TAMING EXECUTIVE AUTHORITARIANISM IN AFRICA: SOME REFLECTIONS ON CURRENT TRENDS IN HORIZONTAL AND VERTICAL ACCOUNTABILITY

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Abstract

Executive lawlessness has been one of the major sources of the crisis of constitutionalism in Africa. After a nine year tenure marked by allegations of corruption and complicity in the capture of the state by an Indian business family, the South African president, Jacob Zuma was forced to resign on 14 February 2018. This came hard on the heels of the rare and bold decision by the Kenyan Supreme Court in September 2017, to declare null and void the results of a presidential election that resulted in the incumbent's winning a second term. Meanwhile, in the Democratic Republic of Congo, dozens of people have died in protests as Joseph Kabila refuses to step down or hold elections after the end of his second and final term, claiming that this is due to lack of funds and logistical obstacles such as an incomplete and unreliable electoral roll.

These and numerous other recent events have not only called into question the prospects for sustaining the democratic transition from the corrupt, repressive and incompetent authoritarian governance of yesteryear that Africa began to witness in the 1990s. More pertinently, this has raised the question of whether the accountability mechanisms in the constitutions that African states revised or adopted in the 1990s and thereafter, are sufficiently effective for checking the continent's unruly executives? Africa's 'big men' and their cronies are well known for their insatiable capacity to misuse their privileged positions to enrich themselves and their supporters almost with impunity. The Zuma case, however, underscores just how challenging it is to enforce the fundamental principle that all citizens, regardless of their status, are not only equal before, and bound to obey and act in accordance with the law, but that the law also applies to all without fear, favour or prejudice.

This paper examines, from a comparative perspective, the manner in which attempts are being made to ensure that the executive branch, especially presidents, are accountable for their actions and inactions. The issue of executive accountability is situated within the broader context of the extensive powers usually conferred on the executive branch. The operation of two main accountability mechanisms and institutions to check against abuses of executive power: horizontal accountability processes and vertical ones, adopted in African jurisdictions, are critically reviewed. The paper shows that, in spite of the numerous innovative measures and institutions introduced to check abuse of powers in Africa, executive accountability is generally in decline. More needs to be done to sustain the transition to transparent and accountable systems of governance on the continent.

1. INTRODUCTION

On 14 February 2018, Jacob Zuma formally, but reluctantly, resigned as president of South Africa after being recalled from office the previous day by the national executive committee of the ruling African National Congress (ANC). His resignation brought an end to what most analysts agree was a disastrous tenure as president. He had come to power in 2009 under a cloud when 783 charges against him of corruption, fraud, racketeering and money-laundering were conveniently dropped, paving the way for him to become president. Zuma left office with the country's second-highest court declaring that the withdrawal of those charges was

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irrational and ordering that they should be reinstated.[1] Moreover, his last year in office was marked by credible allegations that he and several cabinet ministers had been complicit in the capture of the state by a business family, the Guptas.[2] The mounting evidence of corruption, the severe damage it was doing to the party's image, and the ANC's election of a new party president in December 2017, were among the factors that led to Zuma's recall and forced resignation.

Was this a sign, then, of executive accountability under South Africa's widely acclaimed 'Rolls Royce of constitutions'?[3] The question is especially pertinent in view of the extraordinary scale of corruption and state capture portrayed in a report in 2016 by the Public Protector[4] and suggested by the many other incidents that made headlines in South African media, particularly after controversial emails among the Gupta family were leaked into the public domain.[5] How could corruption take place on such a grand scale virtually with impunity under such a robust constitution? If this could happen in South Africa, then how would other African countries with less effective constitutions fare?

It is worth noting in this regard that Zuma's recall by his party came hard on the heels of the rare and bold decision by the Kenyan Supreme Court to declare null and void the results of a presidential election that resulted in the incumbent winning a second term.[6] Meanwhile, in the Democratic Republic of Congo, dozens of people died in protests as Joseph Kabila stubbornly resisted calls to step down or hold elections after the end of his second and final term in 2016, claiming that this was due to lack of funds and logistical obstacles such as an

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[1] *Zuma v Democratic Alliance and Others* (2017), para 146*; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (2017) para 200.

[2] The phenomenon of 'state capture' has been defined in different ways in the literature. What comes through from these definitions is that this phenomenon involves a situation where an individual, group or firm, external to the state exercises decisive influence over state institutions and policies in a manner that advances their financial interests against the public good. Thus usually involves making private payments to public officials and using them to alter the underlying rules of doing business (that is, legislation and rules). The prodigious literature on state capture that became a hallmark of the Zuma presidency includes books by Basson and Pieter du Toit (2017), Chipkin, Swilling et al (2017), Myburgh (2017), and looking beyond South Africa, there is a book on state capture in Kenya by Gichuru (2018). Before his removal from office, Zuma was forced to create a commission of inquiry based on the recommendations made by the Public Protector, discussed below. Evidence of the extent of the complicity of Zuma and his supporters' complicity is emerging daily in the on-going public hearings before this Commission. See for details, 'The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State,' commonly referred to as the Zondo Commission, https://www.sastatecapture.org.za/ Accessed in April 2019.

[3] 'Constitutions in transition' (2018) http://www.open.edu/openlearn/people-politics-law/the-law/constitutions-transition/content-section-2.5. Accessed in April 2019.

[4] 'State of capture: Report on an investigation into alleged improper and unethical conduct by the President and other functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of state-owned enterprises resulting improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' (2016-2017). http://www.da.org.za/wp-content/uploads/2016/11/State-of-Capture-14-October-2016.pdf. Accessed in April 2019.

[5] '#Gupta Leaks. A Collaborative investigation into state capture' (2018) http://www.gupta-leaks.com/. Accessed in April 2019.

[6] *Raila Odinga and Stephen Musyoka v IEBC, Chairperson of IEBC and Uhuru Kenyatta* (2017) http://www.lawyard.ng/full-judgment-of-kenya-supreme-court-nullifying-kenyattas-re-election/. Accessed in April 2019.

incomplete and unreliable electoral roll.[7] In the last few weeks, popular uprisings have led to the removal of some of Africa's longest serving dictators; first was Abdelaziz Bouteflika after 20 years in power in Algeria[8] and a few weeks later, Omar al-Bashir of Sudan was also removed after 30 years in power.[9] It is an irony that the removal from office had prevented Bouteflika, at 81 and wheelchair bound and hardly seen in public since he suffered from a stroke in 2013, from running for a fifth term in office in elections which he would normally have been declared winner regardless of the actual outcome. Omar al-Bashir for his part, had as recently as 2015 won another term in office by a landslide of 94%.[10]

These and numerous other recent events have not only called into question the prospects for sustaining the democratic transition that Africa began to witness in the 1990s but also raised the question whether the accountability mechanisms in the constitutions that African states revised or adopted in the 1990s and thereafter are sufficiently effective for checking the continent's unruly executives? Africa's 'big men' and their cronies are well known for their insatiable capacity to misuse their privileged positions to enrich themselves and their cronies almost with impunity. The Zuma case, however, underscores just how challenging it is to enforce the fundamental principle that all citizens, regardless of their status, are not only equal before – and bound to obey and act in accordance with the law - but that the law also applies to all without fear, favour or prejudice. This paper, through a comparative analysis of the constitutional texts and contexts using examples drawn from the main constitutional traditions on the continent, examine the challenges of limiting executive excesses in Africa.

In the next section, this paper examines the manner in which attempts are being made to ensure that the executive branch, especially presidents, are accountable for their actions and inactions. The issue of executive accountability is situated within the broader context of the extensive powers usually conferred on the executive branch. African jurisdictions have adopted two main accountability mechanisms and institutions to check against abuses of executive power: horizontal accountability processes (discussed in section 3) and vertical ones (discussed in section 4). The conclusion of the paper is that, in spite of the numerous innovative measures and institutions introduced to check abuse of powers in Africa, executive accountability is generally in decline. Where the problem begins is in the dominant position executives occupy in the *trias politica*.

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[7] After enormous internal and external pressure, Kabila finally held what has universally been condemned as a sham elections in which he ignored the actual winner of the presidential poll and imposed an opposition leader with whom he is alleged to have made a deal as winner. See further, 'Congo's elections: A defeat for democracy and a disaster for the people,' https://www.theguardian.com/global-development/2019/feb/09/democratic-republic-of-the-congo-election-a-defeat-for-democracy-disaster-for-people-mo-ibrahim Accessed in April 2019.

[8] See, 'Algeria's President Abdelaziz Bouteflika resigns after 20 years,' https://www.theguardian.com/world/2019/apr/02/algeria-latest-news-president-abdelaziz-bouteflika-resigns Accessed in April 2019.

[9] See, 'Sudan army removes leader, rejects al-Bashir extradition,' https://www.news24.com/Africa/News/sudan-army-removes-leader-rejects-al-bashir-extradition-20190413 Accessed in April 2019.

[10] See Khalid Abdelaziz, 'Sudanese President Bashir re-elected with 94 percent of vote,' https://www.reuters.com/article/us-sudan-election/sudanese-president-bashir-re-elected-with-94-percent-of-vote-idUSKBN0NI0V620150427?feedType=nl&feedName=usmorningdigest Accessed in April 2019.

2. EXECUTIVE DOMINANCE IN THE *TRIAS POLITICA*

Overly powerful executives are a bane not only to transitional democracies in Africa but to the more established ones of the West.[11] For example, Robert Dahl, writing in 2002, commented that the framers of the US Constitution produced an executive that is both monarch and prime minister, and concluded that such power is inappropriate in a modern democracy. Indeed, most constitutions today have created dominant executives in which their powers repose solely in the figure of the president, giving rise to presidencies which are seen as a 'separate branch'[12] of government or, more commonly, as 'imperial'[13] by nature. Alasdiar Roberts has attributed the general increase of executive powers in the 21st century to factors such as improvement in information technology, intensified electoral competition and judicial decisions that have undermined checks on the accumulation of authority in the executive branch.[14]

However, powerful executives in the West have been routinely tamed both by checks and balances written into constitutions and – perhaps more effectively, especially so in countries with no written constitutions, such as Britain and New Zealand – by a culture, custom and tradition of constitutionalism and respect for the rule of law developed over a long history of several centuries.[15] In countries without such rich culture and history to rely on, the letter of the constitutions and increasingly – in value-laden constitutions, such as the 1996 South African,[16] 2010 Kenyan[17] and 2013 Zimbabwean constitutions[18] – the spirit, values and principles they espouse, have become crucially important.

In a newspaper commentary, Albie Sachs, a former justice of the South African Constitutional Court, wrote; '[i]t is often said that when we drafted our constitution we gave powers to the president on the assumption that we would always have someone like Nelson Mandela in office. In fact, the exact opposite was true.'[19] He concluded that 'if one compares South Africa's constitution to that of other countries, the powers of the president are not extensive'. Yet in spite of this, Jacob Zuma was able to take firm control of the state's security cluster, from intelligence services to specialist crime-fighting units and the National Prosecuting Authority, and use them not only to fend off corruption charges against himself but to enable his clients, the Guptas, to capture key sectors of the economy. Once again, if

[11] Dahl 2002, pp. 62-72.
[12] Corwin and Koenig 1956, p. 514.
[13] Rudalevige 2005; and Schlesinger 1973
[14] Roberts 2017, p. 497.
[15] For example, in response to a question in the House of Commons about the need to introduce legislation that will define the limits of the powers of the executive, the Prime Minister responded that his role, 'including the exercise of powers under the royal prerogative, have evolved over many years, drawing on convention and usage, and it is not possible precisely to define them.' See, 372 Parl. Deb HC (6th ser.) (2001) col. 818W, https://publications.parliament.uk/pa/cm200102/cmhansrd/vo011015/text/11015w06.htm Assessed in April 2019. In fact, it has been said that the crux of the checks and balances in the British system lies in an independent judiciary that ensures that no branch of government abuses its powers. See further, Bradley and Ewing (2011).
[16] See for example, the preamble, sections 1, 2, 7 and 8 of the Constitution.
[17] See for example, the preamble, articles 1-3, 19-23 and 73-80.
[18] See for example, the preamble, sections 1-3, and 8-34.
[19] 'The beautiful people were not yet born' (18 February 2018) *Sunday Times*, p.18.

this could happen in South Africa, is any other African country safe from unruly, power-seeking presidents?

The president is the embodiment of executive dominance. Whilst most African constitutions provide for core elements of constitutionalism such as the separation of powers, an independent judiciary, judicial review and, increasingly, so-called 'Chapter 9'[20] state institutions that support and promote constitutional democracy, the explicit and implicit concentration of powers in the hands of the president is all-pervasive. This is however, more pronounced in Francophone and Lusophone African constitutions than in Anglophone ones. A few examples of the elements of excessive concentration of powers in the executive will suffice.

To start with, as pointed out above, the separation of powers has become a feature of all modern African constitutions. This suggests that the traditional triad (the *trias politica*), the executive, judiciary and legislature, operate as co-equals. However, the constitutions of most Francophone states, which from 1990 embraced this fundamental constitutional principle, also contain provisions that contradict it. For example, these constitutions now contain provisions that recognise the judiciary as a separate and independent branch of government but they also add that the president of the republic is the guarantor of such independence. The branches cannot be equal if the one has to guarantee the independence of the other.

Executive dominance over the judiciary is underlined by the powers given to the president to preside over the supreme council of magistracy, which is the body that 'recommends' or 'advises' him on judicial appointments, transfers and disciplinary actions.[21] In most Anglophone jurisdictions, by contrast, it is the case that, even if judicial appointments are made by the president, sometimes subject to confirmation by the legislature, the body making the recommendations – the judicial service commission – is usually reasonably independent of the executive.

Many African constitutions confer wide-ranging delegated powers to their presidents; powers, which are sometimes over and above what is necessary in the ordinary process of exercising the check and balances, that is a normal concomitant of the principle of separation of powers.[22] In Anglophone Africa, the president and ministers are often given delegated powers by an explicit act of parliament that authorises them to make subsidiary legislation that may take diverse forms such as regulations, orders, and statutory instruments. Far more extensive law-making powers are conferred on the executive by Francophone and Lusophone African constitutions. In fact, law-making powers are explicitly shared between the executive

[20] This refers to the institutions provided for in Chapter 9 of the 1996 South African Constitution, which is discussed later in this paper.
[21] Examples of constitutions that clearly make the judiciary a subordinate power to the executive are articles 127-128 of the 1990 Benin Constitution; articles 209 and 219 of the 2005 Burundi Constitution; article 37(3) of the 1996 Cameroon Constitution; and articles 68 and 70 of the 1991 Gabonese Constitution.
[22] For a detailed discussion, Fombad (2016).

and the legislature, with the former having the upper hand not only in initiating legislation but enacting most of the laws in areas subject to concurrent jurisdiction.[23]

Whilst most African constitutions have conferred extensive powers on their presidents, or are worded in a manner that has allowed the presidents to easily accumulate more powers, this is particularly true of constitutions based on or influenced by the continental civilian-style, such as the French Fifth Republic Constitution of 1958. In most such constitutions, the presidents are given the powers to declare a state of emergency, declare war, make wide-ranging appointments in the public service, and even dissolve parliament.

A closer look at the relevant provisions shows that whilst many Anglophone constitutions make some attempt, even if not very successfully, to limit the discretion of the president in exercising these powers, presidents under the civilian-style constitutions exercise far wider discretion.[24] For example, they can declare a state of emergency or indeed dissolve parliament, provided they undertake certain 'consultations'. Often such consultations are merely symbolic, not only because the views expressed in these processes are not binding, but also because those consulted, are usually presidential appointees and members of the ruling party and as such unlikely to tell the president what he does not want to hear.

One of the important preoccupations of the post-1990s constitutional designers was to build in some measures and mechanisms to monitor, check and hold the executive branch accountable. An examination of most of these constitutions reveals that they operate at both a horizontal and vertical level and combine some administrative measures with constitutional measures. It is to these horizontal and vertical measures of accountability that the rest of the discussion turns.

3. HORIZONTAL ACCOUNTABILITY

Horizontal executive accountability is premised on the fundamental principle of checks and balances that underlies the doctrine of separation of powers. It entails that whilst primary responsibility for each of the three core functions of modern governance is conferred on one of the three branches of government, the other two branches are allowed a limited right of interference to prevent the branch exercising primary responsibility from abusing its acknowledged powers: in other words, *le pouvoir arrête le pouvoir*.[25] From this perspective, the two main forms of horizontal checks on the executive are those coming from the judiciary and those from the legislature.

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[23] In these jurisdictions, law-making powers are divided into matters of exclusive legislative domain, exclusive executive domain, and concurrent legislative domain. See, for example, articles 160-165 of the Angolan Constitution of 2010; articles 98-100 of the Constitution of Benin of 1990; articles 159-161 of the Constitution of Burundi of 2005; articles 26-28 of the Cameroonian Constitution of 1996; articles 122-129 of the DR Congo Constitution of 2006; and articles 147-160 of the Gabonese Constitution of 1990.

[24] Cf. articles 61-63, 68 and 101 of the Benin Constitution of 1990; articles 8 and 9 of the Cameroon Constitution of 1996; and articles 81-86 and 149 of the DR Congo Constitution of 2006 with articles 58 and 132 of the Kenyan Constitution of 2010 and sections 110-113 of the Zimbabwean Constitution of 2013.

[25] See, in general, Fombad (2016), pp. 58-92.

3.1 The nature and limits of horizontal accountability measures

The main way in which the judiciary holds the executive accountable is by reviewing executive action for conformity with the law. From a comparative perspective, in civilian-styled Francophone, Lusophone and Hispanophone jurisdictions, judicial review of executive action is usually undertaken by specialised administrative courts,[26] whereas in Anglophone Africa such cases are brought, as a matter of course, before the ordinary courts. As regards legislative oversight of executive action, this is effected in many different ways, which are briefly touched on here.

With respect to judicial oversight, two important developments in Africa since 1990 are worth noting. The first is that there has been a change to the previously defective system of judicial review derived from the French 1958 Constitution. This had allowed only for abstract review of constitutional matters before a quasi-administrative and quasi-judicial body. Perhaps the weakness of this model of constitutional adjudication was that it limited access to the constitutional council only to certain political leaders and institutions to the exclusion of ordinary citizens.[27] The best example of this fundamental change to constitutional adjudication in Francophone Africa is in Benin, where the Constitutional Court is vested with both abstract and concrete review jurisdiction over a wide range of issues and where, unlike before the 1990s, ordinary citizens now have direct access to the Court.[28] Nevertheless, a number of Francophone countries, Cameroon among them, have retained the original constitutional council model of the 1958 French Constitution that provides hardly any possibility for constraining and sanctioning executive violations of the constitution.[29] The only comparable development in constitutional adjudication in Anglophone Africa is that some constitutional courts, unlike in the past, have been vested with abstract jurisdiction, in addition to their usual concrete jurisdiction.[30]

The second and perhaps more far-reaching development is the constitutional entrenchment of the right to administrative justice. An early example of this was in section 33 of the 1996 South African Constitution but it appears as well in several more recent Anglophone constitutions.[31] The best example is section 68 of the 2013 Zimbabwean Constitution, which states as follows:

> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

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[26] In the French system widely emulated in Francophone Africa, the administrative courts deal exclusively with disputes between ordinary citizens and the government, whereas the ordinary courts deal exclusively with disputes between ordinary citizens. This jurisdictional duality can be traced to French Revolution of 1789 and is based on a strict separation between administrative and ordinary courts. See further, Bouboutt (2013), Kanté (1999) and Julien-Laferrière (1970).
[27] For a general discussion of these developments, see Fombad (2016).
[28] See further, Adjolohoun (2016), pp.51-79.
[29] See, Fombad (2016), pp.80-96.
[30] See, for example, sections 79, 121 and 167(1) of the South African Constitution of 1996 and sections 131(8)(b) and 167(2)(a) of the 2010 Constitution of Zimbabwe.
[31] See article 47 of the 2010 Kenyan Constitution and article 31 of the Zambian 2016 Constitution.

(3) An Act of Parliament must give effect to these rights, and must –
(a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal.
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

The right to just administrative action in the countries above forms part of the bill of rights and lays out legal norms, values and principles that must be respected by all administrators, including the president. In South Africa, these constitutional principles provide the basis for a specific and detailed law, the Promotion of Administrative Justice Act, which provides rules on how the right applies in practice.[32] What makes this approach novel is that it provides greater certainty and consistency by constitutionally entrenching these important principles that promote greater administrative accountability which were previously only regulated in a haphazard manner by some common law principles. Those Anglophone countries that have not entrenched this right in their constitutions therefore continue to depend on the common law rules governing judicial review of administrative action. In Francophone Africa, there has also been a similar trend towards the constitutionalisation of the right to administrative action.[33] An example is the 2002 Constitution of the Republic of Congo, which states:

Article 40
Every Congolese citizen has the right to present requests to the appropriate organs of the State.
Article 41
Every citizen, who experienced a prejudice by an act of the administration, has the right to seek justice, in the forms determined by the law.[34]

Even where this is not constitutionalised, some courts in many Francophone countries, among them Cameroon, Gabon and Senegal, now hold government officials responsible for any losses or damage caused in the discharge of their official duties.[35] Another measure to enhance administrative justice is the introduction in several Francophone countries of the rule that consent is to be presumed where there is silence or unreasonable delay in responding to a request, for example in an application to register a new political party.[36] Increasing transparency in government has also led to the enactment of laws granting a right of access to information as well as access to administrative documents for purposes of verifying the

[32] Kotzé (2004), pp. 58-94.
[33] Favoreu (1999), pp. 25-39.
[34] For an example from Lusophone Africa, see article 200 of the Angolan 2010 Constitution, which reads as follows:

(Rights and guarantees of individuals under public administration)
1. Citizens shall have the right to be informed by the public administration of administrative processes that are liable to affect their legally protected rights and interests.
2. Citizens shall have the right to be informed by the administration of the progress of proceedings in which they have a direct interest, and learn of decisions that are taken with regard to them.
3. The interested individuals must be notified, in the form prescribed by law, of administrative acts, which shall require express justification when they affect legally protected rights and interests.
4. Individuals shall be guaranteed the right to access archives and administrative records, without prejudice to the legal provisions for security and defence matters, state secrecy, criminal investigation and personal privacy.

[35] See the discussion by Moudoudou (2009), pp. 17-19.
[36] Lemasurier (1980), p. 1239.

reasons given for certain administrative decisions. The general trend is hence towards more open and accountable governance.

The ability of parliament to hold government accountable is one of the most important means of preventing arbitrary government and dictatorship. African constitutions provide a wide variety of ways in which the legislature can intervene.[37] In Anglophone African constitutions, these include the power to initiate impeachment of the president, deputy president, and ministers.[38] It also includes the power to review and approve any declaration of war,[39] the power to approve the appointment of ministers and other senior government officials,[40] and the power to hold ministers individually and collectively responsible in a process that could lead to their resignation or dismissal.[41]

Unlike under the Anglophone constitutions, the provisions regulating impeachment procedures under Francophone constitutions are often highly detailed. Impeachable crimes and the procedures followed differ from one constitution to another depending on whether it concerns the president alone or in conjunction with other members of the executive such as the prime minister and members of cabinet. Presidents are usually charged with serious crimes such as treason and espionage. In addition, crimes that could lead to impeachment generally include grave abuse of office, corruption, violation of the constitution and of the law, and other so-called heinous and violent crimes. Although the proceedings often end up before either a special High Court of Justice or the Constitutional Court, the process is politicised, with parliament playing a leading role in initiating the process and sometimes appointing some of its members to sit in the High Court of Justice.[42] However, executive accountability is most frequently exercised through an impressive array of other measures. These include a vote of no confidence (which in Francophone Africa is usually limited to the prime minister and his cabinet but not the president), motions of censure, questions (both written and oral), commissions of inquiry, and other forms of parliamentary committees.[43] As

[37] The discussion in this section focuses on the accountability of the president mainly because almost all African countries have adopted either a presidential or semi- presidential system of government. The only few exceptions where the parliamentary system of government is in operation is Ethiopia, Lesotho (which is also a constitutional monarchy), and Mauritius. None of these rules apply to eSwatini (Swaziland), which is an absolute monarchy where King Mswati III is in many respect above the constitution. See further, Fombad (2007).

[38] See, for example, articles 95(5) and 144-50 of the 2010 Constitution of Kenya; section 89 of the Constitution of South Africa, 1996; and section 97 of the 2013 Constitution of Zimbabwe.

[39] See article 95(6) of the 2010 Constitution of Kenya and section 111 of the 2013 Constitution of Zimbabwe.

[40] See article 132(2) of the 2010 Constitution of Kenya.

[41] See article 152 of the 2010 Constitution of Kenya; sections 92(2) and 101-2 of the Constitution of South Africa; and section 109 of the 2013 Constitution of Zimbabwe.

[42] See generally articles 135-6 of the 1990 Constitution of Benin; articles 116-17 of the 2005 Constitution of Burundi; article 53 of the 1996 Constitution of Cameroon; articles 164-7 of the 2006 Constitution of the DR Congo; article 78 of the 1990 Constitution of Gabon; and article 101 of the 2001 Constitution of Senegal. The same is also true of other civil law systems, for example, see article 129 of the 2010 Constitution of Angola.

[43] See generally article 113 of the 1990 Constitution of Benin; articles 187, 202-4 of the 2005 Constitution of Burundi; articles 34-5 of the 1996 Constitution of Cameroon; article 137 of the 2006 of the Constitution of Congo DR; articles 61-4 of the 1990 Constitution of Gabon; and articles 85-6 of the 2001 Constitution of Senegal. It should be noted, however, that Angola, under article 162 of its 2010 Constitution, provides very limited powers of legislative control over the executive.

conceived, these look like perfect measures for holding governments accountable. However, for a variety of reasons, they have not worked well in practice.

First, as in advanced democracies, once a government has a majority in parliament, members of the ruling party are usually reluctant to criticise the government openly or vote against it.[44] This is particularly so when the ruling party is a dominant party. Studies have shown that dominant parties – an overwhelming majority of which correspond with the hegemonic party pattern – control more than half of Africa's governments.[45] Because of these dominant parties, the chances of obtaining the two-thirds majority usually needed to impeach a president are slim. The party-whip system is perhaps the main factor to have reduced parliaments in most African countries into tamed lap dogs. In South Africa, where its parliamentary committees, especially since Jacob Zuma's removal as president, have become more assertive in trying to hold the executive to account, [46]the party-whip system ensures that, in important parliamentary votes, everyone toes the party line, as dictated by the executive.

Even in those few countries where the ruling party lacks, or has only has a small, unpredictable parliamentary majority, as was the case during Joseph Kabila rule in the Democratic Republic of Congo, regular, and of course illegal, financial inducements have been used to buy support which the government needs. Such payments have induced opposition-party parliamentarians in many a country to vote for the repeal of key constitutional provisions designed to promote democracy, such as presidential term limits, which required weighted parliamentary majorities to be amended.[47] The executives are therefore hardly ever under any serious pressure to account in these countries.

A second problem is that even where a vote of confidence succeeds, under Francophone constitutions it is only the prime minister and his cabinet who are required to resign. Yet he is appointed by the president, serves at his pleasure and merely implements the policies laid down by the president.[48] It might well be argued that since the president is elected by the people, he can only be held accountable by the people rather than parliament. However, it remains paradoxical that the prime minister and his cabinet have to take responsibility for implementing bad policies dictated to them by the president.

Finally, the most serious flaw that undermines effective executive accountability is that in many African countries the president benefits from qualified – in some cases, absolute – immunity from prosecution for any wrongs committed in office. An extreme example of

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[44] Bradley and Ewing (2011), p. 84.
[45] See further, Fombad (2015), p. 3.
[46] *Economic Freedom Fighters v Speaker of the National Assembly & Others* (2017; *Democratic Alliance v Speaker of the National Assembly and Other* case (*EFF* case) (2017).
[47] For example, Yoweri Museveni of Uganda did so, initially, to remove the two-term limit and, later, to remove the age limits in the Ugandan 1995 Constitution. See, Reuss and Titeca (7 August 2017) https://www.opendemocracy.net/kristof-titeca-anna-reuss/removing-presidential-age-limit-in-uganda-power-of-cash-and-coercion. Accessed in April 2019; and Fombad and Inegbedion (2010) pp. 1-29.
[48] For example, article 11 of the Cameroon Constitution of 1996 states that '[t]he Government shall implement the policy of the nation as defined by the President of the Republic'. See also articles 118(1) and 131 of the 2003 Constitution of Rwanda and articles 28 and 65 of the Constitution of 1990 Constitution of Gabon.

absolute immunity is the new article 53(3) of the Cameroon 1996 Constitution, which was introduced in 2008. Whilst providing that the President may be tried for high treason, it adds that '[a]cts committed by the President of the Republic in pursuance of Articles 5, 8, 9 and 10 above shall be covered by immunity and he shall not be accountable for them after the exercise of his functions'[49].

In many respects, the Cameroonian legislator merely followed a trend in Francophone Africa of illiberal constitutional changes that weakened the accountability mechanisms introduced by reforms of the early 1990s. These have not only seen protective shields being erected around presidents to guarantee them immunity for crimes committed whilst in office and after they leave office,[50] but also resulted in presidential term limits being removed or rendered ineffective.[51] By contrast, whilst many recent Anglophone constitutions require a high, often unreachable, two-thirds majority to impeach a president, none grants a president lifelong immunity that would protect him or her from accountability even after leaving office.[52] In fact, the South African 1996 Constitution is probably the most advanced in granting the President no immunity whatsoever and providing that he may be removed under section 89(1) by a two-thirds resolution of the National Assembly for, inter alia, 'a serious violation of the Constitution or the law' and 'serious misconduct'. In the *Economic Freedom Fighters & Others v Speaker of the National Assembly and President Jacob Zuma,*[53] the South African Constitutional Court held that the failure of the National Assembly to make rules regulating the removal of the president under section 89 (1) of the Constitution constituted a violation of its duty of oversight over the executive (section 42(3) of the Constitution) as well as its duty of diligent performance of its obligations.[54]

Although this majority might be elusive to obtain, the point to note is that action can indeed be brought against the President. He can be tried whilst in office for any crime he commits and made to account like any ordinary citizen, even if the National Assembly for political reasons is not able to muster the two-thirds majority needed to remove him from office. An exception in Anglophone Africa is the Kenyan 2010 Constitution, which grants the president

[49] These articles virtually cover every important functions that the president is required to perform under the Constitution.

[50] See similar immunities provided for in articles 78 and 81 (introduced in 2000) of the 1990 Constitution of Gabon. Article 115 of the 2003 Constitution of Rwanda states that a former head of state shall not be prosecuted for any crimes committed whilst in office when no proceedings for such crimes were brought against him whilst in office under article 145(8), but the possibilities of a successful prosecution under this article are practically nil. Once again, these immunities were introduced by constitutional amendments in 2010.

[51] The manipulation of presidential term limit provisions has revived the pre-1990 spectre of life presidencies in the 12 countries where these provisions have been removed or manipulated. For example, although Burundi and Rwanda have manipulated their constitutions to give the presidents long tenures, there is every reason to believe that at the end of these prolonged tenures, the provisions will be changed again. Cameroon is a typical example of this phenomenon. President Paul Biya yielded to pressure to accept a two term limit only after the presidential tenure was extended from five to seven years in 1996. However, in 2008, just before the end of his second term, the term limit provision was entirely removed.

[52] See, for example, article 143 of the 2010 Kenyan Constitution and section 98 of the Zimbabwean Constitution.

[53] Accessed at, http://www.saflii.org/za/cases/ZACC/2017/47.pdf Accessed in April 2019.

[54] In fact, section 237 of the South African Constitution states that "all constitutional obligations must be performed diligently and without delay."

immunity from prosecution whilst in office. This is, however, qualified by article 143(4), which provides that this immunity does not apply to prosecution under any treaty to which Kenya is party and which prohibits such immunity.

Presidential immunity provisions, whether absolute (as in most Francophone jurisdictions) or qualified (as in Anglophone jurisdictions), are problematic. Presidents may use their time in office to destroy the evidence of their crimes or intimidate witnesses. Witnesses may also have died, or their recollection of events may have faded with time. The prospect of facing prosecution is probably one of the main reasons why many African leaders, such as Paul Biya of Cameroon, Museveni of Uganda and Paul Kagame of Rwanda, have virtually guaranteed themselves life presidencies: by removing presidential term limits, they seek to escape accountability for their crimes. The former South African president, Jacob Zuma, stood no chance of amending the South African Constitution to achieve a similar goal, and thus sought, desperately yet unsuccessfully, to impose a successor whom he hoped would protect him from the numerous cases that had been pending against him throughout his nine years in office. It is no surprise therefore that within a month after his forced resignation, the corruption charges were reinstated.[55]

It is nevertheless clear that the extensive horizontal accountability mechanisms in present-day African constitutions are not working as effectively as many had hoped when these were adopted in the early 1990s. However, the South African constitutional designers in 1996 had introduced a novel series of institutions to enhance the traditional mechanisms of accountability discussed above. It is to these that we will now turn.

3.2 New avenues for horizontal accountability: Hybrid state institutions of accountability

The 1996 South African Constitution was the first on the continent to entrench what it refers to as 'state institutions supporting constitutional democracy', or what are popularly known as Chapter 9 institutions. Although models of similar institutions have been in existence for centuries, this Constitution was the first in Africa not only to constitutionally entrench these institutions of accountability but also to design them in such a manner that they are now being increasingly recognised and accepted as one of the core elements of modern constitutionalism.

According to section 181(1) of the Constitution, these institutions consist of the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.[56] A number of similar institutions that discharge accountability functions are dispersed in several

[55] Dhlamini (16 March 2018) 'NPA reinstates corruption charges against Zuma' http://www.engineeringnews.co.za/article/npa-reinstate-corruption-charges-against-zuma-2018-03-16/rep_id:4136. Accessed April 2019.

[56] There is a seventh institution mentioned in this chapter, the Independent Broadcasting Authority, but unlike the other six, its basic framework has been established by ordinary legislation.

other provisions in the Constitution.[57] Although similar institutions are found in many African countries, two important features make the South African Chapter 9 institutions unique. First, by constitutionally entrenching them, the fundamental principle of constitutional supremacy protects this framework from arbitrary changes by transient majorities or opportunistic leaders serving their own political agendas. The second feature, and quite clearly the main innovation of these institutions, are the four 'establishment and governing principles'[58] provided for under section 181 to ensure that, unlike similar institutions in most other African countries, they can operate independently with limited risk of political interference.[59] These governing principles go a long way to address one of the main causes of the failure of these accountability institutions in the past, namely, their capture and manipulation by the government and other powerful groups aligned to the ruling elites.

Some post-1996 African constitutions have copied elements of the South African Chapter 9 institutions of accountability either superficially,[60] partially[61] or substantially. The 2010 Kenyan and 2013 Zimbabwean Constitutions are the only examples of full-scale attempts at transplantation of the South African model. What approximates to South Africa's Chapter 9 institutions is contained in chapter 15 of the Kenyan Constitution, which bears as its title, 'Commissions and Independent Offices'.[62] A slightly better adaptation of the Chapter 9 institutions appears in Zimbabwe's 2013 Constitution. As in the South African approach, it provides for 'independent commissions supporting democracy' in its chapter 12,[63]

[57] See, for example, the Judicial Service Commission (in section 178); the Public Service Commission (section 196); the National Prosecuting Authority (sections 179-180); the Financial and Fiscal Commission (sections 220-222); and the South African National Reserve Bank (sections 223-225).

[58] Section 181(2)-(5) enumerates them as follows: 'i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions. iii) No person or organ of state may interfere with the functioning of these institutions. iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.'

[59] A number of cases have illustrated how courts based on the entrenched principles are ready to protect the independence and impartiality of these institutions. See, for example, *New National Party of South Africa v. Government of the Republic of South Africa and Others* (1999), para 191; *Independent Electoral Commission v. Langeberg Municipality* (2001); and *Economic Freedom Fighters v Speaker of the National Assembly & Others* (2017) and *Democratic Alliance v Speaker of the National Assembly and Others* (2016).

[60] This is the case in many Francophone and Lusophone countries. For example, see the national councils in article 268 of the Burundian Constitution of 2005, section IV of the Angolan Constitution of 2010 on 'essential justice institutions', and some of the institutions provided for under the Moroccan Constitution of 2011 and the Tunisian Constitution of 2014.

[61] Two examples of partial transplantation approaches are found in the draft Tanzanian Constitution and the 2016 Constitution of Zambia. The latter provides for 18 commissions and two independent offices.

[62] This chapter contains general principles that regulate ten commissions and two independent offices.

[63] These consist of the Zimbabwe Electoral Commission (sections 238-241); the Zimbabwe Human Rights Commission (sections 242-244); the Zimbabwe Gender Commission (sections 245-247); the Zimbabwe Media Commission (sections 248-250); and the National Peace and Reconciliation Commission (sections 251-253).

'institutions to combat corruption and crime' in chapter 13,[64] and a number of other commissions dispersed in different parts of the Constitution.[65]

The potential of these institutions to hold the executive to account is amply demonstrated by the work of the South African Public Protector, particularly during the tenure of Advocate Thuli Madonsela. She gained worldwide admiration for her courage and tenacity in fighting corruption and maladministration in high places, especially so in the case of her now-famous Nkandla report about the misuse of public funds in renovating the private residence of former President Zuma under the pretext of effecting security upgrades to protect him and his family.[66]

When both the President and the National Assembly ignored her recommendations that the President pay for aspects the upgrades that had nothing to do with his security, two opposition parties in, the *Economic Freedom Fighters v Speaker of the National Assembly & Others*, and *Democratic Alliance v Speaker of the National Assembly and Other* case (EFF case),[67] took the matter to the Constitutional Court. They argued that 'the National Assembly had failed to fulfil its obligations to hold the executive accountable'[68] and that the President had violated the Constitution in not complying with the Public Protector's recommendations. In the *EFF* case, the Constitutional Court held, inter alia, that the failure of the President to comply with the remedial action taken against him by the Public Protector was a violation of his duty to uphold, defend and respect the Constitution as well as of his duty to assist and protect the Office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.[69] The Court also held that the failure of the National Assembly to hold the President accountable and ensure that he complied with the remedial action taken against him was a violation of its constitutional duty to scrutinise and oversee executive action.[70]

The operation of these independent constitutionally entrenched institutions in the last two decades suggests that they have an important role to play not only in supporting and sustaining the transition to constitutional democracy but also in remedying some of the

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[64] These consist of the Zimbabwe Anti-Corruption Commission (sections 254-257) and the National Prosecuting Authority (sections 258-263).

[65] Other commissions dispersed in different parts of the Constitution are the Judicial Service Commission (sections 189-191); the Civil Service Commission (section 202); the Defence Forces Service Commission (sections 217-218); the Police Service Commission (sections 222-223); and the Correctional Service Commission (section 231). In addition, the Auditor-General is provided for in sections 309-314; although this office is not brought within the general provisions regulating commissions in sections 318-323, it too plays an important role in promoting accountability.

[66] Public Protector 'Secure in comfort: Report on an investigation into allegations and implementation of unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province' (2014) http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf. Accessed in April 2019.

[67] Essop 2016, http://ewn.co.za/2015/08/07/EFF-puts-pressure-on-ConCourt-over-Nkandla Accessed in 2019.

[68] Meanwhile, the ANC, with its 249 members in a parliament of 400, had used all manner of delaying tactics to frustrate the process of holding the President accountable; it was therefore no surprise when it rejected the Public Protector's report.

[69] *Economic Freedom Fighters v Speaker of the National Assembly & Others*, and *Democratic Alliance v Speaker of the National Assembly and Other*, para 103.

[70] *Ibid.* at para 104.

defects of the traditional checks and balances associated with the doctrine of separation of powers in Africa.

As noted above, because of extensive powers of African presidents and their ability to control the dominant parties in parliament, the latter can hardly assert any effective oversight over the executive. As the Nkandla saga in South Africa shows, the country's modern liberal constitutional framework could not prevent parliament from being captured and becoming a puppet of the executive and therefore incapable of performing its constitutional duty to check and hold the government accountable. Whilst the three branches of government remain the primary means for checking one another's abuse of powers, it is now clear that the independent institutions play a critical role in complementing them as a secondary mechanism. This is particularly important should any of the three branches fail to act for any reason, be it because they are unwilling to act or because they are ineffective in their action. For instance, if the Public Protector had not intervened to investigate the improper use of public funds to renovate the private residence of President Zuma, it is clear that Parliament, controlled as it is by the ruling party, was not willing to act.[71]

What makes these institutions unique and of critical importance to Africa's democratic project of limited and accountable government is that often they are all the more effective because of their ease of accessibility, especially to the most vulnerable and indigent members of society, and their ability to be both reactive and proactive. For example, the South African Human Rights Commission, which is decentralised and accessible at no cost to a complainant, not only investigates complaints of human rights abuse and recommends corrective action (that is, serves quasi-judicial functions) but often also provides advice on possible options for legal redress.

Each of these institutions is usually conferred specific powers to deal with certain issues, for example, human rights, corruption, gender discrimination or elections. In discharging these functions, they are likely to be more efficient because they are independent and, by virtue of specialising in a particular area, likely to be more efficient. The main areas of executive excesses, such as maladministration, human rights violations, corruption and electoral fraud, are matters over which the courts have not been very successful.[72] The chances of dealing more effectively with these issues have improved when independent institutions are established to deal with them. However, as noted earlier, this will depend on their being well designed and protected from external control and manipulation.

It is argued that if the independent institutions are well conceived and designed, they will not only be capable of countering the numerous threats which stand to undermine the fragile attempts to entrench constitutionalism and the rule of law by executive-minded and captured legislatures and judiciaries, but more effective in holding the executive to account. They can

[71] It is also important to note that throughout his nine years in power, Jacob Zuma succeeding in completely neutralising critical accountability institutions such as the National Prosecuting Authority, the different branches of the police and, in general, the security cluster.

[72] It can be argued that corruption is the greatest threat to peace and stability in Africa, because by robbing people of their right to a better life, it renders constitutionalism a meaningless goal.

now be regarded as a fourth branch of government that provides a much-needed bulwark against the looming resurgence of authoritarian tendencies. The future will depend on how these innovative avenues for strengthening horizontal accountability are perfected and combined with vertical accountability measures to hold the executive branch in check, measures to which we now turn.

4. VERTICAL ACCOUNTABILITY

In contrast to horizontal accountability, vertical accountability obtains when the government, its organs, institutions and related agencies are called upon to account for their activities to the public. This provides an opportunity for ordinary members of the public, as individual stakeholders or collectively as members of civil society organisations, to seek to enforce standards of good governance on public officials. As Machiavelli pointed out centuries ago, the intrinsic motivation of the ruling elites is always to oppress the people and therefore, they should not be trusted with managing the affairs of the state without vigorous oversight by the people who placed them in those positions.[73] The main form of vertical accountability to have emerged over the last three decades is that of regular elections. While there are other forms, such as social mobilisation, advocacy, lobbying and media oversight, quite often these have served mainly to reinforce the actual or potential impact of electoral accountability. In addition, there have been widespread attempts to disperse powers through decentralisation and, in that way, enhance accountability. Some main features of these developments will now be considered.

4.1 Vertical accountability through elections

Elections are the main mechanism for allowing citizens to freely choose those who will govern them and hold them accountable. In fact, the involvement of the general public through voting is the most obvious means through which vertical accountability is exercised today. Prior to the era of democracy and constitutionalism of the 1990s, elections in Africa had been reduced to monotonous rituals in which people were invited to ratify the sole presidential candidates that were presented and to vote for the sole parties that were allowed *de facto* or *de lege* to exist and contest elections. The ability of elections to act as an effective means to hold the government accountable was almost nil.[74]

Post-1990 reforms led to the reintroduction of multipartyism and the laying down of the foundations for a more effective means of vertical accountability by government and other persons holding elected positions to the electorate. The regular holding of multiparty elections has become the norm in almost all African countries, with the exception of Swaziland, which is still ruled by an archaic absolute monarch. The real question is whether these elections provide the citizens with genuine opportunities, inter alia, to hold African governments accountable. This will depend on whether the elections actually provide ordinary citizens with the freedom and ability to make free choices as to whom to elect.

[73] See, generally, McCormick 2001, pp. 297-313.
[74] See, Ellis 2000 and Lindberg 2006.

In the early multiparty elections from 1989 to 1996, a good number of incumbents and parties that were previously liberation movements lost their positions in favour of new leaders and newly established parties.[75] Since then, however, the prospects for opposition parties and their leaders to win elections have diminished progressively in spite of the fact that endemic corruption, mismanagement of state resources, abuse of power and generally bad governance has been the order of the day.

The legitimacy of elections as a means of holding government accountable has declined in the last two decades. Whilst many countries in Africa are freer than they were prior to the 1990s, with electoral processes and competition being much more robust, numerous governance indicators support Larry Diamond's observation in 2015 that the world is experiencing a 'democratic recession', particularly in Africa.[76] In fact, in a recent study, Pippa Norris shows that the electoral processes in African countries are almost identically distributed among three categories: 'failed elections' (29%), 'flawed elections' (27%) and 'acceptable elections' (27%).[77] On a similarly pessimistic note, Freedom House's 2017 overview of freedom in the world introduces sub-Saharan Africa with the subheading, 'Entrenched autocrats [and] fragile institutions'.[78] If only about 27 per cent of elections in Africa attain internationally acceptable standards, it means that the important role these elections are supposed to play in ensuring accountability is being undermined.

There are a number of reasons for the general degradation of elections as a meaningful and effective way of holding governments accountable. Generally, African elections in the last two decades have degenerated into an exercise in participation rather than being an opportunity for competition and accountability. This is because weak legal frameworks, often dictated by incumbents, allow considerable scope for electoral manipulation, fraud and other forms of electoral irregularities. In fact, the defective legal frameworks that have made free and fair multi-party competition an illusion in many countries have also paved the way for one-party-dominant systems to emerge. The phenomenon of the dominant party, now widespread on the continent, arose as a new form of one-party rule that equally undermines the ability of parliament to check the executive. It is perhaps the ability of governments, who through their manipulation of their parliamentary majorities, are able to use their dominance to capture the whole apparatus of the state to gain access to and misuse state resources, that have made the electoral playing field in most countries to be very uneven. In many elections, citizens have been induced to vote for incumbents because of gifts, promises of appointments or development in their communities. The Machiavellian policy according to which enemies are either co-opted into sharing the spoils of power or are annihilated has driven many long-suffering citizens to vote for incumbents as a survival tactic.

One cannot agree more with the view of Michael Bratton and Carolyn Logan that in spite of coming from 'under the shadow of authoritarian pasts, Africans may not so much be

[75] See generally, Bratton and van de Walle 1997 and Schedler 2002, p. 36.
[76] Diamond 2015, pp. 141-155.
[77] Norris 2017.
[78] Freedom House 'Freedom in the world 2017. Populists and autocrats: The dual threat to global democracy' (2017) https://freedomhouse.org/report/freedom-world/freedom-world-2017. Accessed April 2019.

intentionally delegating power to their governments, as failing to claim it from them'.[79] The authors conclude that whether because they are unwilling, unable or simply unaware, many Africans have not taken full advantage of the democratic transition. To the extent that 'democracy is supposed to mean "power to the people" and not just "a vote to the people", democracy, and one may add here, the power to hold governments accountable in Africa remains, according to them, "largely *unclaimed*".[80] The involvement of the general public in holding government accountable through voting has not been as successful as many hoped. However, another a form of vertical accountability to have emerged is decentralisation of governance.

4.2 Vertical accountability through decentralisation

The adoption of different types, forms and levels of multilevel governance through decentralisation in modern African constitutions has been one of the most significant changes in governance and accountability in the last three decades.[81] The evolution and complexity of these developments in Africa in particular and globally in general has made it difficult to provide a precise definition of the concept of decentralisation. Nevertheless, in the context of this discussion, 'decentralisation' is used in a generic sense to refer to the dispersal of governmental authority and power away from the centre to lower levels of government or levels of administration.[82] At the heart of decentralisation is the notion of subsidiarity, which proposes that functions should be devolved to the lowest possible level at which they can best be discharged effectively and efficiently with the participation of ordinary citizens.

Decentralisation was anathema in many respects to post-independence African leaders, who had quickly personalised and concentrated power within a privileged clique in the capital city.[83] This centralising tendency fuelled the repressive governments that over the years came to place a stranglehold over almost all the countries on the continent.

Concrete steps to decentralise powers came with the post-1990 constitutional reforms. Although the precise objectives of the decentralisation programmes vary from one country to another, in most cases the overall goal has been similar: to bring governance closer to the people and make it more democratic, accountable and responsive to their needs. In fact, the prominent role decentralisation played in the design of modern African governance systems

[79] Bratton and Logan 2017, p. 17.
[80] *Ibid.*
[81] Fombad 2018 p. 1-25.
[82] Böckenförde 2011, pp. 1 & 44. The author points out that the term 'level of government' refers to that part of the hierarchy of government through which state power is employed at a certain place in the vertical order of a country, such as national, regional or local level. By contrast, 'level of administration' is used to describe an institutional setting that provides administrative support for the implementation of governmental policies at these levels, whether regional or local. Unlike 'levels of government', 'levels of administrations' are responsible only for implementing polices, not making them.
[83] There are some who trace this centralisation streak to pre-colonial African systems of governance, but there is no doubt that if indeed this was so, the dictatorial and centralised system of colonial governance systems reinforced this. See further, Cappelen and Sorens 2018.

in the last three decades has been likened to a 'silent revolution'.[84] Historically, while most of the governance systems that African countries inherited at independence were decentralised in one form or another, these were progressively centralised for a variety of reasons[85] as governments became more authoritarian. As such, in the processes ongoing in Africa today, a special feature – and, arguably, a major innovation – that distinguishes the modern systems from inherited ones is the constitutional entrenchment of decentralisation, especially with respect to subnational government.[86]

The objectives of decentralisation in Africa are many and vary from country to country.[87] These are dictated by several factors. The main ones are the nature and scope of the decentralisation process, the question whether a unitary or federal system is adopted, and the degree to which power is centralised or 'de-centred' along a continuum ranging from strong subordination to strong equi-ordination. Three of the many possible objectives are germane to this discussion.

One is that decentralisation, in appropriate circumstances, may limit the abuse of power concentrated in the hands of an authoritarian president and a clique of cronies, by devolving certain powers away from the centre to subnational governments. A second objective is that it enhances development by bringing government closer to the people to ensure that development projects reflect regional and local preferences and that resources are spread more equitably across the country; this also serves to bring about better service delivery and encourage greater public participation in development. Thirdly, it promotes constitutionalism and democracy. This involves establishing democratic governance at subnational level to provide a legitimate basis for local government as well as allow for a democratic ethos to permeate the entire polity from the bottom up. Bringing government closer to the people also promotes accountability by increasing the opportunities for popular participation in governance and by providing avenues for checks and balances that can minimise the abuse of powers and tyranny by the majority. From this perspective, decentralisation provides considerable scope for vertical accountability in many different ways.

However, the success or failure of decentralisation, in general and more specifically as a means of promoting effective accountability, depends on the specific design of the

[84] Ivanyna and Shah 2014, pp. 1-61. http://dx.doi.org/10.5018/economics-ejournal.ja.2014-3. Accessed in April 2019.
[85] For example, African leaders throughout the continent championed the centralisation of governance under the pretext of promoting national unity among the diverse communities which had been artificially forced together as states during the partitioning of the continent in 1884, maintaining that centralisation facilitated a shared political identity, nation-building and development. A key element of this was the widespread abolition, whether de jure or de facto, of the multiparty system in favour of the one-party system. It was argued that multipartyism would promote division and tribalism and so waste national resources at a time when the newly independent states, under-resourced and comprised of numerous culturally and religiously heterogeneous groups, needed to focus on national unity, political stability and rapid economic development. It was also argued that the one-party system was the only one that corresponded adequately with traditional African systems of governance. See further, Tunteng 1973.
[86] Olowu 2012, p. 44.
[87] See further, Kälin, and Litvack.

decentralised institutions and whether they are capable of ensuring that the intended goals are achieved.

One of the potentially significant effects of decentralisation that could have a great impact on executive accountability has been the fact that in the last three decades, most major African cities, which in many cases are the seat of economic power are now under the control of opposition parties, hence dispersing power between the centre and the periphery.[88] Opposition party dominance in most major cities in Africa at a time when the continent is considered as one of the fastest urbanising regions in the world potentially provides considerable scope not only for enhancing democratic consolidation but also accountability.[89] The potential of this vertical dispersal of powers between ruling parties operating at the centre, and opposition parties at the local level, to enhance transparency and accountability is however being undermined by diverse subversive strategies used by central government to sabotage the work of the opposition parties in the urban centres in order to regain control at the local level. These subversive tactics have not only been tried by central governments in notorious dictatorships like Cameroon, Gabon and Uganda but also in countries with a good democratic pedigree such as Botswana and Namibia.[90] One strategy has been for the central government to obstruct the ability of the opposition parties to deliver local services by rescinding responsibilities for highly visible services that could bolster the popularity of the opposition whilst offloading important tasks to them that could undermine their reputation. This is usually done whilst limiting the tax base on which the opposition can raise revenue to deliver services and in many cases by also limiting the amount of funds available in inter-governmental transfers or delaying the transfer of these funds. Another common strategy used has been to appoint either additional officials to offset the opposition majority in local councils as is the case in Botswana or, to appoint ruling party officials to act as mayors in the major urban councils under the control of the opposition, as has been the case in Cameroon, Namibia and Senegal.[91] An extreme example of this subversion strategy was in Uganda, where President Museveni used his parliamentary majority to enact the Kampala City Act, which enabled him to appoint an executive director to run Kampala City Council whilst reducing the elected mayor to a ceremonial position.[92] In other countries, the successes of the opposition parties in the major cities has either led to central governments beginning to hesitate in fully implementing legislation on decentralisation or even, in some countries, such as South Africa, threatening to roll back and recentralise power.[93]These subversive strategies

[88] Opposition parties are in control of more than half of Africa's electoral democracies. For example, major cities in countries such as Benin, Cameroon, Ghana, Kenya, Namibia, Nigeria, South Africa, Zambia and Zimbabwe are controlled by opposition parties or in some cases, coalition of opposition parties. See further, Resnick 2010.

[89] Some reports predict that in the next 30 years, urban dwellers will outweigh rural dwellers for the first time in Africa. In some countries, like Gabon, 87% of the population already lives in the urban area. See further, Saghir and Santoro 2018.

[90] See further, Rensnick 2018.

[91] See *Ibid*.

[92] See, *ibid*.

[93] Bownes 2009, points out that the ANC-led government has on numerous occasions made overtures to reverse progress on devolution and potentially even eliminate the country's nine provinces. It is a threat that has become real when it lost the major cities in the 2016 local government elections.

have in many ways limited the ability of opposition parties that control major cities acting as effective checks to abuse of powers by central government. Nevertheless, it must be conceded that the record of opposition parties that have come to power since the 1990s or those that control some of the major urban cities with the exception of the governance record of the opposition Democratic Alliance that has been in governing South Africa's Western Cape Province, has not been exemplary or promising.[94]

Overall, the attempts to promote greater accountability through decentralisation have not been very successful. A recent study shows that from a comparative perspective, by design and operation, Anglophone African countries, particularly Kenya, South Africa and Zimbabwe, have been relatively more successful, at least in terms of constitutionalised and hence self-enforcing and sustainable systems of decentralisation, than Francophone, Lusophone and Hispanophone African countries.[95] The latter, by contrast, lag behind in this regard.[96] In fact, in most of Francophone and Lusophone Africa, power has remained essentially at the centre, with the occasional granting of some limited powers to the sub-regions. This has limited the ability of ordinary citizens to participate in governance. Nevertheless, the prospects for greater vertical accountability have been enhanced through the creation of opportunities for ordinary citizens to be heard at the local level.

4.3 Other forms of vertical accountability – popular mobilisation

Although the active involvement of the general public through elections is one of the most powerful means of asserting vertical accountability, this is certainly not the only way in which the people can hold their leaders to account. The population can demonstrate their disapproval of government action, engage in conscientious objection, and even call for resignations by taking to the streets to strike, protest, riot and blockade. It must be remembered that it was continent-wide demonstrations in the 1990s, reminiscent of the fight against colonialism in the 1950s and 1960s, which forced African regimes to make the numerous concessions that paved the way for the new generation of constitutions we have today. Similar popular mobilisation, this time with social media at the forefront, precipitated the Arab-spring in 2011 that led to the fall of dictators such as Ben Ali of Tunisia, Muammar Gadhafi of Libya and Hosni Mubarak of Egypt.[97] Popular protests in 2014 also led to the resignation and flight into exile of the former Burkina Faso dictator, Blaise Campoare. However, similar popular protests to prevent the removal of presidential term limits in countries such as Burundi, Cameroon and Republic of Congo have not been successful. In some cases, they have been violently suppressed. Such is the case with ongoing situation with

[94] See further, Rakner and van de Walle 2007, Teshome, and Uddhammar, Green & Soderstrom 2011.
[95] There is however need to point out that a good design is not everything. Zimbabwe's reasonably good design has made little difference because the decentralised framework has hardly been implemented.
[96] Fombad 2018, p. 1-25.
[97] The so-called Arab Spring started in Tunisia in 2011 and saw the departure of former dictator Zine Ben Ali and others. It was ironic, because whilst sub-Saharan Africa was in turmoil in the 1990s, the dictators in the north, such as Abdelaziz Bouteflika of Algeria, Hosni Mubarak of Egypt, and Muammar Gaddafi of Libya, looked unperturbed and firmly in charge.

President Joseph Kabila, who is refusing to step down after the end of his second and last term in 2016.

Most constitutions do recognise the right to strike, demonstrate and protest, subject to conditions laid down by law.[98] What do not seem to be recognised yet are popular uprisings intended to bring down an unpopular and dictatorial regime. Such popular uprisings resonate with John Locke's notion of a 'right of revolution'. As John O'Toole points out, the idea of a right of revolution raises a number of complex issues.[99] Should social mobilisation be formally recognised and the right given to the people to revolt against a ruler who has become despotic? Is this an effective means of restraining authoritarianism? If so, under what conditions should such a right be exercised? These and numerous other difficult questions arise when one considers the possibility of formally recognising a right for ordinary citizens to mobilise and, through demonstrations and civil disobedience, even open rebellion, force their leaders to vacate office. So far, only the Ethiopian Constitution of 1995 recognises a right to secession.[100] This, some argue, comes close to recognising a right to revolution, because both rights are usually associated with gross violations of human rights that justify the use of force to overthrow the government or secede from the state.[101]

Be that as it may be, even if African constitutions do not expressly envisage this, the mass protests of the 1990s and the Arab spring of 2011 suggest that when the formal mechanisms of horizontal and vertical accountability fail to halt a situation from degenerating into dictatorship, the people may in desperation resort to rebelling against the leader to force him to resign. This is exactly what forced Bouteflika and Omar al-Bashir from power in the last few weeks. This however carries huge risks. In the present volatile international environment, with an inward-looking and unpredictable American president, a Europe struggling to come to terms with Brexit, and a resurgent Russia, African leaders are increasingly unafraid to resort to all forms of violence to stay in power and suppress internal dissent. The violent suppression of protests in Burundi, the Democratic Republic of Congo, Ethiopia, Republic of Congo, Rwanda and South Sudan are typical manifestations of authoritarian resurgence and the challenges to sustaining the efforts to keep African governments accountable to their citizens. Nevertheless, the legacy of the excesses of the dark days of authoritarian dominance in Africa, an era marked by one-party-rule or military dictatorship and the economic decline associated with it, remains a factor in encouraging social mobilisation against executive abuses. The steady decline of accountability measures raises doubts about whether the lessons of the recent past have been fully understood and if the social determination to resist dictatorship is strong enough.

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[98] See, for example, articles 47 and 51 of the 2010 Angolan Constitution, article 31 of the 1990 Benin Constitution, article 37 of the 2010 Kenyan Constitution, and sections 59 and 65(3) of the 2013 Zimbabwean Constitution.

[99] See O'Toole 2011 'The right of revolution: An analysis of John Locke and Thomas Hobbes' social contract theories' https://dlib.bc.edu/islandora/object/bc-ir:102351/datastream/PDF/view. Accessed in April 2019; and Founders' Constitution 2000 'Right of revolution' http://press-pubs.uchicago.edu/founders/documents/v1ch3s2.html Accessed in April 2019.

[100] See articles 39(1) and (4) and 62(3).

[101] Eastwood Jr 1993, pp. 299-347.

5. Concluding remarks

Jeremy Bentham was right when he said that 'the more strictly we are watched, the better we behave'.[102] Numerous mechanisms and institutions of horizontal and vertical accountability were adopted in Africa from the beginning of the 1990s' wave of constitutional reforms. These integrated diverse principles of administrative and constitutional law that were constitutionally entrenched and designed to operate at different levels to check against executive abuses. These mechanisms and institutions, although distinct from each other in the context of the doctrine of separation of powers, mutually support each other. For example, popular mobilisation by civil society organisations creates awareness that may increase electoral turnout. If more independent-minded parties are elected to parliament as a result, this may help strengthen the independence, and hence the ability of parliament to operate as an effective body for executive oversight.

This paper has underscored the fragility of horizontal and vertical accountability mechanisms in Africa today. As long ago as 1852, Wendell Phillips made the prescient warning:

> The hand entrusted with power becomes, either from human depravity or esprit de corps, the necessary enemy of the people. Only by continual oversight can the democrat in office be prevented from hardening into a despot; only by unintermitted agitation can a people be sufficiently awake to principle not to let liberty be smothered in material prosperity.[103]

The limits of authoritarian rule are determined in most cases by the extent of the docility and forbearance of those who are subject to such rule; moreover, these limits serve as an indication of the weaknesses or absence of effective accountability checks. The existence of elaborate mechanisms and institutions of accountability count for nothing on their own if they are not used effectively. Similarly, the right to form a party and vote for a party of one's choice is pointless if it cannot be exercised in a meaningful manner. It is clear that African leaders, caught off guard by the 1990 revolution, have regained their poise and spent the last two decades undoing the concessions they made. The price to pay for sustaining constitutionalism, the rule of law, good and accountable governance in Africa is eternal vigilance.

In reflecting on the challenges of taming the almost suffocating powers of African executives today, one must never forget that the wave of democratisation in sub-Saharan Africa in the 1990s and the liberation in Arabophone Africa in 2011 were the result of mass mobilisation of citizens who had put up with enough hardship. As we have seen, the resulting constitutional reforms tried to lay down a firmer foundation for accountable government based on the basic principles of constitutionalism, good governance and respect for the rule of law. This paper has focused on the institutions and mechanisms for horizontal and vertical

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[102] 'People, spaces, deliberation' 2010 http://blogs.worldbank.org/publicsphere/quote-week-jeremy-bentham. Accessed in April 2019.

[103] An extract from a speech by the famous American abolitionist and liberal activist to members of the Massachusetts Anti-Slavery Society on 28 January 1852. http://www.thisdayinquotes.com/2011/01/eternal-vigilance-is-price-of-liberty.html. Accessed in April 2019.

accountability that were entrenched in these constitutions. The approaches adopted in the different countries were a mirror reflection of the colonial heritage of each country. The legislative and judicial branches of government have remained weak, particularly in Francophone and Lusophone Africa. As a result, the mechanisms of vertical accountability that enable direct popular control of leaders and enhance horizontal accountability have been in steady decline in the last two decades. Nevertheless, the numbing effect of decades of dictatorship on the people must be overcome through greater public awareness and proper use of the existing avenues for holding leaders and other elected officials to account, particularly in the face of the ominous signs of an authoritarian resurgence in Africa.

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