

# The African State and Constitutional Renaissance

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## Abstract

*The constitutional framework for government and politics in Africa has long been ignored by those attempting to find solutions to Africa's current political, economic and social crises. This article argues that fundamental constitutional change is necessary if African countries could implement successful liberal democratic and free market reforms. It also assesses the prospects for a return to constitutionalism for the mediation of power relations in Africa.*

## Introduction

There are constant reports about the crisis of the African state, challenges to the nation-state, the prevalence of despotic and authoritarian rule, corruption and inefficiency and other excesses of the political elites, as well as untold human suffering. Without doubt the African state is in a critical situation; but while there have been numerous expressions of despair and pessimism, there are also declarations of hope and confidence in the future of the continent. South Africa's Deputy President Thabo Mbeki is one of those who looks to the future with confidence and conviction; he, for example, talks of an "African Renaissance". The African Development Bank points to improved economic performance in many African countries while the G7 countries look at Africa anew and pledge support for an initiative to increase trade and investment in the continent.

Despite the talk of an "African Renaissance", improved economic performance and new trade and investment initiatives, specific and fundamental solutions to promote long lasting political stability, and sustainable economic growth are few

and far between. References are made in the literature and by politicians, foreign governments multilateral organisations and others to the need to liberalise, democratise, introduce multi-partyism, good governance and free market principles, among others. But, little is said about how these principles should be successfully implemented and supported in the African state.

This article argues that for these principles to be successfully implemented African states need to be reconstituted by Africans themselves. Further, institution-building, which includes the more fundamental process of constitution-making needs to be undertaken first as the most important step or component in the reconstitution of the African state. It is maintained that the above mentioned principles can only flourish in a state organised and governed in terms of a fundamental set of laws which ensure predictability and enjoy a great degree of legitimacy in the society at large.

### **The Foundations of the Modern State**

One of the foundations of the modern state is a constitutional order that provides the fundamental laws under which power is exercised and establishes permanent institutions with recognised functions and well-defined rights (Strong 1966:15). Constitutions are the organising legal mechanisms mediating the exercise of power in most states of the world. Many states in Africa are exceptions to this rule. Power in Africa is by and large not wielded within the framework of settled constitutional rules. Or if it is, the rules are not sufficiently wide in scope; or they are easily circumvented where they do not suit political elites or special interest groups. Constitutions generally do not enjoy a great deal of legitimacy and do not by and large entrench the mechanisms to sustain many of the principles like a multiparty system and democracy referred to above. Part of the answer as to why constitutions do not function effectively in contemporary Africa lies in their origins.

The precise origins of African constitutions is not well known. In very broad terms, they are largely a legacy of the departing colonial power to nationalist leaders. They were drafted in the offices of civil servants in haste without much input by the local citizenry or even the nationalist leaders. The notion of autochthonous, or home grown, constitutions was extremely rare. The British constitution drafting process for example, was closed and undertaken most often by the legal staff in the Colonial Office (Jennings 1963: 70) with a minimal degree of participation by the colonial people. Coupled with this, Britain as a decolonising power sought to impose a model on its former colonies as close to the Westminster model as possible, what S. A. de Smith refers to as the "Westminster export model" (1964: 7). This is also true of the constitutions in other former colonies - like those of the French, Portuguese and Belgians where they were drafted by a small group of local or foreign individuals with virtually no input from the wider sections of the African population. The important point however is that Africa's independence

constitutions in general were not drafted to suit the specific conditions of individual countries. Above all, they were not drafted to entrench democratic practices or free market principles. Moreover, they were drafted in a different ideological climate in which variants of state-centrist, monist, socialist and Marxist doctrine prevailed. For example, the 1980 Zimbabwean independence constitution was negotiated and written under pressure outside the country. In 1979, the new British Conservative Party government wished to dispose of a difficult and protracted foreign policy problem; there was also the need to end a drawn out war in her former colony. Black and white people in the negotiating parties were ranged against one another and each party wanted as much as it could get from the other. The refinements necessary to entrench liberal democracy were therefore not given as much consideration as they should. In Zimbabwe's case, this was certainly not an auspicious start for a true constitutional democracy.

By contrast, the Namibian constitution-drafting process of 1989-90, took place within the country and involved many participants, both local and international, and was eventually finalised in a constituent assembly. Likewise, the South African constitution drafting process of 1990-96, took place within the country and involved a broad section of the population. The participants included both elected and non-elected leaders, members of civil society and experts on constitutional matters. The South African constitution was finalised in a constituent assembly and certified by a Constitutional Court. Because of the more open constitution drafting processes in the case of Namibia and South Africa, both of these constitutions are likely to enjoy a greater degree of legitimacy among leaders and followers alike.

The importance of constitutions and constitutional design in the early 1960s generally was glossed over in favour of the creation of political institutions like the one-party state. It was believed that the single party would be the driving force behind political development, stability and economic prosperity. Perhaps, Rivkin (1968:7) is one of the few early critics of this emerging trend. Writing in 1968 not long after most African countries received their independence, he criticised the fact that constitutional and governmental institutions were being denigrated while the importance of political leaders and movements was being inflated. Rivkin concluded that the absence or lack of institutional development has distorted, retarded and forestalled Africa's development. He added that institutions "to control, regulate, guide, harness and channel the 'idea' and goal of development" (1968: 34) in order to maximise the benefits of the many, will remain the problems and tasks of the new African state. The wheel has turned full circle in the last 25 years. The literature is now pointing in the direction of institutional, including constitutional strengthening — a belated acceptance of what Rivkin had argued for.

## **The Reassessment Process in Africa**

The post-independence African state, its organisation and functions are very much

in a state of flux at the present time. Numerous commentaries and analyses appearing in the 1990s suggest the need for restructuring the public domain and promoting political reform. The performance of institutions, including constitutional forms, are increasingly being called into question in the literature (Mbaku 1996; Wunsch and Olowu 1990; Rimmer 1991; Governance and Development 1992 (World Bank Report); Widner 1994; Olukoshi and Wohlgemuth 1995; Zartman 1995; Mamdani 1996; Havnevik and Van Arkadie 1996; Ellis 1996; Munro 1996; Leftwich 1996; and Hope 1997). These works and many others were inspired by the declining competence and performance of African governments and more specifically by Africa's economic decline which has, since the 1980s, led to the implementation of International Monetary Fund (IMF)/World Bank economic structural adjustment policies. They have dealt in broad terms with questions of democratisation, individual freedoms, rights and responsibilities, liberalisation, governmental accountability, decentralisation, governance, leadership, the legal framework for development, structural or institutional reform and, only in a peripheral way, with the fundamental constitutional order in which the state functions.

Even less mentioned are the actual constitutional/legal provisions necessary to give content to these principles. What however is emerging, is the suggestion of a linkage between institutions, constitutions, democracy and economic development. For example, Mbaku (1996), poses the question as to why Africa has failed to improve the living conditions of its inhabitants in the post-independence period. In addition to the external obstacles he identifies a number of internal obstacles including political corruption, political and institutional instability, poorly defined infrastructure, economic dependence and unmanageable foreign debts. He concludes that a significant number of these problems are the result of poorly designed institutional arrangements. He further argues that in order for the democratisation process sweeping Africa to succeed and properly implemented, it needs to be preceded by the choice of an appropriate constitutional form. According to Aron [1996: 96], the prospects for growth in Africa are confined by the continent's political, economic and legal institutional foundations. For effective performance of institutions, oversight or monitoring structures are a necessary complement. Aron further argues that "deep-seated constitutional change" is probably necessary. An effective constitution would ensure the existence of a strong civil society which could challenge governments; but this must be accompanied by reforms such as the decentralisation of power.

Drame [1996: 210] writes in a similar vein about the crisis of the state in Africa. He refers to the crisis of confidence between the state (government) and society in Africa. The state (government), he argues, has monopolised key positions and roles in economic activity and public life. It has, in addition, assumed a key role in the redistribution of national wealth and the development of the middle classes who

have benefited from this tendency. With the decline in economic well-being and the increasing repression in many African states, these classes have come into conflict with central governments and are calling for a redistribution of power. State (government) structures therefore need to be reformed and the "principle of devolution of responsibility to the grassroots communities and their institutions" implemented (*Ibid.*: 210).

Commenting on the crisis of the African state, Zartman [1995: 269-273] has proposed 4 areas which might be the focus in any attempt to reconstitute it; namely, power; participation; resources; and external assistance. With regard to power, he argues that state (government) structures need to be reconstituted from the bottom up through the use of some temporary agent at the top so that the state (government) can return to the centre of social and political organisation in civil society. Participation and legitimacy must also be restored through constructive, freely expressed support on the part of society. Structures for institutionalised participation need to be created through the holding of a national convention in which a constitution would be designed to provide the foundations for a normative and legal political order. Resources need to be allocated from both internal and external sources in order to assist in the reconstitution of the state. Leftwich [1966:4], on the other hand, maintains that in Western circles good governance is now considered to be a necessary condition for development. From a developmental point of view, he argues that it is the primacy of politics, the character of the state (government) and the institutional ideal of good governance which are necessary for development (*Ibid.*: 1966:18).

### **Bringing Constitutions and Constitutionalism Back**

The reassessment of the African state and its role and relationship to society has been in progress for some time. Yet, fundamental change or reform has been slow to materialise. No African state has been reconstituted with adequate grassroots participation since independence. Uganda, Namibia and South Africa may be marginal exceptions. The mechanism most often used to effect constitutional reform in the post-independence African state is the government appointed commissions with a limited mandate usually to recommend solutions to specific and immediate issues affecting the political fortunes of the ruling elite. The fundamental restructuring of the state, including constitutional reform, has generally not been part of their mandate.

There are basically two issues surrounding the adoption of appropriate constitutional forms. The first one concerns how a constitutional reform within a particular state is initiated and what mechanisms may be appropriate to bring a new constitution into being. How does one in fact establish a self-enforcing social contract between the relevant population groups within a country and their government? If a constitution is not self-enforcing and legitimate, it is almost

useless. To put it another way, how does one devise a constitution which is legitimate and likely to endure? Constitutions need to be drafted with as high a degree of public participation and concurrence as possible to be effective in mediating power relations within a state. The answer as to how this drafting process is to be initiated is likely to lie in the international and national considerations pertaining to a particular country. In this regard, Namibia and South Africa have a number of lessons which can be passed on to those contemplating constitutional change. Regrettably an elaboration of this issue is beyond the scope of this article.

The second question is perhaps the easier to answer and the main subject of this article. What does one include in a constitution to embrace and sustain democracy as well as free market principles. Related to this is a subsidiary question: What is the basic function of a constitution? The latter question could have many answers; but one of them and perhaps the most important, as I have suggested above, is to mediate the relations of power within a state. To take this question further, it will be useful to know how constitutional draughtsmen ensure the effective mediation of the power relations between leaders and followers. How can leaders be held accountable to followers or the governors to the governed for their actions?

The notion of accountability in a pure form means that one accounts for one's actions to somebody else. Following Chabal (1994), I will argue that wherever there are political communities there are relations of power. In the modern state, different communities, centres or structures exercise power over others. At the heart of the democratic state is the notion of political accountability in which one community, centre or structure accounts to the other for the way in which it uses the power at its disposal. At the core of political accountability according to Chabal (1994), is the notion of political obligation — the obligation of the communities towards one another. How this obligation between the two or more communities is put into practice defines political accountability. Furthermore, political accountability involves the relationship between the governors and the governed. The governors are obliged in a democracy to account to the governed as to how they exercise the power at their disposal. Broadly speaking, governments are obliged to account to their respective populations. Accountability, in this sense, involves a vertical relationship. Within this structure of power relations there are various intermediate levels of accountability; for example, executives and auditor generals may account to legislatures.

Accountability can also be viewed as having two dimensions; that is on-going accountability and periodic accountability. In terms of the first dimension (that is on-going accountability) the work of a free press, the constant probing by opposition parties of governmental activities, the work of parliamentary select committees, the activities of a human rights commission or an auditor-general would be examples. On-going accountability can also be implemented through the

organisational decentralisation of political and administrative power to enable the population to keep a closer watch over government activities. In terms of periodic accountability, elections within defined periods at national, provincial and local government levels can also ensure accountability of leaders to followers. Within these broad categories of accountability, there are various models and devices which can be used to ensure effectiveness, for example, single member electoral systems or proportional electoral system. Other devices include recall mechanisms and the 'no confidence vote'.

Beside political accountability, economic accountability is also important in the modern state. The World Bank and the International Monetary Fund (IMF) are major players in Africa's economic fortunes. In terms of the World Bank's Articles of Agreement, its role is to promote sustainable economic and social development. Political interference in a country is excluded in terms of these Articles. Hence the World Bank directs its reform initiatives largely to the broad economic sphere and public sector management. One of its prescriptions is that of accountability. In the economic sphere, the World Bank considers public accountability as necessary to ensure congruence between public policy and actual implementation and the efficient allocation of public resources. Accountability is considered to be important throughout the economic sphere, including the private sector, through the provision of regulatory oversight. It is argued then that for "neo-conservative" or "neo-liberal", free market principles and political conditionalities being insisted upon by the IMF, World Bank and western governments to survive and prosper a stable, predictable and legitimate institutional and constitutional forms are necessary. Indeed market forces cannot function adequately in an environment dominated by the whims of an all-powerful authoritarian or personal ruler.

Following the World Bank's position, we would posit two different types of economic accountability. At the macro-level there is an obligation on governments to ensure overall financial accountability. At the micro-level a government department or local authority may be accountable for its actions. Decentralisation can also ensure accountability at the micro level. Specific mechanisms like the office of auditor-general and public-protector may also facilitate this process. Political and economic accountability are inseparable. There cannot be economic accountability without political accountability. The one must complement the other. It is therefore necessary that both political and economic accountability are guaranteed in any political system. The question then is how to ensure that both forms of accountability prevail in a political system. The only way this can be done, I would argue, is through the provisions of a constitution.

In the preceeding section I have argued, rather briefly, the case for considering accountability as an important facet in the management of power relations and its linkage with a constitutional democracy. However, several other institutions are necessary to support accountability in a constitutional democracy. One of them is

the multi-party system which facilitates free opposition party activity. Opposition parties are important in holding governing parties and state institutions accountable for their actions. For a multi-party system to adequately perform this function certain guarantees, among others, are required to ensure that they could operate fairly and freely in seeking support from an electorate and investigating governmental performance and actions. For example, freedom of association and expression and freedom from unlawful arrest are necessary for the optimal functioning of a multiparty system. Furthermore, opposition parties must be guaranteed the opportunity to freely compete for the support of the electorate in their bid to defeat a governing party. The administration of elections, as a requisite for the successful functioning of a multi-party democracy, should also be under the supervision of an independent authority. The important point is that the activities of political parties and their followers in a real multi-party democracy should not be subject to the whims of a government or individual members of a ruling group. They must be guaranteed by the constitution.

An additional and equally important factor in promoting multi-party democracy is the provision of exit options for leaders and party members who might be defeated in elections. The potential loss of political power by one party or another is one of the cardinal features of a multi-party democracy. The loss of power is traumatic enough but the life after may be equally as traumatic for many leaders and parties. Leaders are more likely to engage in multi-party electoral contests, if they are for example guaranteed legal immunity out of office for actions while in office. Further, leaders are more likely to accept defeat if their material well being while out of office is guaranteed. The guarantees may include a pension for life and certain material support. To facilitate the functioning of a multi-party democracy, exit guarantees need to be entrenched in constitutions.

The above are only a few examples of constitutional provisions necessary to promote accountability, multi-partyism and democracy. There are many more constitutional innovations which might be considered to promote these values. What is necessary is for African constitutions to be strengthened by entrenching these and other provisions so that they cannot be easily ignored by ruling elites, or overturned by simple parliamentary majorities.

## **The Prospects for Fundamental Constitutional Reform in Africa**

Although there are hints in the literature (see above), regarding the need to reform or even reconstitute the state, very little has happened in actual practice. Perhaps the only area in which reform has occurred is decentralisation. According to Tordoff [1994] the majority of the governments in the region until the late 1980s tended to reinforce central control rather than enhance local autonomy. Since the late 1980s, however a number of governments have, encouraged by the democratisation movement currently sweeping the continent, attempted to pro-



more meaningful decentralisation. The centralising trend of the 1980s, according to Tordoff, has therefore been checked [Tordoff 1994: 558].

The reassessment of the performance of post-independence African governments, which in many cases do not function constitutionally or according to democratic norms, is likely to gain momentum in response to the following factors:

- Broad based nationalist sentiment as an integrating force which drove the independence process is now of little significance. Regional and ethnic loyalties can and do periodically assert themselves, demanding special accommodation in new constitutional forms. Since nation-building processes in many parts of Africa have not obliterated regional and ethnic loyalties, a different approach could be taken, as argued by Selassie (1992), whereby they are acknowledged and accommodated in new constitutional forms without impairing national unity and stability.
- The demise, or exit from office, of many of the original nationalist leaders and the emergence of new political elites educated in the post-independence era are likely to affect how the need for constitutional alternatives is viewed, especially since there is no longer an external colonial enemy and post-independence expectations have not materialised.
- The pressure for constitutional innovation will further be supported by the current global ideological climate. The world in general has entered a new ideological climate, referred to as "neo-conservatism" or "neo-liberalism", which emphasises markets, deregulation, privatisation, supply-side economics, individualism, competition and the "enterprise" culture (Leftwich 1996:13). Traditional Marxist and socialist doctrine with emphasis on centralised constitutional forms, as was the case in the early 1960s, have greatly diminished in importance as a result of its general failure to improve the material wellbeing of Africa's peoples. The technical, administrative and managerial requirements for the promotion of a free market economy and good governance are also different and form part of the conditionalities of the IMF and World Bank structural adjustment programmes. (Leftwich 1996: 15-16). In view of their poor economic growth rates, African countries have little choice but to accept the conditionalities being imposed by these multilateral institutions and western governments. In general, the submission of African economies to market forces compels African governments to reform the institutional bases of politics to make government more democratic. (Falk, 1996) To achieve the goal of political reform and secure adequate legitimacy for the new political institutions a broad range of political forces operating internally ought to be harnessed.

That institutions are the 'carriers of history' (David, 1994), is a fact that is difficult, if not impossible, to ignore. The centralised unitary state, which has until recently been the predominant constitutional form in Africa, has evolved over a long period of time. To reverse the process is likely to take time. It is quite possible that if South Africa's 1996 federal, partly decentralised constitution, proves workable it could provide a further incentive and benchmark for the reassessment and redesigning of decentralised unitary constitutional forms in other African countries. That is, the South African model could push the debate on governmental organisation and institutional design one step further towards a fundamental reassessment of constitutional forms in a number of African countries.

## Conclusion

The debate on establishing multi-party democracy in Africa needs to be taken a step forward. Liberal democratic and free market economic principles simply cannot be implemented in an unpredictable environment, or in a constitutional vacuum. The question of who is to impress this upon Africa's political elites probably lies in the hands of the international donor community and elements in Africa's own civil society.

## Notes

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