
ACHIEVING THE 2030 AGENDA AND AGENDA 2063: THE RULE OF LAW AS A DRIVER OF AFRICA'S SUSTAINABLE DEVELOPMENT

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Constitutionalism and legal reform: strong foundations for sustainable development

BACKGROUND PAPER

OBJECTIVE

This paper examines the principles of constitutionalism and sets out the issues confronting Africa in establishing inclusive, effective and fair political and legal processes. The purpose is to identify the challenges and opportunities to achieve the goals of the 2030 Agenda and Agenda 2063 through the promotion and respect of the rule of law and democracy, in particular constitutionalism and legal reform.

CONTEXT

The principles, ideals and values of constitutionalism are firmly embedded in international declarations and conventions, including the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). They are also enshrined in the Constitutive Act of the African Union and are part of the underlying principles in the visions and goals of the UN 2030 Agenda for Sustainable Development and the AU Agenda 2063.

Modern constitutions are usually based on two principles: (i) representative government, enabling citizens to participate in public affairs and hold their government to account; and (ii) the protection of rights - especially the due process of law, freedom of speech and freedom of religion or belief, equality and non-discrimination - through which citizens are insulated from abuses of power.

The concept of constitutionalism is much broader than the text of a constitution containing the core elements of democracy. As a principle, constitutionalism attempts to limit governmental arbitrariness. It is moreover understood to include international commitments, norms, customs, traditions, judicial decisions and administrative structures, among others, that are integral to making constitutions work in practice and achieving their aims and aspirations for the benefit of individuals and society as a whole.¹

An important element that is fundamental for the successful implementation of constitutions is the definition and establishment of processes and practices to effectively transpose the letters and the spirit of the constitution into laws and regulations that are applicable to all and properly applied and enforced. This law making and law enforcement process is at the intersection of policy making and the separation of the executive, the legislature and the judiciary, and is at the very core of constitutionalism.

¹ Charles Manga Rombad, African Human Rights Law Journal, (2014) 14 AHRLJ 412-448

DISCUSSION

Since the 1990s, Africa has witnessed the adoption of an impressive number of new or revised constitutions. Driven by internal and external pressures, such as civil unrest, political instability and economic decline, a large number of countries have sought to entrench democratic principles and values in their constitutions. Some countries have seized the opportunity of constitution-making to engage in serious inclusive and transformative processes. In other cases, while the constitutions contain most of the core principles and values generally expected from modern democratic constitutions, they have been less transformative.

South Africa adopted one of the most advanced constitutions of its time in December 1996, laying a strong foundation for shift from the apartheid regime to democracy. Pushed by the post-election violence crisis, Kenya engaged in a thorough constitutional reform process and adopted a new constitution in 2010. The post-revolution 2014 constitution of Tunisia has been based on a large consultative and inclusive process and is one of, if not the modest advanced and democratic constitution in the region.

Constitutional provisions on their own cannot meet the expectations of African citizens; they cannot build roads, nor can they provide health care, education or security. The success of constitutional reform therefore needs to be measured in terms of implementation that leads to concrete achievements and results for individuals and communities. Is power exercised fairly and impartially, does it enable an orderly and peaceful society? Does it protect the rights of individuals and communities? Does it deliver public services? Does it lead to transparent and accountable management of resources and the development of the economy?

Building a democratic constitutional order needs to be viewed and designed as a long-term process. Three fundamental stages and processes can be discerned, each of which depends for its success on the results of the preceding one:² A preparatory stage in which institutions, procedures and rules for constitution-making are agreed upon and established; an adoption and ratification stage; and an implementation stage that ensures the spirit and the letter of the constitution are faithfully implemented.

Many, if not most constitutions in Africa, as well intended and well drafted as they might be, have so far failed to deliver the expected results. When assessing the achievements of new constitutions, it appears that only a minority of states have fully enabled citizens' participation in public affairs. This is essential if governments are to be held to account, and if citizens are to have their fundamental rights properly protected and benefit from growth and economic development.

The reasons for this are manifold. For example, the constitution drafting process is not inclusive and participatory enough and does not take local customs and traditions sufficiently into account; the process might be undermined by the resistance of elites to a new order that limits their privileges; the required technical expertise and skills might not be available; or financial or logistical resources can be insufficient.

GUIDING QUESTIONS

1. How can constitutionalism and legal reform be advanced in Africa towards the achievement of the sustainable development goals of the 2030 Agenda and Agenda 2063?

² International IDEA; What is a constitution? Principles and concepts, 2014

2. What lessons can be learned from good practice in Africa to ensure that constitution-building is truly inclusive and participatory and reflects the will of all sections and layers of society?
3. What are the main challenges for the judiciary in interpreting and implementing the constitution?
4. What are the key challenges and how does Africa overcome them to move from norms on paper (constitutions and laws) to a culture of respect for constitutional principles?
5. What is the role of the institutions of government, the private sector and civil society in ensuring the effective implementation of democratic constitutions?

BACKGROUND DOCUMENTS

- International IDEA; Constitution building primers: <http://www.idea.int/cbp/constitution-building-primers.cfm>
- A practical guide to Institution building: <http://www.idea.int/publications/pgcb/loader.cfm?csmodule=security/getfile&pageid=49280>
- World Bank World Justice Project Rule of Law Index 2015: <http://worldjusticeproject.org/rule-of-law-index>
- The World Bank: New Directions in Justice Reform: <http://documents.worldbank.org/curated/en/2012/05/16706679/world-bank-new-directions-justice-reform-companion-piece-updated-strategy-implementation-plan-strengthening-governance-tackling-corruption>
- IDLO Doing justice to sustainable development: Integrating the rule of law into the post-2015 development agenda. IDLO, 2014: <http://www.idlo.int/publications/doing-justice-sustainable-development>