

African Democracy Essay Award 2023



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1. Introduction

Until now, a sizable portion of the literature has painted a picture of a continent where formal institutions do not function as intended; rather, official rules are portrayed as being weak and fragile, making them susceptible to executive manipulation due to the prominence of corrupt personal networks and ethnic politics. Patrick Chabal and Jean-Pascal Daloz came to the conclusion that Africa lacks strong political institutions and is instead a continent of "strong societies and weak states," to use Joel Migdal's famous expression. (Migdal, 1988)

Presidents in some countries such as Malawi, Uganda and Zambia, just to name a few, have all to varying degrees attempted to subvert the democratization process in their respect countries. The first part of this essay will provide a quick overview of the attempts undertaken to adopt constitutions that promote constitutionalism. The second part argues that while most of these states have been seen as embarking on some semblance of democratic rule, their rulers have utilized weak democratic institutional structures, co-opted the elite and rallied the 'mob' to commit democracy 'infanticide'. The third part will discuss how some of these challenges can be overcome.

By way of conclusion, it will be argued that without constitutions that firmly establish certain essential institutions, principles, and mechanisms that support constitutionalism, accountability, democracy, and good governance, African countries cannot be economically viable, socially and politically stable, or even hope to lessen the scourge of disease, hunger, and poverty. We have experienced enough change to bring about a new set of rulers but not the profound institutional changes in the system that make dictatorship, corruption, inefficiency, poverty and economic decline almost inevitable.

2. Constitutional Modifications in Africa that are Legitimate

In the creation and modification of constitutions, constitutional legitimacy has emerged as a major philosophical and increasingly practical concern. The United Nations Secretary-General's 2020 Guidance Note to Assistance in Constitution-Making Processes emphasises the significance of legitimacy of constitution making, which it connects to inclusive, participatory, and transparent processes, as critical to fostering agreement around the constitutional framework and its ultimate success. It might be argued that constitutional legality, the most common source of legitimacy, does not always imply the legitimacy of the original constitution; in other words, arguments against the legitimacy of amendments do not always imply the legitimacy of the process that led to the creation of the original constitution. For instance, the transition from Apartheid to a democratic dispensation in South Africa was pursued based on the formal framework established in the Apartheid constitution.

The African National Congress and the Apartheid administration reached an agreement in 1993 that became the basis for the 1993 Interim Constitution, which was approved by the Apartheid Parliament in accordance with the provisions of the previous constitution. In 'pacted' transitions from authoritarianism/conflict to democracy/peace, as was the case in South Africa from Apartheid to democracy in the early 1990s, constitutional legality is primarily prized regardless of the legitimacy of the previous framework. In cases where the transition is the outcome of rebel victory or popular uprisings, the existing constitutional framework may be set-aside and the legitimacy of the new framework is often drawn from sources outside the previous constitutional framework.

3. Democratic Regression

Since the continent gained independence in the 1960s, incumbents have been able to manipulate and fabricate the parliamentary and popular majorities required to pass changes that blatantly fail to reflect the views of the majority of the country's citizens. In addition to this, parallel informal constitutional arrangements have been established and constitutional standards have frequently been violated, prompting one well-known author to criticise the prevalence of "constitutions without constitutionalism." As early as in 1971, soon after establishing a one-party state, the Malawian legislature declared Hastings Banda, who led Malawi since independence in 1964, 'President for Life', meaning he need not run for (re)election. Banda served until 1994, when he lost presidential elections after the reinstatement of multiparty democracy. Following Banda's lead, a few more presidents proclaimed themselves to be in office forever. Kenya's majority ruling party changed the constitution in 1982 to declare it a one-party state and outlaw opposition political parties.

Despite the objections of opposition groups, African incumbents have frequently been successful in pursuing constitutional revisions through established methods. The presumptive broad national agreement that ought to support modifications has not been able to ensure conventional amendment procedures. Nothing demonstrates this better than how frequently the duration and number of presidential terms are being changed. President Yoweri Museveni, who has been in power since 1986, led the amendment of the constitution through a referendum in 2005 to remove term limits. In 2017, he instituted the removal of upper age limits on presidential candidates to allow him to run again, while reinstating the two-term limit. President Idris Deby of Chad, who was in power since 1990, similarly orchestrated the removal of the two-term presidential limit in 2005 and reinstated it in 2018.

Although South Africa's 1993 constitution stipulates a two term- limit, this limit has never been tested. Nelson Mandela served only one term. Thabo Mbeki resigned in September 2008, nine months before the end of his second and final five-year term. Jacob Zuma also resigned before the end of his second and final five-year term.

Many civilian and military dictatorships have been overthrown, clearing the way for the development of rule-of-law based governance systems characterised by constitutionalism and constitutional government, including reforms like term limits. However, many of these countries continue to struggle with the deepening and institutionalisation of democracy as well as the effective and comprehensive addressing of government impunity, particularly that which is connected to the abuse of executive power and the violation of human rights.

Supermajorities and referendum requirements are unreliable stand-ins for ensuring wide political and public consensus on constitutional modifications, as shown by the history of regressive revisions in Africa. The same justifications apply to constituent assemblies, which unavoidably would exhibit political factionalism on par with conventional representative legislative bodies. Therefore, researchers and practitioners interested in constitution-making and -change should look at how the necessary broad national consensus actually supports amendments, particularly to core constitutional clauses.

4. Elections as a Democratic Tool

If it ever was, it is now impossible to comprehend Africa without taking into account the importance of its constitutions, legal systems, electoral processes, and other structures. Elections in Africa serve at least three crucial democratising purposes: (1) they aid in the development and maintenance of effective democratic institutions; (2) they give the populace a powerful legal instrument to check and guard the government and reduce impunity; and (3) they increase the populace's capacity to overthrow their government and install new, youthful, and capable political leaders. However, elections must be fair, free, competitive, inclusive, transparent, and credible in order to carry out these three crucial roles, in addition to being regular and not infrequent.

Though essential for a nation to move from authoritarianism to constitutional democracy, elections can also be a tool for the survival of authoritarian governments. For instance, elections have been used by autocratic governments in countries like Cameroon to legitimise their rulers and hold onto power indefinitely.

One concrete way to enhance electoral participation is to provide electors with information about all the issues that must be decided by the election. In the majority of African countries, where most citizens are not fluent in their countries' official language (e.g., French or English), the government should provide election-related information to citizens in a language they can understand. Studies have demonstrated that "inclusive language recognition is linked to higher turnout" for South Africa's various subcultures during elections. By expressly recognizing the language of each of its various ethnocultural groups and providing them with election information in their own language, the South African government significantly

increased the participation of these groups in elections and, as a result, in governance generally.

A successful democracy in which elections are held also depends on the institutional environment, one in which civil liberties and political rights are assured and safeguarded. Political and civic rights of citizens must be upheld and preserved. Citizens must be permitted to peacefully and freely criticise or support governmental actions, including those pertaining to elections. Additionally, citizens must be free to create political organisations to compete for jobs in the government

knowing there is sufficient protection of free speech, free media, as well as freedom for the opposition to campaign unhindered. Political rivalry on such an environment has the potential to greatly enhance election quality and strengthen constitutional democracy.

5. Overcoming Challenges

Instead of relying on faulty proxies, I believe that constitutional designers should pursue more direct methods of securing broad support for constitutional modifications. This section suggests amendment procedures that call for cross-party approval of proposed revisions, adapting the notion of "separation of parties, not branches." As a result, a change would only be accepted if a majority of political parties—or a specific number of them—supported the suggested reform. This strategy would pursue broad consensus more directly by ensuring that amendments have the support outside of the ruling party or coalition, regardless of the size of its dominance, rather than relying on the size of the legislative majority required as a proxy. The strategy assumes that political parties serve as the primary determinants of the diversity and representation of popular feelings and seeks the necessary support from a well-defined minimum number of parties before amendments could take effect. In such a scenario, no one party—regardless of its size at a given time—could alter the constitutional provisions governing the democratic game. The game's titans would not and should not be the only ones to change the rules, to borrow a football metaphor. If such were the case, the regulations would solidify the interests of their powerful authors. In the same way, no political group—not even a real one—should have the final word in deciding the terms by which it must interact with other political parties.

6. Conclusion

A constitution is likely to be received with great respect, if not admiration, if it clearly represents the principles of constitutionalism and includes the ideals that the majority of people hold dear and believe to be just and good as prima facie. The South African constitution is unquestionably unique as an example of contemporary

constitutionalism and offers an array of lessons from which other African countries can benefit. African judges need to employ a bold, creative, and judicially progressive approach, similar to that used by the South African Constitutional Court in many of its rulings, for the process of constitutionalism, good governance, and accountability to take root. It is significant to note that the comparatively weak institutional framework and dearth of a democratic culture have made it easier for rulers to alter the constitutions in the aforementioned countries.

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