

Contrary to popular belief, constitutions are not new to Africa. If one takes a broader view of history, any organised society operates on the basis of some hierarchy of norms, laws and customs, written¹ and unwritten². This applies equally to ancient and modern societies. The general understanding of constitutions is that they constitute the basic foundational norms, laws and customs. Modern constitutions are laws in themselves as well as directives and standards for the making of other laws, policies and practices. At the same time, constitutions are deemed to be the “highest” norms, laws and standards within any sphere of jurisdiction. For illustrative purposes, it is pointed out that within the international sphere, the Charter of the United Nations³ is, broadly speaking, the constitution of the United Nations Organisation. Similarly, at the regional level the Constitutive Act of the African Union⁴ that consolidated and superceded the Charter of the Organisation of African Unity⁵ and the Abuja Treaty⁶ is the African regional constitution.

Although expressed in legal form and possessing legal authority, constitutions are products of political engagement. In this context, living constitutions are dynamic and evolve with time.

Given a globalised world in which individual states are compelled to enter into sub-regional, regional and international associations with each other for specified purposes, the constitution of any one country is often influenced by, and must be interpreted and operationalised within, the broader external context and arrangements. In other words, there are many fields in which states traditionally enjoyed “exclusive national sovereignty” but which are now mediated by the sub-regional, regional and international constitutional norms and standards. It is for this reason that most written constitutions today provide specifically for the modalities for concluding treaties (agreements) and the application and status of international customary law in the domestic sphere⁷. This is of singular importance because of the international law principle that states that a state

¹ The term “written” includes written texts using modern alphabets and letters as well as sketches and drawings on stones, caves and similar sites of recorded history.

² It is generally claimed and accepted that the United Kingdom of Great Britain (the UK) has a “Constitution” which is not written but inheres in peoples’ consciousness and in established customs, conventions and practices. In Africa, Swaziland has only a partially written constitution – see International Bar Association, **Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law**, March 2003.

³ Signed on 26 June 1945, in San Francisco, and came into force on 24 October 1945.

⁴ Adopted in Lome, Togo, on 11 July 2000.

⁵ 1963.

⁶ **Treaty Establishing the African Economic Community**, adopted in Abuja, Nigeria, on 3 June 1991, and formally entered into force on 12 May 1994.

⁷ Examples are: **Constitution of the Republic of Namibia**, 1990, sections 143 and 144; and **Constitution of the Republic of South Africa**, Act 108 of 1996, sections 231 and 232.

party to an agreement “may not invoke the provisions of its international law as justification for its failure to perform a treaty [obligation]”⁸.

Before proceeding to examine the doctrine or principle of constitutionalism and how it relates to constitutions, it is important to draw attention to the fact that the majority of modern constitutions, whether new or amendments of old ones, incorporate certain minimum core content. The following are the most common elements in the minimum core content:

- (i) the structure of government;
- (ii) human rights, fundamental freedoms and responsibilities;
- (iii) distribution and separation of powers between the executive, legislature and judiciary;
- (iv) entrenched independence of the judiciary and the independence of the prosecuting authorities and other law enforcement organs of state;
- (v) entrenched independence of the legislatures;
- (vi) entrenched independence of national institutions responsible for elections, human rights, anti-corruption and abuse of power;
- (vii) regulation of the public service, the security and defence organs;
- (viii) the system of monetary policy determination and collection and distribution of revenue; and
- (ix) the manner of concluding treaties and status of international law.

Constitutions and constitutionalism

The present author has argued elsewhere that⁹:

“...constitutions are rightly or wrongly associated with governance that adheres to the letter and spirit of the constitution – in other words, to *constitutionalism*¹⁰. Real fidelity to constitutionalism means that even under “emergency” situations, when there is a threat to public order or state security, commitment to core values of democracy and human rights is retained. Failure to maintain a balance in “emergency” situations may easily lead to what has been termed “constitutional dictatorship”¹¹... At the practical level, some multilateral bodies

⁸ Article 27, **Vienna Convention on the Law of Treaties**, adopted on 22 May 1969 and entered into force on 27 January 1980.

⁹ S Gutto, “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights”, background paper presented at the **United Nations Seminar on the Interdependence between Democracy and Human Rights**, Geneva, November 2002 (forthcoming in a UN publication).

¹⁰ See generally, C E Zoethout *et al* (eds.), **Constitutionalism in Africa: A quest for autochthonous principles** (Faculty of Law, Erasmus University, Rotterdam, 1996).

¹¹ C Rossiter, **Constitutional Dictatorship: Crisis Government in the Modern Democracies** (Harcourt, Brace & World, Inc., New York, 1963).

today [e.g. the AU] openly reject or ostracise governments that come to power through “unconstitutional means”¹².

It is implicit in the above excerpt that “constitutionalism” is a broader concept than the text of a constitution. Constitutionalism is both the “letter and spirit” of a constitution. In other words, constitutionalism is about fidelity to the letter of the constitution and the core values and principles upon which a constitution is based. The spirit of a constitution is expressed in, amongst others manifest deeds, policies, laws, regulations and the manner of their implementation or practical realisation.

Constitutionalism is about constitutions in practice and not only in form or in theory. The practice of constitutionalism is capable of independent empirical verification using the tools of scientific social inquiry. At another level, the practice of constitutionalism also implies the degree to which constitutions and their implementation address the real social needs of society¹³. Here lies the imperative of interpreting constitutionalism from the perspective of human rights.

The meaning given to constitutionalism in this paper clearly suggests that many African countries have constitutions but do not practise constitutionalism. The so-called “waves of democratisation” in Africa¹⁴ in the last ten to fifteen years seem to be thinly spread on the surface and do not go deeper than political pluralism and regular elections. Indeed, political pluralism and the holding of regular elections are important elements of democracy but they alone are not sufficient for the realisation of constitutionalism and genuine democracy. Perhaps what has given the impression, and maybe the hope, that there are “waves of democratisation” sweeping through Africa, are the phenomena, first, of former one-party systems embracing multi-partyism and, second, of former military regimes, or regimes led by militarists, shedding their uniforms and reinventing themselves as democrats willing to compete for power through the ballot box. The former include countries such as Tanzania, Malawi, Zambia, Mozambique and Kenya. Examples of the latter are Nigeria, Ghana, the Gambia, Uganda, Ethiopia and Rwanda. Perhaps, the liberation of South Africa and its nascent democratic order could be added as a third example of the “waves”.

Constitutions, constitutionalism, elections and good governance

In a narrow sense, elections involve a series of procedural mechanisms for effecting the people’s participation in choosing their political leadership. The relevant international principles are found in the Universal Declaration of Human Rights (1948)¹⁵ as well as the

¹² Articles 4(p) and 30 of the **Constitutive Act of the African Union**, above.

¹³ See the thrust of articles in J Elster and R Slagstad (eds.), **Constitutionalism and Democracy** (Cambridge, Cambridge University Press, 1993).

¹⁴ **New Partnership for Africa’s Development** (NEPAD), adopted at Abuja, Nigeria, October 2001, at paragraph 7.

¹⁵ Article 21 reads:

“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.

International Covenant on Civil and Political Rights (1966)¹⁶. The African regional system has recently put a premium on the principle of popular participation in governance¹⁷. Earlier, the African Charter on Human and Peoples' Rights (1981) had already encapsulated the international norms on participation through elections¹⁸.

The significance of elections lies in the fact that the elected political leadership usually translates into the executive at the top and the legislatures at the various levels or spheres of government. It is such legislatures and the executive that determine the criteria and processes for the selection or appointment of judicial officers and officials of other independent national institutions. It is this direct link of elections to structures of actual governance that makes elections and the system of elections such important foci in politics and the pursuit of constitutionalism. Elections are therefore not an end in themselves but rather a means to the constitution of government and governance itself.

The norms and standards in international and African regional instruments¹⁹ clearly refer not only to participation in elections. They go further to require that citizens should have equal access to public service, services, property and other resources – in other words, a package of citizenship rights that facilitates real ownership of the state and government by the people. The package also links civic and political rights with economic, social and cultural rights.

It is not difficult to concede that the conduct of free and fair elections, or elections that substantially reflect the will of the electorate, to use two of the most popular modern political jargons, *contributes* to the quality of governance. The term “contributes” is used deliberately because there is no automatic correlation between free and fair elections or elections that substantially reflect the will of the electorate and democratic good governance. The immediate post-Kaunda (UNIP) era in Zambia clearly demonstrates that bad and undemocratic governance can follow. The same can be said of Kenya's two elections in the 1990s that extended the Moi/KANU dictatorship to December 2002. In

3. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

¹⁶ Article 25 reads:

“Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.”

¹⁷ **Constitutive Act of the African Union**, above, Articles 3(g) and 4(c).

¹⁸ “Article 13

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- (2) Every citizen shall have the right of equal access to the public service of his country.
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.”

¹⁹ See footnotes 16, 17 and 19, above.

these instances, and similar ones, elections under multi-party systems had the effect of legitimating corrupt and dysfunctional state power, partly because the political and electoral reforms were not accompanied by at least the minimum core content of modern democratic constitutions and commitment by the leadership to constitutionalism.

African Union's NEPAD and the prospects for constitutionalism and holistic democratisation

The novelty of the NEPAD initiative and programme seems to lie in the NEPAD stated departure from the perennial theoretical separation between political governance on the one side and the economic and social order on the other. NEPAD's conception of "good governance" is linked to adherence to human rights, rule of law, and the pursuit of development and poverty eradication²⁰. To this end, NEPAD does, at least at the

²⁰ See the excerpts from the following paragraphs of NEPAD:

"43. The new phase of globalisation coincided with the reshaping of international relations in the aftermath of the Cold War. This is associated with the emergence of new concepts of security and self-interest, which encompass the right to develop and the eradication of poverty. Democracy and state legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements.

49. To achieve these objectives, African leaders will take joint responsibility for the following:

- Promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels;
- Instituting transparent legal and regulatory frameworks for financial markets and auditing of private companies and the public sector;

> Promoting the role of women in social and economic development by reinforcing their capacity in the domains of education and training; by the development of revenue-generating activities through facilitating access to credit; and by assuring their participation in the political and economic life of African countries.

71. African leaders have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries, sub-regions and the continent.

79. It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the ***New Partnership for Africa's Development***, Africa undertakes to respect the global standards of democracy, which core components include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organized to enable the populace to choose their leaders freely.

80. The purpose of the Democracy and Governance Initiative is to contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for

theoretical level, to capture the essence of constitutionalism and democratic good governance. The fact that it goes further to provide for mechanisms for continual monitoring and assessment, especially through the African Peer Review Mechanism (APRM)²¹, is also positive. As the present author has noted elsewhere, the challenge for African countries lies in weak compliance with international commitments for a variety of justifiable and unjustifiable reasons²².

If the intention is to involve the African Commission on Human and Peoples' Rights (ACHPR)²³ in the implementation of some aspects of the APRM, there is need for complete overhaul of the institution. In its current form, it lacks the expertise, capacity, motivation and resource base to enable it to adequately discharge its existing mandate and any additional responsibilities will definitely overwhelm it. Some of the commissioners view their status as diplomatic postings by their governments, contrary to the express provision in Article 31(2) of the Charter which requires commissioners to serve in their personal capacity. The political climate in the Gambia, the seat of the Commission, is also not conducive to the operation of a serious multilateral body responsible for the protection and promotion of human rights. The AU should consider relocating the seat of the Commission to another country or to its headquarters in Addis Ababa.

Institutions and mechanisms for strengthening constitutionalism and democracy in Africa

It has already been noted in this paper that entrenching the independence of national institutions responsible for elections, human rights, anti-corruption and abuse of power is one of the main features of modern constitutions. The implications of this are twofold: first, the entrenchment signifies the importance of securing the institution responsible for elections by ensuring that it is protected from undue influence and intrusion by political formations vying for power and, second, that independent electoral bodies alone are not enough in ensuring good democratic governance. Other mechanisms and institutions, especially the ones responsible for the promotion and protection of human rights and the

human rights and promotion of the rule of law. It is strengthened by and supports the Economic Governance Initiative, with which it shares key features, and taken together will contribute to harnessing the energies of the continent towards development and poverty eradication.

180. The ***New Partnership for Africa's Development*** has, as one of its foundations, the expansion of democratic frontiers and the deepening of the culture of human rights. A democratic Africa will become one of the pillars of world democracy, human rights and tolerance. The resources of the world currently dedicated to resolving civil and interstate conflict could therefore be freed for more rewarding endeavours."

²¹ See the Abuja Communique, 9 March 2003 (***Communique issued at the end of the Sixth Summit of the Heads of State and Government Implementation Committee (HSGIC) of the New Partnership for Africa's Development***).

²² "The compliance to regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights", in P Anyang' Nyon'go, A Ghirmazion & D Lamba (eds.) ***New Partnership for Africa's Development – NEPAD: A New Path?*** (Nairobi, Heinrich Boll Foundation, 2002) 94-104.

²³ Established under Article 30 of the ***African Charter on Human and Peoples' Rights***, above.

fight against corruption and abuse of power, are also needed. Independent and efficient judiciaries and other dispute resolution forums are also essential.

The management of elections is a complex undertaking. In designing the systems, particular attention must be paid to the following:

- (i) electoral systems that optimise real participation, particularly of minorities and marginalised groups;
- (ii) electoral boundaries that are equitable and electoral sites that are accessible to voters;
- (iii) proper registration of voters and management of the process of voting;
- (iv) an efficient and transparent method of counting of votes and the announcement of results; and
- (v) predetermined and legitimate process for the resolution of disputes.

The importance of designing electoral systems that optimise real participation, especially of minorities and marginalised groups cannot be over-emphasised. Elsewhere, the author has pointed out the following -²⁴

Within competitive political models, the question of form or type of the electoral system counts. Some systems operate on the constituency model while others are based on proportional representation. Still others use a combination or a mixture of these two systems. The critical principle that should inform the choice and construction of any genuinely democracy-friendly electoral system should be the optimisation of representation of the marginalised groups and classes such as women and indigenous peoples, and linguistic, cultural and religious minorities. It is in this regard that systems employing elements of proportional representation, such as that obtaining in the new South Africa, tend to produce results with greater diversity and inclusiveness²⁵. The same obtains in most of the Nordic countries in Europe. On the contrary, electoral systems in societies with diverse racial and ethnic groups that are differentiated by numbers but that do not sufficiently incorporate proportional representation, are justifiably criticised for being exclusionary and unfair to minority groups²⁶.

It may not be necessary to set out all the details about the design of electoral systems and procedures in constitutions. The essential principles should be contained in constitutions and the details left to ordinary legislation.

The establishment and effective operation of all the above institutions costs money. Since these are not institutions and mechanisms involved in economically productive activities that generate wealth, it has to be kept in mind that initiatives to strengthen revenue generation by governments must also be prioritised. This, once again,

²⁴ In the work cited in footnote 10 above.

²⁵ See generally, G Fick, S Meintjes and M Simons (eds.), **One Woman, One Vote: The Gender Politics of South African Elections** (The Electoral Institute of Southern Africa, Johannesburg, 2002).

²⁶ L Guinier, **The Tyranny of the Majority: Fundamental Fairness in Representative Democracy** (The Free Press, N. York, 1994).

emphasises the significance of the NEPAD initiative and similar efforts by governments, sub-regional and regional bodies. Failure to pay adequate attention to the provision of enabling financial and other material resources will cripple the democratisation project and may leave electoral systems at the mercy of unpredictable, and often patronising, external donors.

Linked to the sustenance of the institutions and the mechanisms for managing constitutionalism and the process of democratisation are the material, spiritual and intellectual condition of the people. No matter how free and fair elections may be, the democratic vision in Africa will lose legitimacy and appeal if it is not accompanied by improvement in the conditions and quality of life of the broad masses. In other words, the other side of the democracy coin is a citizenry that is a real stakeholder in the collective creation and enjoyment of national wealth and productive resources.

Bibliography

African Charter on Human and Peoples' Rights (1981).

C E Zoethout *et al* (eds.), ***Constitutionalism in Africa: A quest for autochthonous principles*** (Faculty of Law, Erasmus University, Rotterdam, 1996).

C Rossiter, ***Constitutional Dictatorship: Crisis Government in the Modern Democracies*** (Harcourt, Brace & World, Inc., New York, 1963).

Charter of the Organisation of African Unity (1963).

Charter of the United Nations, signed on 26 June 1945, in San Francisco, and came into force on 24 October 1945.

Constitution of the Republic of Namibia, 1990.

Constitution of the Republic of South Africa, Act 108 of 1996.

Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2000.

G Fick, S Meintjes and M Simons (eds.), ***One Woman, One Vote: The Gender Politics of South African Elections*** (The Electoral Institute of Southern Africa, Johannesburg, 2002).

International Bar Association, ***Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law***, March 2003.

International Covenant on Civil and Political Rights (1966).

J Elster and R Slagstad (eds.), ***Constitutionalism and Democracy*** (Cambridge, Cambridge University Press, 1993).

L Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (The Free Press, N. York, 1994).

New Partnership for Africa's Development (NEPAD), adopted at Abuja, Nigeria, October 2001.

NEPAD, Abuja Communique, 9 March 2003 (*Communique issued at the end of the Sixth Summit of the Heads of State and Government Implementation Committee (HSGIC) of the New Partnership for Africa's Development*).

P Anyang' Nyon'go, A Ghirmazion & D Lamba (eds.) *New Partnership for Africa's Development – NEPAD: A New Path?* (Nairobi, Heinrich Boll Foundation, 2002).

S Gutto, "Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights", background paper presented at the *United Nations Seminar on the Interdependence between Democracy and Human Rights*, Geneva, November 2002 (forthcoming in a UN publication).

S Gutto, "The compliance to regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights", in P Anyang' Nyon'go, A Ghirmazion & D Lamba (eds.) *New Partnership for Africa's Development – NEPAD: A New Path?* (Nairobi, Heinrich Boll Foundation, 2002) 94-104.

Treaty Establishing the African Economic Community, adopted in Abuja, Nigeria, on 3 June 1991, and formally entered into force on 12 May 1994.

Universal Declaration of Human Rights (1948).

Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and entered into force on 27 January 1980.