

# The Constitution as a Source of Accountability: the Role of Constitutionalism

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## 1 INTRODUCTION

Most good governance, accountability and constitutionalism indicators suggest that, whilst African countries have made considerable strides since the tidal wave of democratisation and liberalisation reached the African shores in the 1990s, the institutional foundations and framework for effective and sustainable change remain shallow.<sup>1</sup> It thus comes as no surprise that the “born again” dictators of yesteryears and the post-1990 democrats of the new era are now using the rapidly spreading dominant parties to threaten to reverse the progress towards genuine constitutional democracy all over the continent. The cancer of corruption, incompetence, poor governance, political instability and economic mismanagement which result in conflict, poverty and disease continues to plague the continent.

The notion that entering into, and participation, in politics is for the noble purpose of service to the people and to improve their lot is almost, but not quite, unknown in Africa.<sup>2</sup> The recalcitrant “born again” dictators of the past who have

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1 For an analysis which compares the general freedom trends in Africa for the period 1980–1989 with the period 1990–1999, see Fombad “Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism” in Nhema and Zeleza, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post-Conflict Reconstruction*. (2008) 184–187. The main indicators are: freedom of the world survey of civil and political rights published by Freedom House since 1972 at [http://www.freedomhouse.hu/index.php?option=com\\_content&view=article&id=221:freedom-in-the-world-2009-survey-release&catid=47:freedom-in-the-world&Itemid=102](http://www.freedomhouse.hu/index.php?option=com_content&view=article&id=221:freedom-in-the-world-2009-survey-release&catid=47:freedom-in-the-world&Itemid=102) (accessed 20-10-2010), freedom of the press survey also published by Freedom House at: <http://www.freedomhouse.org/template.cfm?page=470> (accessed 20-10-2010).

2 Hoffman “Democracy and Accountability: Balancing Majority Rule and Minority Rights” Occasional Paper No 27 Governance and APRM Programme (March 2009) [http://www.ifaisa.org/current\\_affairs/Balancing\\_Majority\\_Rule\\_and\\_Minority\\_Rights.pdf](http://www.ifaisa.org/current_affairs/Balancing_Majority_Rule_and_Minority_Rights.pdf) (accessed 20-10-2010).

stubbornly stuck to power, and also the “new wave democrats” have turned out to be as greedy, unreliable, opportunistic, corrupt and bent on entrenching themselves in power today as was the case before the 1990s.<sup>3</sup> The new or substantially revised constitutions which carried a promise of constitutionalism do not appear to have stemmed the slow but steady resurgence of authoritarianism on the continent. Is Africa doomed to be ruled exclusively by politicians who once in power turn out to be corrupt, greedy and sometimes murderous in their desire to perpetuate their hold on power? Are these inherent and incorrigible traits of most African leaders? Can this process never be reversed?

As Gerald Caiden rightly points out, people usually get the government they deserve. If the people are diligent, demanding, inquisitive and caring, they will get a good government. However, if they allow themselves to be intimidated, bullied, deceived and ignored, then they will get a bad government.<sup>4</sup> Politicians are ordinary mortals and not saints.<sup>5</sup> Africans, in most cases, do not elect bad leaders. They elect potential Nelson Mandelas, such as Julius Nyerere of Tanzania, Kenneth Kaunda of Zambia and Ahmadou Ahidjo of Cameroon, but either close their eyes, lean back, relax and hope to enjoy the promised land of democracy and good governance, or transform these ordinary mortals into infallible, indispensable and irreplaceable saviours whose departure from power must be viewed with trepidation.<sup>6</sup> In South Africa, the African National Congress is so adored that it can do no wrong in the eyes of the people. Hence, its leaders are also seen to be unable to set a foot wrong. Any accusations of impropriety against its leaders can only be the machinations of those suffering from the hangovers of apartheid. In other African countries, any criticism of a leader is viewed as the diabolical ploy of people who do not belong to the leader's tribe and who want to replace the incumbent with a tribesman of their own. In many of these countries, the opposition – where it is real – are regularly castigated by the government media as unpatriotic dreamers and adventurers whose advent to power must be prevented at all cost.<sup>7</sup> As in the past, we have continued to deify our leaders once they are elected to power, whereafter they forget about those who had elected them and rely only on the small cliques that repressively keep them in power. The leaders lose touch with the electorate and are accountable only to themselves. Today we are haunted by the old demons of authoritarian rule which we had hoped to have exorcised through constitutional reforms and multiparty democracy in the 1990s.

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3 For a balance sheet after a decade of democratisation, see Fombad “The African Union, democracy and good governance” 2006 *Current African Issues* 10–18.

4 Caiden “Public Maladministration and Bureaucratic Corruption” in Mackinney and Johnston (eds) *Fraud, Waste and Abuses in Government: Causes, Consequences and Cures* (1986).

5 “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” This citation from *The Federalist Papers* No 5 is taken from Diamond, Plattner and Schedler “Introduction” in Schedler, Diamond and Plattner *The Self-Restraining State. Power and Accountability in New Democracies* (1999) 3.

6 This is not fantasy. See some of these arguments raised when presidents wish to remove constitutional term limits, discussed Fombad and Inegbedion “Presidential Term Limits and their Impact on Constitutionalism in Africa” in Murray and Fombad (eds) *Fostering Constitutionalism in Africa* (2010).

7 Fombad 2006 *Current African Issues* 10–18.

It is contended that the constitutional rights revolution of the 1990s did not break the perpetual cycle of transforming potentially good leaders into unaccountable despots. To ensure that the good people we elect today do not become the tyrants and dictators of tomorrow, constitutions must be devised that do not only promote constitutionalism, but also guarantee accountability and responsibility.

This article will first briefly examine concept of constitutionalism and its core elements as this is currently understood. This will be followed by discussion of the concept of accountability and its links to modern constitutionalism. Because of Africa's poor record on constitutionalism, the third part of the article considers ways in which the critical elements of accountability can be entrenched within the core elements of constitutionalism.

In this era of liberalisation and globalisation that is now compounded by a global recession, only those African countries that are ready to entrench credible accountability mechanisms constitutionally can hope to attract the few foreign investors that still have the wherewithal to invest on the continent. Besides, there is no turning back on an increasingly restive but rights-conscious people who are bound to have their way at some point. For as the late American president, John F Kennedy said, "those who make peaceful revolution impossible, will make violent revolution inevitable".<sup>8</sup>

## 2 THE CONCEPT OF CONSTITUTIONALISM AND ITS CORE ELEMENTS

### 2.1 The concept of constitutionalism

It is necessary to start by pointing out that constitutionalism must be distinguished from the notion of a constitution. In its broadest sense, a constitution consists of a collection of rules, whether written in a formal document or not, that limits both government and the governed with respect to what may or may not be done. The very essence of a constitution is to prevent both tyranny and anarchy. To achieve this, it must sufficiently empower the government to enable it to be strong enough to operate effectively, whilst imposing reasonable restraints on it that do not make it too weak and create the risk of anarchy.<sup>9</sup> Nevertheless, it must be recognised that some apparent restraints, especially on governments, may actually be a sham. It is thus no surprise that many tyrants and dictators in Africa and elsewhere, have, whether individually or collectively, often used constitutions as a convenient smokescreen behind which they have dissimulated their despotism. The absence of meaningful restrictions therefore made it almost impossible for many countries to practice constitutionalism. This raises the question of what exactly is meant by constitutionalism.

The distinction between a constitution and constitutionalism, it has been said, is more than a simple exercise in semantics.<sup>10</sup> Constitutional scholars, political

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<sup>8</sup> Cited in Anderson (compiler) *Great Quotes from Great Leaders* (1989) 39.

<sup>9</sup> Holmes *Passions and Constraint: On the Theory of Liberal Democracy* (1995) 270–271, aptly captures the paradox thus: "How can we exit from anarchy without falling into tyranny? How can we assign the rulers enough powers to control the ruled, while also preventing this accumulated power from being abused?"

<sup>10</sup> See Curry, Riley and Battistani *Constitutional Government: the American Experience* (1997) 4.

scientists and other social scientists have had great difficulties defining the concept of constitutionalism. Some have even confused it with the very notion of a constitution.<sup>11</sup>

The concept of constitutionalism certainly defies any easy and simple definition or description. It clearly means something far more than the mere attempt to limit governmental arbitrariness, which is the premise of a constitution, and which attempt may fail, as it has done several times in Africa.

The concept today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limits. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. The modern concept therefore rests on two main pillars. First, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on a certain clearly defined set of core values. Secondly, it relies on the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has a certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable. The most recent literature on the topic suggests that the following can be identified as the core elements of constitutionalism:<sup>12</sup>

- (i) the recognition and protection of fundamental rights and freedoms;
- (ii) the separation of powers;
- (iii) an independent judiciary;
- (iv) the review of the constitutionality of laws;
- (v) the control of the amendment of the constitution; and
- (vi) institutions that support democracy.

There are, however, three important points to note about constitutionalism as defined above. First, constitutionalism is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.<sup>13</sup> Second, the presence and institutionalisation

11 See for example Nwabueze *Constitutionalism in the Emergent States* (1973) 1 and Gloppen *South Africa: the Battle over the Constitution* (1997) 43.

12 See Henkin "Elements of constitutionalism" 1998 *The Review* 11–22 who identifies nine "essential elements"; Sartori *The Theory of Democracy Revisited* (1987) who lists five elements of what he terms liberal constitutionalism, although he lays emphasis on the rule of law; Bo Li "What is constitutionalism?" [http://www.oycf.org/Perspectives/6\\_063000/what\\_is\\_constitutionalism.htm](http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm) (accessed 20-10-2010). And the same author in "Constitutionalism and the rule of law" [http://www.oycf.org/Perspectives/7\\_083100/constitutionalism\\_and\\_the\\_rule\\_o.htm](http://www.oycf.org/Perspectives/7_083100/constitutionalism_and_the_rule_o.htm) (accessed 20-10-2010); Murphy "Constitutions, Constitutionalism and Democracy" Greenberg, Katz, Oliviero and Wheatley (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 3–25. Gloppen *South Africa: the Battle over the Constitution* 23–57 and Nwabueze *Constitutionalism in the Emergent States* 1–22.

13 In this regard, one could add as an emerging core element, the institutions supporting constitutional democracy, found in Chapter 9 of the South African Constitution. For one can not agree more with Klug "Constitutional law" in *Annual Survey of South African Law* (1995) 1–11, when he states that Chapter 9 of the South African Constitution is probably South Africa's most "important contribution to the history of constitutionalism".

of these core elements do not necessarily guarantee constitutionalism. Nevertheless, their presence makes the prospects for constitutionalism better. In the absence of such provisions, the chances of constitutionalism are very bleak. Finally, it is the cumulative effect of these core elements that enhance the chances for constitutionalism.

The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that could promote respect for the rule of law and democracy.

## **2.2 Constitutionalism in post-1990 African constitutions**

At independence, most African countries adopted constitutions that had been crafted by the departing colonial powers. The British parliamentary or Westminster model to which elements of the United States of America's presidential system were added was widely adopted in most of Anglophone Africa. The other major Western constitutional model that was adopted was the Gaullist constitutional system based on the French Fifth Republic Constitution of 1958. This model was essentially an admixture of the Westminster parliamentary and the US presidential system. This model has been widely adopted in Francophone Africa and variations of it were adopted in Lusophone Africa. Within a short while after independence, most of these constitutions were brazenly suspended, circumvented or disregarded arbitrarily by the different governments.

The new or revised constitutions adopted in the 1990s attempted to usher a new era of constitutionalism. We shall briefly see how this is manifested in a number of selected countries representative of the different constitutional models received in Africa.<sup>14</sup>

### *2.2.1 Fundamental human rights*

The protection of fundamental human rights and freedoms has now become a standard of constitutionalism recognised and accepted by all countries. Two main patterns emerge in the incorporation of fundamental rights provisions in the constitutions examined in this paper.

The first pattern which reflects the Gaullist style is by way of incorporation of international human rights instruments by reference. This was the system adopted by many Francophone constitutions upon independence. But of the post-1990 constitutions examined, only the Cameroonian Constitution has maintained this style. The Constitution itself, unlike all the other constitutions studied, contains no Bill of Rights or provisions recognising and protecting fundamental rights and freedoms. The preamble thereof affirms the peoples' "attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the

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<sup>14</sup> To ensure a balanced representation of the different constitutional traditions operating in Sub Saharan African, the analysis that follows will be based mainly on the constitutions of the following countries, Angola of 25-08-1992, Cameroon of 18-01-1996, Republic of Congo of 15-03-1992, Eritrea of 07-1996, Gabon of 26-03-1991, Ghana of 07-01-1993, Mali of 26-03-1991, Mauritania of 12-07-1991, Mozambique of 11-1990, Namibia of 02-1990, Niger of 18-07-1999, Nigeria of 1999 and South Africa of 04-02-1997. Unless otherwise stated, any references to the constitutions of these countries should be taken as references to the constitutions on or after these dates.

Charter of the United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto", it then proceeds to state as "principles", but in often obscure and circumlocutory language, some of the standard rights and freedoms found in a Bill of Rights.

The more common pattern that features in almost all the other constitutions examined is the inclusion of provisions under the heading "Bill of Rights",<sup>15</sup> or "Protection of fundamental rights and freedoms",<sup>16</sup> which set out in some details the specific rights and freedoms recognised and protected.

Hence, apart from Cameroon and to a certain extent Mauritania, where the fundamental rights and freedoms are merely listed in art 10 of that Constitution, the general pattern that is discernible is that most post-1990 African constitutions now clearly recognise and protect fundamental human rights and freedoms and also provide for their judicial enforcement.

### 2.2.2 *The separation of powers*

The separation of powers as one of the fundamental preoccupations of modern constitutionalism is driven by the suspicion and distrust of power in general, and the concentration of power in particular. As Lord Acton had observed several centuries ago, "all power tends to corrupt, and absolute power corrupts absolutely".<sup>17</sup> The abuse of the often exorbitant powers that many African leaders arrogated to themselves has been one of the major causes for the continent's woes.

The doctrine of separation of powers, in its simplest and probably extreme form, basically requires that the three branches of government, namely the executive, legislative and judiciary, should be kept separate from each other.<sup>18</sup> African constitutional engineers, in incorporating the doctrine, had three main Western models to choose from. The first model is the semi-rigid presidential form of the US Constitution. Notwithstanding the emphatic, and in some instances unqualified terms in which the doctrine is expressed in the US Constitution, it is clear that the regime contemplated is far from a rigid separation of powers. In practice, it turns out to be an elaborate system of checks and balances. The Westminster model of the doctrine, whilst recognising the three branches of government, provides for extensive fusion and overlapping, especially between the legislative and executive powers and it basically centres on the independence of the judiciary. The third model is the French, which is essentially a mix of the other two and provides for a close collaboration, rather than a strict separation of powers with the only peculiarity being the dominance of the executive and the subordinate position of the judiciary.

The prevention of tyranny is the common thread that ties all three models although the approaches adopted in achieving this common goal are quite different. All the constitutions examined in this study expressly or implicitly provide for a separation of powers. Most of the constitutions of Francophone African countries

15 See for example Chapter 2 of the Constitution of South Africa.

16 See for example, Part II of the Constitution of Angola; Title II of the Constitution of Republic of Congo; Chapter 5 of the Constitution of Ghana; Title I of the Constitution of Mali; Part II of the Constitution of Mozambique; and Title II of the Constitution of Niger.

17 Cited in Curry, Riley and Battistani *Constitutional Government: the American Experience* 4.

18 See generally Fombad "The separation of powers and constitutionalism in Africa: the Case of Botswana" 2005 *Boston College Third World Law Journal* 101-139.

have copied the French model. A typical example of this is the Cameroon Constitution that has adopted *holus bolus* the French Fifth Republic Constitution approach. Whilst purporting to introduce a separation of powers, it provides for an all-powerful and “imperial” president of the republic who appears to exist and operate outside the classic division of legislature, executive and judiciary. The whole idea of a separation of powers under the Cameroonian Constitution becomes more of a farce in the face of a number of provisions that enable the president not only to dominate the legislature but also to control the judiciary completely.<sup>19</sup>

Insofar as the separation of powers is concerned, most modern Anglophone African constitutions, whilst predominantly influenced by the Westminster model, have infused many elements of the US approach. There are extensive variations.<sup>20</sup> In spite of the apparently dominant position of the executive, there are provisions that ensure legislative control over the executive through the principles of individual and collective responsibility before Parliament.<sup>21</sup>

The main conclusion that can be drawn here is that most post-1990 constitutions do provide for a separation of powers in the sense of checks and balances that has the potential to reduce the risks of despotism and thus enhance the chances of constitutionalism. The provisions dealing with this in the constitutions of Anglophone African countries do allow for a partial and limited intermixing of powers, but on the whole are capable of preventing executive excesses. By contrast, the provisions in most Francophone African constitutions are unlikely to be very effective, even though most have tried to improve on the rather defective French model, with the exception of Cameroon where the purported separation of powers is purely symbolic. However, the possible effectiveness of any separation of powers provision depends on the extent to which the judiciary is independent.

### 2.2.3 *The independence of the judiciary*

An independent judiciary is a necessary and logical corollary to the doctrine of separation of powers. A formal constitutionally entrenched independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence.

From a formal perspective,<sup>22</sup> all African countries have provisions which, in varying degrees of effectiveness, provide for judicial independence.<sup>23</sup>

19 As regards the extensive powers of lawmaking, see arts 27 and 28 of the Cameroon Constitution, and as regards the judiciary, see the part on judicial independence below.

20 See s 32 of the Botswana Constitution; s 86(1) of the South African Constitution and also arts 40 and 41(1) of the Constitution of Eritrea. Contrast this with art 28(1) of the Constitution of Namibia and art 63 of the Constitution of Ghana.

21 See for example, s 50(1) of the Botswana Constitution; art 82 of the Constitution of Ghana; and s 92(2) of the South African Constitution.

22 For a more detailed account of this, see Fombad “A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions” 2007 *Public Law* 233–257 and Madhuku “Constitutional protection of the independence of the judiciary: a survey of the position in southern Africa” 2002 *Journal of African Law* 32–45.

23 See arts 120–133 of the Angolan Constitution; ss 96–104 of the Botswana Constitution; ss 47 and 118–133 of the Lesotho Constitution; arts 97–124 of the Madagascan Constitution; ss 103–109 of the Malawian Constitution; ss 76–86 and 113–119 of the Mauritian

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Determinants of such formal constitutional independence include<sup>24</sup> vesting judicial functions exclusively on the judiciary,<sup>25</sup> qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits.

Most recent constitutions have, in dealing with the judiciary, either adopted the Westminster or Gaullist model. To the extent that the executive appoints members of the judiciary under both, it can be said that the executive controls the judiciary.

The French model that has been widely copied in most Francophone African countries and Lusophone African countries have been significantly influenced by the Gallic obsessive fear of the threat of legal dictatorship through a “government of judges”. Thus art 64 of the French Constitution, which provides that the “president of the Republic is the guardian of the independence of the judiciary”, clearly suggests that the judiciary is not on the same par as the executive but rather below it. This conclusion is reinforced by the powers given to the president to appoint, promote, transfer, and dismiss judicial personnel, which effectively compromises their personal independence. Similar provisions are found in the constitutions of most Francophone African countries.<sup>26</sup> The very strong political interference in the process of judicial appointments, promotions, transfers and dismissals is often mildly disguised by provisions that require the President to act on the “advice” of, or receive the “opinion” of the Higher Judicial Council or similar bodies, which are controlled and dominated by the executive.

By contrast, Anglophone African countries have made tremendous strides towards making the judiciary independent of both the executive and the legislature. For example, although appointments, as well as certain decisions on the transfer, promotion and dismissal of judicial personnel are taken by the executive, the latter is often required to act on the recommendations of a Judicial Service Commission or similar body. Unlike similar bodies provided for in the constitutions of Francophone and Lusophone countries, these bodies are usually

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Constitution; arts 161–175 of the Mozambican Constitution; arts 78–85 of the Namibian Constitution; ss 165–180 of the South African Constitution; ss 62 and 138–160 of the Swazi Constitution; arts 901–98 of the Zambian Constitution; and ss 79–92 of the Zimbabwean Constitution.

24 For a detailed discussion of this, see Autheman “Global best practices: judicial integrity standards and consensus principles”, IFES Rule of Law White Paper Series, [http://66.249.93.104/search?q=cache:TVdXJQ6CiwJ:www.ifes.org/searchable/ifes\\_site/](http://66.249.93.104/search?q=cache:TVdXJQ6CiwJ:www.ifes.org/searchable/ifes_site/) (accessed 20-10-2010).

25 Although this is not a very common constitutional provision, it is still important to spell it out. The Zimbabwe Constitution provides the very opposite of this in s 79(2)(a) which gives Parliament the right to vest “adjudicating functions in a person or authority other than a court”. In October 2004, Roy Bennett, a member of the opposition party in Parliament, became the first person to be convicted and sentenced outside of the judicial process and under the judicial authority of Parliament in terms of the Privileges, Immunities and Powers of Parliament Act.

26 See for example, art 37(3) of the Cameroon Constitution; art 69 of the Constitution of Gabon; art 89(1) of the Constitution of Mauritania; and art 100 of the Constitution of Niger.



composed of specified independent legal experts who are more likely than not to act objectively and impartially.<sup>27</sup> It is also unlikely that the executive will disregard their recommendations. Perhaps the wording that best enhance the chances of objectivity, fairness and impartiality in the appointment of judicial personnel is found in the South African Constitution.<sup>28</sup>

One can thus conclude that the majority of recent African constitutions recognise and sometimes purport to protect the independence of the judiciary. However, because of the substantial scope for political interference, the prospects for effective judicial independence in Francophone and Lusophone countries are quite limited. By contrast, many Anglophone constitutions, especially those of Ghana and South Africa, contain provisions that can considerably enhance the chances of the judiciary operating relatively independently. A judiciary that operates without pressure, threats or intimidation will clearly enhance the prospects for constitutionalism in the country.

#### 2 2 4 Control of the constitutionality of laws

A constitution is only as good as the mechanism provided within it for ensuring that its provisions are properly implemented and that any violations of it are promptly sanctioned. An important bulwark of constitutionalism is therefore the existence of an efficient and effective mechanism for controlling and compelling compliance with the letter and spirit of the constitution. In the absence of this, the constitution is not worth the paper on which it is written and it is probably as good as being non-existent. Besides this, it is the only way in which the supremacy of the constitution, which most constitutions explicitly<sup>29</sup> or implicitly<sup>30</sup> provide for, has meaning.

Although most African independence constitutions adopted different methods for controlling the constitutionality of laws, the choice was mainly between the American system of judicial review based on *Marbury v Madison*,<sup>31</sup> and the French system of quasi-administrative/quasi-judicial review before a Constitutional Council.

The latter is the model which is usually associated with continental Europe and more specifically, the *Conseil Constitutionnel* (Constitutional Council) of the French Fifth Republic Constitution of 1958 which has been widely adopted in the constitutions of Francophone African countries and in slightly modified form in Lusophone countries such as Angola,<sup>32</sup> and

27 See for example ss 103–104 of the Botswana Constitution; arts 153–154 of the Constitution of Ghana; and art 85 of the Constitution of Namibia.

28 See s 174 of the Constitution of South Africa.

29 For example, art 1(2) of the Constitution of Ghana states: “This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provisions of this Constitution shall, to the extent of the inconsistency, be void.” See also, s 1(1) and (3) of the Constitution of Nigeria; art 1 (1) of the Constitution of Namibia; s 1(c) of the Constitution of South Africa; s 2 of the Lesotho Constitution; ss 5 and 10(1) of the Malawian Constitution; s 2 of the Mauritian Constitution; art 200 of the Mozambican Constitution; art 2(1) of the Zambian Constitution; and s 3 of the Zimbabwean Constitution.

30 See art 153(1) of the Angolan Constitution; ss 18(1) and 105–106 of the Botswana Constitution; and art 122 of the Madagascan Constitution.

31 1 Cranch 137 (1803).

32 See arts 134–157. Although these provisions refer to it as a “Constitutional Court”, factors such as the nature of its jurisdiction and its access clearly indicate that it is only such a court in name but not in function.

Mozambique.<sup>33</sup> The majority of these countries introduced some changes to this model in their post-1990 constitutions in an attempt to remedy some of the serious defects of this model. But in its 1996 constitutional amendment, Cameroon copied the French model in its pure and undeveloped form with all its defects and weaknesses.<sup>34</sup> The original and congenital defect of this model, namely its quasi-administrative rather than judicial nature, renders the entire mechanism flawed. For the Constitutional Council is comprised of political appointees who are not necessarily judges which compromises the chances of effective review. In fact, the Council may be seized by the very politicians who made the unconstitutional laws. Further, from a functional point of view the Council's pre-promulgation review is a weak form of review and therefore ineffectual. Because the key pillar of judicial review is absent, the prospect for constitutionalism in these three countries is very bleak indeed. This is perhaps accentuated by the enormous scope that these constitutions often allow for direct executive law-making<sup>35</sup> which makes it easy for dominant parties in these countries to enact legislation that may entrench their hold on power with little fear of judicial oversight.

Most Anglophone African countries adopted the American system of judicial review. The review is done either by the ordinary courts or by specially created constitutional courts.<sup>36</sup> The pattern of review by ordinary courts appears in diverse forms under the constitutions of Botswana,<sup>37</sup> Lesotho,<sup>38</sup> Malawi,<sup>39</sup> Mauritius,<sup>40</sup> Namibia,<sup>41</sup> Swaziland<sup>42</sup> and Zimbabwe.<sup>43</sup>

This second pattern, review by a specially created court or what may be described as a mixed model, may take various forms. One form appears in the

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33 See arts 180–184.

34 See generally Fombad “The new Cameroonian Constitutional Council in a comparative perspective: progress or retrogression” 1998 *Journal of African Law* 172–186 and Fombad “Protecting constitutional values in Africa: a comparison of Botswana and Cameroon” 2003 *Comparative and International Law Journal of Southern Africa* 83–105.

35 For example, in the Angolan Constitution, what is usually referred to as the exclusive legislative domain is defined in art 89 (which actually says “full and sole legislative powers” and art 90 (which also refers to “relative sole legislative powers”) whilst the residual legislative domain reserved for the executive is defined in art 91 (under what it refers to as “laws of authorisation”). See provisions on the executive law-making domain in art 83 of the Madagascan Constitution and art 157 of the Mozambican Constitution.

36 An example of the former is provided for in art 2 of the Constitution of Ghana. It provides that “a person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment; or any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect”. See further arts 130–131 of that Constitution, and similar provisions in arts 79 and 80 of the Constitution of Namibia and art 49 of the Constitution of Eritrea.

37 See ss 18(1) and 105–106.

38 See ss 22 and 129.

39 See ss 11(3) and (4), 103(2) and 108(2).

40 See ss 17 and 83–84.

41 See arts 25 and 80(2).

42 See ss 35, 139(2) and 146(2)(a).

43 See s 24. The constitutional scope for judicial review of constitutionality appears to be very narrow as Section 24 restricts review only to matters dealing with the declaration of rights provided for in arts 11–23.

South African Constitution, which combines elements of both a diffuse and concentrated system. Despite the fact that there is a specialised Constitutional Court specifically created to deal exclusively with constitutional adjudication, parties may raise constitutional issues before the lower courts. Another example that of s 27 of the Zambian Constitution which provides for the creation of *ad hoc* special tribunals to deal with pre-promulgation preventive review of constitutionality whilst reserving repressive *a posteriori* review of constitutionality to the high court.<sup>44</sup>

The excessive powers conferred upon the executive branch (or which it arrogates to itself) in African constitutions means that an efficient mechanism for reviewing the constitutionality of laws needs to be firmly in place as a check against any abuses. It clearly defies all logic to think that the executive, led by the president, who generally initiates almost all laws that go through Parliament, will want to impugn these very laws as contemplated by some African Francophone constitutions. The effective removal of the review of constitutionality of legislation from the ordinary courts of law and placing it before anomalous quasi-administrative bodies whose composition is determined wholly or partly by politicians, compromises the chances of ensuring that the constitution is not violated. As the analysis has shown, the Anglophone constitutions that have adopted the American system of judicial review provide a more credible mechanism for reviewing the constitutionality of laws. If it is accepted as legitimate to establish in a constitution certain guarantees designed to protect citizens as well as control the government as to what to do or not do, then it must also be considered as legitimate to build into the constitution the measures to ensure that the guarantees contained in it are respected. It is therefore contended that there can be no constitutionalism, in the sense of respect for the constitution and the values and principles that underlie it, if there is no secure mechanism, whether it takes the form of judicial review by ordinary courts or other specialised courts or bodies, that can independently and impartially enforce the provisions of this constitution and check and control any abuses of its provisions. On the other hand, any system of control of constitutionality of laws which makes the control to a large extent dependent on the lawmaker or the executive is clearly a sham and defeats any prospects of constitutionalism.

#### 2.2.5 *The control of constitutional amendments*

A constitution is or should be an enduring document. It is a law, but as we saw above, it is unlike any other law and is usually declared explicitly or implicitly as the supreme law of the land based on the sovereign will of the people. It will lose its value as the supreme law of the land and the will of the people will be subverted if it can be altered easily, casually, carelessly, by subterfuge, or by implication, through the acts of a few people holding leadership positions. Constitutionalism implies that the constitution should not be suspended, circumvented or disregarded arbitrarily by the political organs of government. If the constitution is to be amended, this should be through a clearly laid down procedure that ensures that the will of the people is not defeated in the process. The existence of a constitution that is not overtly vulnerable to governmental manipulations through arbitrary amendments provides a sense of certainty and predictability that enhances the prospects for constitutionalism.

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44 See s 94(1).

The problem of controlling the frequent and arbitrary constitutional changes that were so common prior to the 1990s appears to have been on the minds of the constitutional reformers. Insofar as the restrictions placed on constitutional amendments are concerned, almost all the constitutions examined in this study can be placed in the semi-rigid category. The exact extent varies from country to country. A good number of constitutions require that these amendments be approved in Parliament by a special majority of two-thirds or three-quarters,<sup>45</sup> or that failing such a majority the proposed amendment be put to a referendum.<sup>46</sup> In some constitutions, amendments must not only get the approval of a special parliamentary majority but must also be submitted to a referendum.<sup>47</sup> The Ghanaian Constitution distinguishes between amendments of what it refers to as “entrenched” provisions and “non-entrenched” provisions. The former are listed in art 290(1) and include provisions dealing with matters considered as very important and which in some of the other constitutions are listed in so-called “unamendable”<sup>48</sup> provisions. The procedure provided for dealing with these entrenched provisions is quite cumbersome, stringent and complex.<sup>49</sup> This is in sharp contrast with the procedure provided for amending the non-entrenched provisions, which although less stringent are still fairly rigorous. Nevertheless, the general rigidity of the process is such that it is unlikely that any alterations may be made to the Ghanaian Constitution lightly and without due notice, elaborate consultations and the full and active participation of the people.

The Cameroonian Constitution is at the other end of the amendment spectrum since it can be amended by an ordinary law. Apart from the obvious weakness that this Constitution can be altered at the whims of the government, one common feature that this Cameroonian Constitution shares with some of the others discussed here is that it contains an “unamendable” provision. Two observations need to be made about the concept of unamendable provisions and the significance of a controlled procedure for amending a constitution and constitutionalism.

First, nothing is completely immune from change. The purpose of a controlled amendatory procedure is not to prevent changes but rather to prevent the process being abused by dictators to serve their own ends. It is contended that the concept of unamendable provisions is an illusion. One constituent body cannot make constitutional provisions that prevent a future constituent body from repealing the constitution, even where it introduces an express provision that

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45 See for example art 158 of the Angolan Constitution; art 135 of the Constitution of Niger; and art 116 of the Constitution of Gabon, which in addition, requires that proposals be put before the Constitutional Council for an opinion, although it is not clear what the purpose of such an opinion is. For example, will an adverse opinion mean that Parliament should not be allowed to discuss the proposal or that it should not be put to a referendum?

46 See, art 116 of the Constitution of Gabon and art 135 of the Niger Constitution.

47 See for example s 89 of the Botswana Constitution; art 178 of the Constitution of the Republic of Congo; and art 118 of the Constitution of Mali. Under art 99 of the Constitution of Mauritania, the President may avoid the inconvenience of a referendum by ensuring that he obtains three-fifths votes of Parliament convened in congress.

48 See for example, arts 178(4), (5) and (6) of the Constitution of the Republic of Congo; art 117 of the Constitution of Gabon; art 118, proviso 3 and 4 of the Constitution of Mali; art 99(3) of the Constitution of Mauritania; and art 136 of the Constitution of Niger.

49 See art 290 (2) of the Constitution of Ghana.

purports to do this. Arguably, a constituent body is omnipotent in all, save the power to destroy its own omnipotence.<sup>50</sup> A constitution or constitutional provisions could with time become antiquated and if there is no procedure for amending it or if this is too cumbersome, this may provoke violent changes through revolutionary means. A better approach, it is submitted, is to strictly regulate and control the manner in which amendments may be made, in order to ensure that this is done with due notice, with deliberation, not lightly and wantonly, and in consultation with the people to ensure that the general will of the people is not subverted by a few selfish individuals.

Secondly, the mere fact that a constitution contains a number of legal obstacles to its amendment that make it harder to alter does not necessarily mean that it will be less frequently altered than one which contains fewer or no special obstacles. The ease or frequency with which a constitution is amended will depend not only on the provisions which prescribe the method for effecting changes, but also the predominant political and social groups within the community and the extent to which they are satisfied with or acquiesce in the organisation and distribution of power within the constitution.<sup>51</sup> Nevertheless, the existence of a defined process for effecting changes and the nature of this process indicate the extent to which the popular will counts and to that extent indicates the prospects for constitutionalism in the country.

#### *2.2.6 State institutions that support and sustain constitutionalism*

Implanting and sustaining constitutionalism in Africa's fledgling democratic transitions needs something more than the mere entrenchment of the core elements discussed above. There is a need to establish a solid basis upon which a new constitutional culture would emerge that can transform the constitution into a "living document, building ownership around it, making it available and accessible to all in society and encouraging the people to deploy it in defence of their individual and collective rights".<sup>52</sup> Africa and Africans do not have any history, tradition or culture of constitutionalism to build on and they have to develop and nurture this almost from scratch, especially because the basic political and social substratum on which the present democracy is built on is very weak and tenuous. Constitutional design must therefore include a framework for cultivating the ethos of constitutionalism. There are already many promising signs of this in some of the constitutions examined in this study.

What has rightly been described as probably South Africa's most "important contribution to the history of constitutionalism"<sup>53</sup> appears in Chapter 9 of its Constitution, under the title, "state institutions supporting democracy". As will be shown below, these provide for the establishment of a number of institutions with the avowed purpose of strengthening constitutional democracy and accountability in the country.

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50 By analogy from the analysis of the supremacy of Parliament by Sir Robert Megarry his judgment in *Manuel v Attorney-General* [1982] 3 AER 833.

51 See Wheare *Modern Constitutions* (1966) 17.

52 See Ihonvbere "Politics of constitutional reforms and democratization in Africa" 2000 *IJCS* 22.

53 See Klug in *Annual Survey of South African Law* 1–11.

### 3 THE CONCEPT OF ACCOUNTABILITY AND ITS LINKS WITH CONSTITUTIONALISM

#### 3.1 The concept of accountability

The concept of accountability has long been both a key theme and a key problem not only in constitutional scholarship, but also in other areas such as political science.<sup>54</sup> The concept has been defined by public lawyers in many diverse and complex ways.<sup>55</sup> These diverse definitions underscore the complex nature of the concept, of which an exact definition remains elusive. The boundaries of this concept are fuzzy and its internal structure confusing.<sup>56</sup>

Be that as it may, what is now abundantly clear is that the concept of accountability can no longer be confined to the traditional view that it is simply a process of calling someone to account to some authority for one's actions or omissions,<sup>57</sup> or that it is synonymous with a set of particular processes such as ministerial responsibility and judicial review. Most of the literature on the subject attempt to make a distinction between different types of accountability, such as legal, financial, democratic, political, administrative and electoral accountability.<sup>58</sup> Some writers also note that accountability can be internal or external, formal or informal, vertical or horizontal, and direct or indirect.<sup>59</sup> A consideration of these different perceptions of accountability illustrates that the concept has now been extended in a number of directions well beyond its core sense of calling someone to account for his or her actions or omissions. According to Richard Mulgan, there are four senses in which the word "accountability" is used in public law which cut across the different perceptions highlighted above.<sup>60</sup>

These senses provide a useful basis for attempting to understand the nature and scope of the concept.

What is usually referred to as the "core", "primary" or "traditional" sense of accountability is the process of calling someone to account for his or her actions or omissions and which necessarily involves retribution. In this sense, accountability involves a process of asking questions, demanding answers and imposing sanctions if the need arises. Core accountability commonly covers issues like voters deciding whether or not to vote out an incumbent government based on their satisfaction or dissatisfaction with the government's policies and performance, Parliament scrutinising the actions of civil servants, and the different ways in which members of the public can seek redress from government agencies and officials. Accountability has now been extended beyond these core areas to cover matters such as the sense of individual responsibility and concern

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54 See Scott "Accountability in the regulatory state" 2000 *Journal of Law and Society* 38.

55 *Ibid* and see the elaborate analysis of the several senses in which the word is used by Mulgan "Accountability: an ever-expanding concept" 2000 *Public Administration* 555-573.

56 See Schedler "Conceptualizing Accountability" in Schedler, Diamond and Plattner *The Self-Restraining State: Power and Accountability in New Democracies* (1999) 13.

57 What Mulgan 2000 *Public Administration* 555 refers to as the "the original or core sense" with "the longest pedigree in the relevant literature".

58 See Harlow *Accountability in the European Union* (2002) 1-2.

59 See for example Oliver *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (1991); Schedler in Schedler, Diamond and Plattner *The Self-Restraining State: Power and Accountability in New Democracies* 13.

60 Mulgan 2000 *Public Administration* 555.

for the public interest expected from public servants which is sometimes referred to as professional or personal accountability.<sup>61</sup>

The second sense in which accountability is used, is an extension on the traditional meaning of accountability. In this sense, accountability refers to the various institutional checks and balances through which the action of government is controlled in a democracy. Some writers, however, try to distinguish between accountability and control, and they view the latter as implying *ex ante* involvement in a decision-making process, and the former as being restricted to *ex post* oversight.<sup>62</sup> The better view is that control and accountability are closely linked concepts which operate in a continuum.<sup>63</sup> Whilst Uhr sees accountability and control as so intimately linked because the former is a vital mechanism of the latter,<sup>64</sup> it would seem better to view accountability as control in itself.<sup>65</sup> The question then becomes one of designing appropriate institutions that will guarantee that public officials are appropriately constrained. Viewed from this perspective, accountability therefore involves the institutions that aim to control or constrain government to prevent it from acting in an arbitrary manner.

The third sense in which accountability is used is similarly an extension of the core meaning of this word. This view equates accountability to the responsiveness of public agencies and officials to their political masters and the public. Like control, the aim of responsiveness is to ensure that the action of government officials reflects the will of the people, but it is different in that whilst control stresses the coercive role of external pressure, responsiveness reflects the public servant's general compliance to popular demands. This could be indirect by public officials responding to the politicians elected by the people, or directly when public officials respond directly to the people themselves rather than through elected officials.

In the fourth sense in which the term is used, it refers to the public dialogue that is seen as an essential part of democracy. In this sense, it requires officials to answer, explain and justify while those holding them to account engage in questioning, assessing and criticising their action or inaction.<sup>66</sup> Accountability in this sense involves open discussion and debate about matters of public interest, which is a critical aspect of modern deliberative democracy. It can also be argued that the requirement that politicians and other public officials publicly account for their actions, whether to the legislature, the courts, or in the media is a form of public dialogue.

### 3 2 Accountability within and through constitutionalism

It is in the extended sense of control that accountability has its closest links with constitutionalism. This is not surprising, for most public lawyers regard traditional accountability mechanisms as inadequate to deal with the problems of today's

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61 Mulgan 2000 *Public Administration* 556.

62 See Birkinshaw "Decision-making and its Control in the Administrative Process – An Overview" in McAuslan and McEldowney (eds) *Law, Legitimacy and the Constitution* (1985) 152.

63 Scott 2000 *Journal of Law and Society* 39.

64 Uhr "Redesigning accountability" 1993 *Australian Quarterly* 6.

65 Mulgan 2000 *Public Administration* 563.

66 Mulgan 2000 *Public Administration* 569–570.

society.<sup>67</sup> In this respect, accountability involves a series of mechanisms and institutions which, like constitutionalism, are designed to control and constrain government in order to prevent both anarchy and arbitrariness. As one writer points out, both constitutionalism and accountability are “intellectual constructs” by which one can “organise the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone)”.<sup>68</sup>

Three main mechanisms of control have been identified by writers viz., political mechanisms, legal mechanisms and administrative mechanisms.<sup>69</sup> The primary political accountability mechanism is free and fair elections. Elections force elected officials to account for their performance and provide opportunities for challengers to offer citizens alternative policy choices. Where voters are not satisfied with the performance of any officials, they may vote them out of office when their term expires. Legal accountability mechanisms include the constitution and other legal instruments, such as laws, decrees, rules, codes and regulations which define actions that public officials may or may not take and how citizens may take action against those officials whose conduct is considered unsatisfactory. The effectiveness of legal liability depends on the existence of independent courts and the power of judges to review the decisions and actions of public officials and governmental agencies. Administrative accountability mechanisms include ombudsmen agencies responsible for hearing and addressing citizen’s complaints, independent auditors who scrutinise the use of public funds, and administrative courts and tribunals which hear citizens’ complaints about the decisions of government departments and agencies.

Some writers have argued that only a few institutions, such as the audit offices, ombudsmen and administrative tribunals can properly be described as institutions of accountability because their primary responsibility is to call public officials to account. Others, such as courts whose primary responsibility is enforcing the law, and Parliament whose primary responsibility is making laws, only exercise accountability functions in an incidental and indirect manner.<sup>70</sup> Courts, just like the legislature, play a very important part in upholding respect for the constitution and it is irrelevant that this is not their primary responsibility. There are also other equally important, and in fact crucial, institutions of accountability which can not easily be placed under the threefold classification above, but which are very essential in governmental accountability even if this is not their primary business. Examples of these are the media and civil society organisations which act as watchdogs.

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67 See Graham “Is there a Crisis in Regulatory Accountability?” (1995) reproduced in Baldwin, Scott and Hood *Socio-legal Reader on Regulation* (1998).

68 See Fisher “The European Union in the age of accountability” 2004 *Oxford Journal of Legal Studies* 498 and Weiler *The Constitution of Europe: Do the New Clothes Have an Emperor?* (1999) 223.

69 See for example Scott 2000 *Journal of Law and Society* 42; Richard Mulgan 2000 *Public Administration* 563–564; and “Government Accountability” <http://www.america.gov/st/democracy-english/2008/May/20080609214957eafas0.82> (accessed 20-10-2010).

70 See Mulgan 2000 *Public Administration* 565.



#### 4 REINFORCING ACCOUNTABILITY BY CONSTITUTIONALISING THE FUNDAMENTAL ACCOUNTABILITY MECHANISMS

The major challenge today is not merely designing constitutions that promote constitutionalism, but also ensuring that these constitutions also entrench accountability measures and mechanisms in an effective manner. It is no accident that in recent years the concept of accountability has been considerably expanded beyond its traditional core sense.

Many post-1990 African constitutions do make direct or indirect reference to accountability and transparency measure and even provide for such measures. In almost every country, there are similar measures and mechanisms that have been introduced through ordinary legislation. In most cases, these measures and mechanisms have not worked, mainly because the legal safeguards to protect them from being abused or manipulated by the governments were weak or more often absent. For example, the ombudsman institution has now generally been accepted in Africa as one of the essential components of good governance and accountability and many recent constitutions or, more often, legislation provided for it in one form or another. In many instances, these institutions end up like prize champion fighters whose hands have been tied behind their backs.<sup>71</sup> Whilst the absence of sufficient accountability measures and mechanisms remains a fundamental problem, it is also a fact that, even where they exist they are unable to operate effectively and check governmental abuses. The tenacity of the one-party mentality within the new dominant parties that are entrenched in power, coupled with weak and ineffective civil societies in many African countries have steadily diminished the prospects for good governance and democracy in Africa.

It is contended that the only way to lay a solid foundation for promoting any credible and effective accountable and transparent governments in Africa, is for the well-established and accepted accountability institutions to be constitutionalised. A word of caution is appropriate here. It is true that a constitution should not be cluttered and overloaded with trivia and that one should not attack the vice of inadequate breadth with the equally fatal infirmity of over breadth. Whilst a good number of African constitutions have indulged in such lengthy, programmatic and convoluted details that defy the wisdom of both Wheare and Marshall,<sup>72</sup> there is a need to start by recognising the fact that African constitutions can not be as brief as Western constitutions. Whilst the written constitutions in Africa almost contain every relevant and applicable constitutional principle, Western constitutions rarely embrace all the constitutional principles

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71 See Fombad "The enhancement of good governance in Botswana: a critical assessment of the Ombudsman Act" 2001 *Journal of Southern African Studies* 57–77.

72 One is therefore mindful of the advice of Wheare *Modern Constitutions* 33–34, that a constitution should contain "the very minimum, and that minimum [should] be rules of law". Or, as Chief Justice Marshall put it in the celebrated United States' case of *McCulloch v Maryland*, 4 Wheat 316, 407 (1819), a constitution by its very nature requires that only its "great outlines" be marked and its "important objects" designated, and that it not descend into the "prolixity of a legal code". For example, see the Swaziland Constitution which has 279 sections and 19 chapters, which are essentially a chaotic catalogue of contradictions that make no sense of the essentials of constitutionalism whilst dwelling on matters which should normally be found in ordinary legislation. Another example is the Nigerian Constitution of 1999 which has 318 sections and 7 schedules, which may be understandable for such a large and complex society but with its own traits of trivia.

that apply. The shorter Western constitutions are normally complemented by a number of usages, understandings, customs and conventions that may apply, as well as judicial precedents. Over and above this, most Western constitutions are greatly strengthened and supported by centuries of political behaviour, political culture and political tradition and history, which is generally lacking under many African constitutions. The constitutionalisation of certain accountability principles and institutions may look like a superfluous aberration to a Western constitutionalist or in a Western setting, but in Africa it must now be regarded as one of the essential elements in the emerging constitutional rights culture of today that should seek to bury the ghost of the one-party dictatorships of the past. The critical question remains that of defining what form and what content these accountability mechanisms should take.

We no longer need to go abroad for examples of good practice. There is an excellent example in Africa that even some Western countries can learn from. As indicated earlier, the South African constitution in its Chapter 9 creates a phalanx of institutions to uphold constitutional democracy and promote accountability.<sup>73</sup> This provides for the establishment of a number of institutions with the avowed purpose of strengthening constitutional democracy in the country. The mere listing of these institutions on their own is not novel, for many constitutions do provide for some of them. What is perhaps unique about the South African approach is that there are four legal principles that are spelt out to ensure that these institutions are effective and not a political charade of symbolic value only. The four guiding principles provide that:

- (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.<sup>74</sup>

Something similar to these principles are referred to in some constitutions as “directive principles of state policy”,<sup>75</sup> but these directive principles, unlike the principles in the South African Constitution, are stated in purely hortatory terms.

The six institutions provided for under the South African Constitution are:

- (i) the Public Protector (commonly referred to elsewhere as ombudsman);
- (ii) the Human Rights Commission;

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73 A lot has been written about these institutions. See for example Govender “The reappraisal and restructuring of Chapter 9 institutions” 2007 *SA Public Law* 190–209.

74 See ss 181(1), (2), (3) and (4) of the South African Constitution.

75 See for example, arts 34–41 of the Constitution of Ghana; and ss 13–24 of the Constitution of Nigeria.

- (iii) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities;
- (iv) the Commission for Gender Equality;
- (v) the Auditor General; and
- (vi) the Electoral Commission.

Many of the other constitutions provide for one or more of these institutions,<sup>76</sup> but what distinguishes the South African institutions is that they have been constitutionally entrenched in such a way that they can operate as independent sites of oversight, supervision as well as enforcement of the constitution. In this way, they not only support, but also help to sustain constitutionalism.

Three cases will suffice to illustrate how the guiding principles spelt out in the constitution have protected the South African oversight institutions from political interference. In *Independent Electoral Commission v Langeberg Municipality*,<sup>77</sup> the Constitutional Court had no hesitation in pointing out that, as a result of the constitutional guarantees of the independence and impartiality of the Independent Electoral Commission (hereafter “IEC”), Parliament had a duty in making the legislation regulating its activities to ensure its manifest independence and impartiality, and that such legislation was justiciable for conformity to the Constitution. In the absence of the constitutional guarantees of independence and impartiality, courts will lack the power to review legislation on electoral commissions to ensure that it is not biased in favour of ruling parties. In *New National Party of South Africa v Government of the Republic of South Africa*,<sup>78</sup> questions were raised about the independence of the IEC and possibility of governmental interference with its proper functioning. The Constitutional Court, although concluding that the allegations had not been proven by the facts, pointed out that the IEC was one of the institutions provided for under chapter 9 of the South African Constitution and as such a product of a “new constitutionalism”<sup>79</sup> whose independence had to be jealously preserved by the courts. Two factors that were relevant to this independence were highlighted by the court. First, it pointed out that independence implied financial independence which required that the IEC should be given enough money to discharge its functions. This had to come, not from government but from Parliament and the IEC had to be “afforded an adequate opportunity to defend its budgetary requirements before Parliament and its relevant bodies”.<sup>80</sup> Second, the IEC’s status also implied administrative independence which implied that the IEC was subject only to the Constitution and the law, and answerable only to Parliament

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76 See for example, the Ghanaian Constitution which provides for an Electoral Commission (arts 43–54), a Commission on Human Rights and Administrative Justice (arts 216–230), a National Commission for Civil Education (arts 231–239), a National Media Commission (arts 166–173) and the Auditor-General (arts 187–189). The Namibian Constitution provides for an Ombudsman (art 142) and an Auditor-General (art 127); and the Eritrean Constitution provides for an Auditor-General (art 54) and an Electoral Commission (art 57); whilst the Angolan Constitution provides for a judicial protectorate (an Ombudsman, in art 142).

77 2001 9 BCLR 883 (CC).

78 1999 3 SA 191 (CC).

79 *New National Party* per Langa DP 224.

80 *New National Party* 231.

rather than to the executive. The ability of the Constitution to control the way the IEC discharges its functions was again in issue in another South African case *August and Another v Electoral Commission*.<sup>81</sup> The IEC had refused to make arrangements for registering prisoners to enable them vote, citing amongst other reasons the immense logistical, financial and administrative difficulties that this entailed. A prisoner and an awaiting trial prisoner launched an unsuccessful application seeking appropriate relief before the high court, which agreed with the arguments put forward by the IEC that the predicament of the applicants was of their own making. On appeal, the Constitutional Court held that the Constitution did not contain any provision allowing for disqualification of voters to be prescribed by legislation and Parliament had not made any such legislation. The IEC therefore had no powers to make an administrative decision that had the effect of disenfranchising a certain category of electors because this violated the guarantees of political rights in s 19 of the Constitution. The court pointed out that the positive duties imposed on the IEC by the Constitution required them to take every reasonable step to create the opportunity to enable eligible persons to register and vote.

By way of contrast, the South African Constitution also provides for the establishment of a National Prosecuting Authority (hereafter "NPA"). This however, is not one of the Chapter 9 institutions that have been carefully protected from political interference. Although s 179(4) of the Constitution says that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice", the ability for the courts to intervene and prevent interference with the NPA is limited by s 179(5)(a) which states that the National Director of Public Prosecutions "must determine, with the concurrence of the cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process". Because of this weak constitutional foundation, there has been frequent interference in the work of the NPA. For instance, at its 2007 Polokwane conference, the ruling African National Congress passed a resolution to dissolve the NPA's Directorate of Special Operations, popularly known as the Scorpions. This was deliberately designed to destroy this independent unit of crime and corruption fighters that had been very successful in its campaign against corruption and racketeering against people in high places, including many prominent politicians. Legislation to dissolve the Scorpions was easily approved by Parliament. The weaknesses of the NPA was further underscored when its Director was suspended and later dismissed because as one critic put it, he took his responsibility to act "without fear, favour or prejudice", too seriously for those who would prefer to have a less independent person in his office.<sup>82</sup>

It is therefore clear that in spite of its solid Constitution, there are still weaknesses in the South African constitutional framework. In fact, because of the political turmoil of the last two years leading to the election of Jacob Zuma as president, many of the Chapter 9 institutions, especially the Public Protector and the Human Rights Commission have come under pressure.<sup>83</sup> A commission

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81 1999 4 BCLR 363 (CC).

82 See Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 5.

83 Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 5-6.

established in 2007 under the former minister, Kader Asmal, to examine the effectiveness and efficiency of these institutions recommended the abolition of some of these institutions, such as the Commission for the Protection of Cultural, Religious and Linguistic Minorities and their rationalisation under the aegis of the Human Rights Commission.<sup>84</sup>

Three important conclusions can be drawn from the experiences of the South African Chapter 9 institutions with respect to the best ways to make these accountability institutions effective and to shield them from manipulation by the opportunistic dominant parties of today. First, the basic structure of the institution, as well as its composition and powers must be laid down in the constitution in a manner that will ensure that they cannot be manipulated by government. Second, they must be given powers to be both reactive and proactive. These institutions can only be credible if they provide what has been described as “low” or “retail” constitutionalism which will address the rampant impunity and abuse of power by officials at the most basic level of the public administration, as opposed to “high” or “wholesale” constitutionalism that addresses the concerns of the elites.<sup>85</sup> These institutions will need to deal with the pervasive and perennial abuses of discretionary powers involving unjustified discrimination and extortion of money which a many Africans are subjected to on a daily basis. This includes, for example, the extraction of bribes by police officers at road blocks and the bribes extracted by civil servants in order to process official documents. Third, these institutions will be more effective if they are made easily accessible to the poor and marginalised in society. For instance, ombudsmen and anti-corruption institutions should be decentralised and have offices in as many districts as possible and not merely in the capital city. In addition to this, there is a need for considerable investment in educating the public about the constitution in general and the protection provided by these institutions.

Another measure that is needed to promote accountability is that of constitutionalising the rights of political parties. This will provide a number of advantages. First, from the perspective of constitutionalism this may be regarded as a bulwark to the looming threat of dictatorship resulting from the *de facto* one-party resurgence in the form of dominant parties. Second, this will mean that although they remain essentially private associations freely created and run by the membership in pursuit of a political goal, they are unlike all other private associations because of the potentially wide-ranging reach of their activities in the public domain. This means that political parties can no longer simply be allowed to do

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84 See “Report of *Ad Hoc* Committee on Review of Chapter 9 and Associated Institutions”, <http://www.pmg.org.za/node/14142> (accessed 20-10-2010). Many commentators are agreed that to avoid duplication of functions, save cost and enhance efficiency, it might be a good idea to merge three of these institutions viz., the Human Rights Commission, the Commission for the Protection of Cultural, Religious and Linguistic Minorities and the Commission for Gender Equality. Although the government seems to have accepted the main thrust of the Kader Asmal report, they don’t seem to be in any hurry to implement its recommendations. The political fallout from merging these institutions at a time of high unemployment is considered too high a price to pay by a Government that promised employment but has been struggling to reduce the numbers of jobs that are being lost as a result of the global recession.

85 This is discussed by Prempeh “Africa’s ‘constitutionalism revival’: false start or new dawn?” 2007 *ICON* 469.

their own things their own way. Constitutionalising their status necessarily means that their actions will come under public scrutiny at all times and not just during elections. The traditional approach to actions against political parties which allowed them to enjoy a high degree of immunity from legal action by disaffected members on the grounds that their internal rules were considered as those of an unincorporated non-profit society and thus unenforceable as a contract, should have no place under the modern constitutional dispensation.<sup>86</sup> Perhaps the greatest merit of this process is that it will promote internal democracy and ensure that personal actions can be brought against political parties which break their own rules as they are often apt to do when they find this politically expedient.<sup>87</sup> Finally, constitutional provisions should lay down criteria for elections within all political parties to ensure that persons with criminal records, or who are subject to the legal process, should be excluded from political office.

Constitutional provisions should clearly define the role of each of the three branches of government and provide clear legal principles which will guide subsequent laws, regulations, rules and codes of conduct which lay down measures, mechanisms and systems of checks and balances to strengthen accountability, transparency and good governance. In particular, each branch of government must be required to adopt codes of ethics for its members.

A number of institutions of oversight, either of a general nature or of specific branches of the government have become an absolute necessity in any constitutional design that aspires to promote both constitutionalism and accountability. These are:

- (i) the ombudsman;
- (ii) a human rights commission;
- (iii) a public accounts committee;
- (iv) an auditor-general;
- (v) an access to information commission;
- (vi) a media commission;
- (vii) an independent prosecuting authority;
- (viii) an anti-corruption agency;
- (ix) a judicial service commission;
- (x) a minority rights commission;
- (xi) an independent electoral commission; and
- (xii) an electoral boundaries commission.

On their own these institutions cannot achieve much unless there is the political will to make them work and the necessary safeguards to protect them from

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86 For the common law perspective on this see Forbes "Judicial Review of Political Parties" (1995–1996) *Research Paper* 21 <http://www.aph.gov.au/LIBRARY/pubs/rp/1995-96/96rp21.htm> (accessed 20-10-2010) and for a civilian perspective, Ipsen "Political Parties and Constitutional Institutions" in Starck (ed) *Studies in German Constitutionalism* (1995) 195–243.

87 This in no way underestimates the value of using the sometimes quite sophisticated internal rules for settling disputes that are found in the constitutions and rule books of political parties. The processes are, however, often slow and could sometimes be abused by party bosses.

political interference. In addition to the four constitutional principles that govern the South African institutions that support democracy, the constitution must also define their structure, functions and composition in a manner that will ensure that none of the three organs of government may interfere with their operations.<sup>88</sup> Perhaps the main safeguard against any abuse would be a general limitation clause which provides that any legislation, measures or mechanisms introduced to regulate any of these institutions, which undermines the essential purpose of accountability and transparency that the institution is designed to achieve must be declared null and void by the courts.

In order to ensure that the institutions of accountability are not only proactive and reactive, but are also able to tackle both petty and grand corruption there is need for the constitution to lay down the basic principles for effective whistleblower legislation<sup>89</sup> and legislation requiring mandatory declaration of assets for all political office holders and senior public officers. The whistleblower provision should require that legislation should, *inter alia*, provide incentives for citizens to freely report corrupt or improper conduct and to prohibit retribution against those who make such disclosures. There should also be waivers from criminal and civil penalties for those who disclose secret information. Such legislation should impose penalties on those who harass whistleblowers. Many countries, such as South Africa have introduced codes of ethics, or legislation that requires all political office holders to declare their assets. Unfortunately, in most cases the legislation is weak, or as in the case of South Africa, the codes of ethics are not legally enforceable and therefore fail to check against any abuses.<sup>90</sup>

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88 In spite of the commendable attempt to limit political interference, the South African Chapter 9 institutions have been criticised because of political interference. The Human Rights Institute of South Africa (HURISA) in a report on these institutions in 2008 concludes that “the majority of people believe the Public Prosecutor to be either ineffective or obedient to the interests of the African National Congress (ANC)”. It went further to state that “it is worrying that there is a culture of absolving any wrongdoing, especially in cases such as the arms deal, the Oilgate, as well as Phumzile Mlambo-Ngcuka’s controversial trip to the United Arab Emirates in 2005”. See “Do or Die for Chapter 9 Institutions”, <http://www.ngopulse.org/Article/do-or-die-chapter-9-institutions> (accessed 20-10-2010). Also see the Report on Parliamentary Oversight and Accountability, <http://www.pmg.org.za/bills/oversigh&account.htm> (accessed 20-10-2010).

89 On 03-03-2011 the Ugandan Parliament approved a comprehensive whistleblowers bill and Uganda is the third African country with such legislation. South Africa regulates this under the Protected Disclosures Act 26 of 2000.

90 In South Africa, the Code of Ethics for Members of Parliament and the Executive Members’ Ethics Act requires members of Parliament, ministers and deputy ministers as well as the president to disclose details of their financial interests, assets and gifts received. In spite of this, President Zuma only complied with this requirement some eight months after the sixty day deadline stipulated in the Executive Members Ethics Act and after considerable public pressure. See “DA Wants Urgent Party Question on Zuma Assets Issues” 12-03-2010 *The Citizen*. By way of contrast, art 66 of the Cameroon constitution provides for a declaration of assets by “the President of the Republic, the Prime Minister, Members of Government and persons ranking as such, the President and Members of the Bureau of the National Assembly, the President and Members of the bureau of the Senate, Members of Parliament, Senators, all holders of an elective office, Secretaries-General of Ministries and persons ranking as such, Directors of the Central Administration, General Managers of public and semi-public enterprises, Judicial and Legal Officers, administrative personnel in-charge of the tax base, collection and handling of public funds, all managers of public votes and property”. This has never been done since this constitution came into force in 1996.

The basic principles requiring strict declaration of assets by all office holders with sanctions such as removal from office for non-compliance will go a long way to control the rising political corruption that is fast undermining the fragile democratic transition in Africa, even in countries such as Botswana and South Africa<sup>91</sup> that have regularly been classified by Transparency International as the least corrupt countries on the continent.<sup>92</sup>

## 5 CONCLUSION

The burden of getting the African democratic train back on the rails falls squarely on the shoulders of the citizens of each country. We are in an era of democratisation and constitutionalism in which one of the missing blocks has been that of accountability. Until recently, not much attention has been paid to the important role that the constitution can play in securing governmental accountability and transparency. The best example of the entrenchment of accountability is currently provided by South Africa's "state of the art" constitution. The fact that it is neither a perfect nor foolproof guarantee against governmental abuse is evident in the controversy leading to the resignation of former president, Thabo Mbeki and the recent election of a person against whom corruption charges were dropped by the National Prosecuting Authority only weeks before the elections were held. Constitutional democracy requires constant vigilance not just by some people some of the time, but by all the people all the time. However, whether or not governments can be effectively made to account depends very much on what the constitution says.

Constitutional democracy can not successfully and effectively be established in the absence of a constitution that promotes both constitutionalism and accountability; reliance on one or the other alone is not sufficient. Many African constitutions have made some progress on the path towards constitutionalism. It is

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91 The 2009 survey shows that Botswana ranked 37 in the world, remains the least corrupt country in Africa, whilst South Africa, ranked 55 in the world, is the fifth least corrupt country in Africa. See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table) (accessed 20-10-2010).

92 The ANC's business arm, Chancellor House, as a 25% shareholder in Hitachi South Africa stood to gain about R9.625bn because of its stake in the company from a contract that the government awarded to Eskom, the national electricity supplier. Last year, the former Public Protector, Lawrence Mushwana concluded that the then Eskom chairman and ANC executive committee member had acted improperly in the award of the contract to Hitachi SA. See Brown "Inside Resources: ANC must exit Hitachi to fulfil its manifesto" 18-03-2010 <http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=5394938> (accessed 20-10-2010). Da Costa in "ANC chief's fat-cat deals" reports how the chairperson of the ANC's biggest and most influential region in KwaZulu-Natal is alleged to have been awarded tenders worth at least R40million by the eThekweni municipality [http://www.iol.co.za/index.php?set\\_id=6&art\\_id=201003120425266](http://www.iol.co.za/index.php?set_id=6&art_id=201003120425266) (accessed 20-10-2010). In the last few months, after allegations about how several prominent members of the ANC and its youth wing have enriched themselves through the regular awarding of government contracts to companies that they owned, calls for lifestyle audits were rejected by the government and its supporters termed it a "smokescreen" masking "racist narratives". See "BMF: Calls for lifestyle audits mask 'racist narrative'" <http://www.mg.co.za/Article/2010-03-23-bmf-calls-for-lifestyle-audits-mask-racist-> (accessed 20-10-2010). See also Good, "The Presidency of General Ian Khama: The Militarization of the Botswana Miracle" <http://afraf.oxfordjournals.org/content/early/2009/12/14/afraf.adp086.full> (accessed 20-10-2010).



contended that the ominous signs of dominant party dictatorships emerging all over the continent has been facilitated by the absence of or weak accountability mechanisms in the constitutions. It is for this reason that it is suggested that the fundamental accountability mechanisms and institutions need to be embedded in the constitution. The nature, scope and functions of these institutions should be constitutionally defined in such a way that any legislation or measures taken by the government which threatens the ability of these institutions to operate effectively as independent sites of oversight should be nullified by the courts. This, it is argued, will create a solid foundation for a vigilant society that will be able to regularly call the government to account. The threat posed by efficient and effective institutions of oversight will tremendously enhance constitutionalism. As Paul Hoffman rightly points out, what makes constitutions work is accountability.<sup>93</sup>

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93 Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 2.