

Separation of Powers, Independence of the Judiciary, and Good Governance in African Union Member States

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1. Introduction

As the structural adjustment programmes (SAPs) developed by the Breton Woods institutions, namely the International Monetary Fund (IMF) and the World Bank were running out of tune in the late 1970s, the concept of “governance” and then “good governance” was brought to the fore. Arguably, since the early 1980s, no political, economic and social concept has dominated the intellectual and political discourse as the concept of “good governance”.

“Good governance” replaced SAPs as a conditionality for developing countries to be granted aids or to secure loans from international or foreign (Western) institutions. On the other hand, it has become a prerequisite for development, democracy and peace.

Separation of powers and independence of the judiciary are considered critical to good political governance under the African Union (AU), which superseded the Organisation of African Unity (OAU) in the early 2000s and established mechanisms such as the New Partnership for Africa’s Development (NEPAD) and its African Peer Review Mechanism (APRM) to promote democracy and development as a prerequisite for African renaissance.

Against this background, this paper reflects on the separation of powers, independence of the judiciary and good political governance in the AU member States. It first revisits these three concepts, the relationship between them and particularly the role of the judiciary in promoting the separation of powers and good governance on the African continent. It then deals with the separation of powers, independence of the judiciary, and good governance under the AU Constitutive Act, NEPAD and APRM instruments. Based on the findings of the APRM panels on the three first countries whose governance was reviewed and on some developments that recently occurred on the continent, the paper highlights a number of challenges and conclude on the prospects for the separation of powers, independence of the judiciary, and good governance in Africa.

2. Separation of Powers, Independence of the Judiciary, and Good Governance Revisited

Separation of powers, independence of the judiciary and good governance are the key concepts used in this paper and that need to be revisited briefly before assessing their respect and promotion in AU member states.

2.1 Separation of Powers

The separation of powers is the most ancient and enduring element of constitutionalism. Vile argued that it was the great pillar of Western political thought.¹ According to Vile, its first modern design is to be found in John Locke's writings, especially his *Second Treatise of Government*.²

Many scholars agree, however, that Charles Louis de Secondat, better known as the Baron de Montesquieu is the first who gave it paramount political importance and remains the "oracle who is always consulted and cited on this subject" since his contribution surpassed that of all earlier writers.³

As Vile rightly noted, Montesquieu did not invent the doctrine of separation of powers, and much of what he had to say in his *De L'Esprit des Loix (The Spirit of Laws)* was inspired by contemporary English writers and by John Locke.⁴

Montesquieu contributed new ideas to the doctrine; he emphasised certain elements in it that had not previously received much attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than most writers before him. His view of the function of government was much closer to modern usage than that of his predecessors. He emphasised the judicial function and its equality with other branches of government and the independence of the judiciary while providing a clearer view of the separation of legislative and executive branches. Vile held that with Montesquieu, the separation of powers was no longer an English theory; it had become a universal criterion of a constitutional government. *De L'Esprit des Loix* was therefore hailed as the first systematic treatise on politics since Aristotle.⁵

The doctrine of the separation of powers assumes that power corrupts and separation of powers is essential to liberty and democracy. The underlying idea of Montesquieu's thought was that Man, though a reasoning animal, is led by his desires into immoderate acts and "Constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go".⁶ The end result of concentration or accumulation of all powers is despotic government, tyranny or suppression of all form of liberty.⁷

¹ Vile, M J C, *Constitutionalism and the separation of powers*, Oxford: Clarendon Press, 1967, 2.

² Idem 2.

³ See Vile op cit 96-97; Cooper, S W, "Considering 'power' in separation of powers" *Standard Law Review*, 1994, 362-363; Levi, E H "Some aspects of separation of powers" *Columbia Law Review*, 1976, Vol 76, 37-374; Van der Vyver, J D "Political power constraints and the American Constitution" *SALJ*, 1987, 419; Idem "The separation of powers" *SAPR/PL*, 1993, 177.

⁴ Vile op cit 76.

⁵ Idem op cit 96-97.

⁶ Montesquieu op cit 78.

⁷ Levi op cit 375-376.

To prevent abuse of power, Montesquieu demanded that everything be done to ensure that “*le pouvoir arrête le pouvoir*”.⁸ As Montesquieu held, “it is necessary from the very nature of things that power should be a check to power.”⁹ To secure liberty and freedom against tyranny and dictatorship, Montesquieu thus recommended the separation of powers:

All would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers; that of making laws; that of executing public resolutions; that of judging crimes and disputes of individuals.¹⁰

Separation of powers may be horizontal or vertical depending on whether it is among state organs at the central level or between the state and its constitutive territorial units. Federalism, which is another version of the separation of powers, relates to vertical, spatial, territorial or geographic separation of powers.¹¹ Separation of powers and federalism are interlocking elements in a thoroughgoing philosophy of the division of power.¹²

Vile also distinguished between what he called “the pure doctrine of separation of powers”, which in his view is a complete separation of powers, and its modification essentially by the Fathers of the American Constitution, who championed a partial separation of powers or the modification of the “pure doctrine” by a system of checks and balances.¹³

Tacking stock of the above developments, Van der Vyver¹⁴ held that the idea of separation of powers eventually developed into a norm comprising the following four basic precepts or principles:

- the principle of *trias politica*, requiring a formal distinction to be made between three independent branches of state authority, namely the legislative, executive and judicial branches;
- the principle of the separation of personnel according to which the same people should not be allowed to serve more than one branch of government at one time;
- the principle of the separation of functions between the three branches of state authority to avoid one interfering with or assuming functions vested by law in another branch or state organ; and
- the principle of checks and balances that requires that each organ be entrusted with special powers designed to serve as checks on the exercise of functions by the others in order to come to equilibrium.

⁸ French translation for “power should be a check to power”.

⁹ Lafrance G “Montesquieu and Rousseau on Constitutional Theory”, in Rosenbaum, A S (ed) *Constitutionalism: The Philosophical Dimension*, Greenwood Press, New York, 1988, 60.

¹⁰ Montesquieu, as quoted by Vile op cit 85; Cooper op cit 362-363; Levi op cit 373-374; Van der Vyver “The separation of powers” op cit 177-178.

¹¹ Chandler, R C, Enselen, R A & Renstrom, P G *The Constitutional Law Dictionary*, Vol 1, ABC-CLIO, Oxford, England, 1985, 31, 58.

¹² Vile op cit 171.

¹³ Idem 85-86.

¹⁴ See Van der Vyver “Political power constraints...” op cit 419-420; Idem “The separation of powers” op cit 178-179.

The three first principles are characteristics of what Vile called “the pure doctrine of the separation of powers”,¹⁵ as inherited from the Masters, especially Montesquieu. According to the Fathers of the American constitution,

Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.¹⁶

Checks and balances were therefore indispensable. The fourth principle represents the major American contribution to the theory of separation of powers. It brought about significant change to the “pure doctrine”, as it requires a partial separation of powers instead of an absolute one. One of the checks and balances is judicial review by independent courts.

According to Feliciano, “Judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three departments of government.”¹⁷

Yet, it is also a limitation on the principle of the separation of powers in that by striking down laws or acts of Parliament, the judiciary encroaches upon the functions of other branches of state authority, especially the legislature. There lies the paradox of judicial review.¹⁸ The conclusion reached was that the people, not the institutions of government, were sovereign. Each branch served the sovereign people and no branch could rightly claim to be its sole representative. Each branch, in its own way, was the people’s agent, its fiduciary for certain purpose, whatever its manner of selection.¹⁹

In Vile’s words, absolute and extreme separation of powers as systematised by Montesquieu was a pure abstraction, an “ideal”.²⁰

According to the judges of South Africa’s Constitutional Court,²¹ no constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation. Even in the USA, following the principle of checks and balances, there is no drastic separation of powers. The Founders did not erect walls as a way to defend each branch’s authority.²²

¹⁵ Vile op cit 12, 13.

¹⁶ Idem 159-160.

¹⁷ Feliciano F P “The application of law: some recurring aspects of the process of judicial review and decision-making” *The American Journal of Jurisprudence*, 1992, 19, 24.

¹⁸ Mangu A M B *Separation of Powers and Federalism in Post-colonial Africa: The South African Case*, unpublished LLM Dissertation, Pretoria, University of South Africa, 1998, 5.

¹⁹ See Levi op cit 385-386; Mangu op cit 5.

²⁰ Vile op cit 13, 18, 85-86.

²¹ *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at paragraphs 1298 G, 1299A-H, 1300 A-F, 1301 A.

²² See Levi op cit 376-391; Cooper op cit 363-364.

All powers should collaborate given that they all have to serve the same sovereign, namely the people. Moreover, the advent of political parties has reinforced collaboration and undermined the principle of the separation of powers as one winning party may lead both the legislature and the executive.

Of all the components of the separation of powers, the only one to have survived in full in all states, is the principle of the *trias politica* requiring a formal classification of the repositories of state authority into the legislative, executive, and judicial branches of government.²³ An important aspect of the separation of powers is that the legislature should be autonomous enough to control the government instead of being reduced to rubberstamp machinery and the judiciary should be independent.

2.2 Independence of the Judiciary

As pointed out above, the independence of the judiciary is critical for the separation of powers. There would not be any separation of powers without the independence of the judiciary. According to Rabkin, the most fundamental aspect of the separation of powers is that there should be a separation between the judiciary and the other two “political” branches of government.²⁴

The independence of the judiciary means that it should not be subordinated to the authority of any other branch of government, but only subject to the Constitution and the law. It should be impartial and perform its functions without fear or bias. This does not mean that the executive is not involved in the appointment of the members of the judiciary or that the judges are not accountable. In every country, judges are appointed by the head of state based on recommendation by the judges themselves as members of an independent judicial commission or *conseil supérieur de la magistrature*²⁵. This is also part of the checks and balances affecting the judiciary. On the other hand, the judges are controlled and are accountable to the people. Nowhere did the people establish a “government of the judges”. The “guardians” should themselves be controlled.

The independence of the judiciary is critical for constitutionalism, the separation of powers, and respect for human rights and the rule of law. As Mc Ilwain once put it,

the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.²⁶

²³ Mangu op cit 7.

²⁴ Rabkin, J., “The Success of the separation of powers and its contemporary failings” *Birmingham Young University Law Review*, 1987, 1008.

²⁵ “Superior Council for the Magistracy”, the French equivalent to an independent judicial commission.

²⁶ McIlwain, C H, *Constitutionalism: Ancient and Modern*, Ithaca, New York: Cornell Review Press (Revisited edition), 1947, 22.

Mojekwu also regarded constitutionalism as “a man-made device to limit the arbitrariness of governments.”²⁷ It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.²⁸ This is what Ivison referred to as “negative constitutionalism” or “Hobbesian constitutionalism”.²⁹

According to Ihonvbere and Shivji, the liberal concept of constitutionalism rests on two main pillars, namely limited government and individual rights.³⁰ This negative or liberal constitutionalism favoured by traditional definitions of constitutionalism was procedural or formal constitutionalism relating to the “normative *Verfassung*”, “normal politics” or politics in terms of the norms and the rules of law in which “power is proscribed and procedures prescribed”, as Andrews emphasised.³¹ It tended to create what Olivier referred to as the “minimal state”, that is a state which leaves greater space to individual freedom and activities.³²

Ivison revolted against negative constitutionalism as “an incomplete formulation of what constitutionalism means. Constitutions are about preventing abuses of powers, but are also about more positive things too”.³³

Zoethout and Boon also levelled criticism at traditional constitutionalism and its mainly procedural nature and suggested that we should redefine or reconceptualise the concept and transcend its negativism. Not only should it provide for the protection of individual rights and freedoms (negative constitutionalism limiting state authority), but it should also include some social, economic and collective rights requiring state’s action (positive constitutionalism).³⁴

Rosenfeld holds that “Modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of human rights”.³⁵

²⁷ Mojekwu, C C, “Nigerian Constitutionalism”, in Pennock, J R & Chapman, J W (eds) *Constitutionalism*, New York: New York University Press, 1979, 184.

²⁸ See Zoethout, C M & Boon, P J “Defining constitutionalism and democracy: An introduction”, in Zoethout, C M *et al* (eds) *Constitutionalism in Africa. A Quest for autochthonous principles*, Gouda Quint-Deventer, 1996, 1; Mojekwu op cit 164.

²⁹ Ivison, D., “Pluralism and the Hobbesian logic of negative constitutionalism” *Political Studies*, Vol XLVII, 1999, 83-89.

³⁰ See Ihonvbere, J O, *Towards a new constitutionalism in Africa*, London: CDD Occasional Papers, 2000, 13; Shivji, I G, “State and Constitutionalism: A New Democratic Perspective”, in Shivji, I G (ed) *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES, 1991, 28.

³¹ Andrews, W G, *Constitutions and Constitutionalism*, Princeton: New Jersey, 1968, 13, 26.

³² Olivier, P.J.J., “Constitutionalism in the New South Africa”, in Licht, R A & De Villiers, B (eds) *South Africa’s Crisis of Constitutional Democracy. Can the U S Constitution Help?* Johannesburg & Washington: Juta & The AEI Press, 1994, 20, 21.

³³ Ivison op cit 83.

³⁴ Zoethout & Boon op cit 1, 15.

³⁵ Rosenfeld, M., “Modern constitutionalism as interplay between identity and diversity”, in Rosenfeld, M, (ed) *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Durham & London: Duke University Press, 1994, 3.

It is “a three-faceted concept”, consisting of three general features, namely limited government, adherence to the rule of law and protection of human rights.³⁶

Modern constitutionalism is therefore both negative and positive constitutionalism, procedural and substantive. It is based on forms but also and even mainly on the values such as equality, justice and respect for human rights.

Carpenter considered constitutionalism as “a doctrine which is concerned with values”.³⁷ Most constitutions are value-based. The 1996 Constitution of the Republic of South Africa, for instance, is based on a number of values that must be promoted.³⁸ A powerful version of this kind of constitutionalism is what Ivison called “rights-based constitutionalism”.³⁹

According to Olivier, “Constitutionalism has become central to the jurisprudence”.⁴⁰

As the guardian and protector of the Constitution – without favour or fear – and human rights, an independent judiciary is needed. An independent judiciary serves as a foundation of the English rule of law, the German *Rechtsstaat*, the Afrikaans *Regstaat* and the French *Etat de droit* in whether their formal or material sense.

2.3 Good Governance

According to Hyden, at its modern origin, the language of governance was typically applied by the World Bank and the IMF to serve their narrow purposes.⁴¹ It was a donor “obligation” imposed on underdeveloped countries. In its 1989 report on the prospects for development in Sub-Saharan Africa, the World Bank defined governance with reference to “the exercise of political power to manage a nation’s affairs”.⁴² Governance was narrowly understood to refer to management and particularly to economic and financial management.

In 1992, the World Bank used governance to refer to the practical exercise of power and authority to conduct public affairs. In Hyden’s view, it is clear that in such terms, “governance could refer to just anything political. It had no other value than allowing the Bank to make reference to things political.”⁴³

³⁶ Rosenfeld op cit 28.

³⁷ Carpenter, G, “Public Law: Constitutional Law”, in Hosten, W J *et al* (eds), *Introduction to South African Law and Legal Theory*, Durban: Butterworths, 1997, 949.

³⁸ Section 1 of the 1996 Constitution of the Republic of South Africa.

³⁹ Ivison op cit 85.

⁴⁰ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at paragraph 301.

⁴¹ Hyden, G, “Governance and the Reconstruction of Political Order,” in Joseph, R., (ed), *State, Conflict, and Democracy in Africa*, Boulder & London: Lynne Rienner Publishers, 1999, 184.

⁴² *Idem*.

⁴³ *Idem*.

At its inception, governance did not mean “good governance”. It is only in a paper presented at a World Bank - sponsored conference on development economics in 1992 that Boeninger suggested that governance was the same as “good government”.⁴⁴ The definition of “governance” was later extended beyond the managerial and technical approach to become more holistic.

“Good governance” implies or requires transparency, equity, justice, promotion of and respect for human rights, whether civil, political, economic, social and cultural, promotion of the rule of law, decentralisation, sound economic policies, open, free and fair elections, and popular participation. Accordingly, to African leaders, good governance can be political, economic, social and corporate and also requires legitimacy of power or democracy.

Few concepts would dispute the current popularity of “good governance”. There is no single day when it has not been used in a political or an economic discourse. Good governance has also imposed itself as a recurrent theme in intellectual debates among social scientists.

Governance has increasingly attracted the attention of policy makers, civil society organisations, development agencies, political leaders, and social scientists. Institutes and centres have been created to discuss and promote good governance.

On the African continent, the Council for Development of Social Science Research in Africa (CODESRIA) established an institute on “democratic governance” in 1992. The different themes of the Governance Institute have revolved around good – democratic – governance which has also become a permanent sub-theme at every CODESRIA’s general assembly.

In the language used by international financial institutions such as the IMF, the World Bank, the African Development Bank (ADB), the United Nations Development Programme (UNDP) and Western governments, “good governance” has been made a panacea for all Africa’s development problems.

Since 2000, the UNDP has established an “Africa’s Governance Forum”, which is organised every year to reflect on issues related to governance in Africa.

National and international meetings bringing together international and donor institutions, representatives of Western governments, national governments, academics and civil society organisations are regularly held to debate and exchange on governance in Africa.

⁴⁴ Boeninger, E., “Governance and Development: Issues of Governance,” *Proceedings of the World Bank Annual Conference on Development Economics*, Washington, DC: World Bank, 1992, 24-38.

In South Africa, for instance, the 2008 Polokwane conference, which was co-organised or funded by the Institute for research and debate on governance (IRG), the Alliance for the refoundation of governance in Africa, the University of South Africa (UNISA), the University of Limpopo (UNILIMPO), the French Ministry of Foreign and European Affairs, the French Institute of South Africa, the UNDP, the South African Institute of International Affairs (SAIIA), Modus Operandi and the Charles Léopold Mayer Foundation brought to South and Southern Africa the governance debate that started in Addis Ababa, Ethiopia, and continued in Bamako, Mali, with the aim of promoting good governance and democracy on the African continent. In Africa, as elsewhere, good or democratic governance is not possible without respect for the principles of the separation of powers and independence of the judiciary which postulate respect for constitutionalism, democracy and the rule of law.

Good governance in Africa has become a holistic concept closely associated with constitutionalism, democracy and the rule of law and implying the separation of powers and independence of the judiciary. It may be political, economic, social and corporate governance.

3. Separation of Powers, Independence of the Judiciary, and Good Governance under the AU Constitutive Act, NEPAD and APRM Instruments

The OAU was created in May 1963, shortly after many African countries gained their independence. The main objectives of the OAU included decolonisation, self-determination, and African unity through the reinforcement of cooperation among African countries.⁴⁵ The ultimate but implicit objective of the OAU was Africa's development to enable Africa in general and African states in particular to occupy their rightful place among the nations of the world.

As the 20th century was drawing to an end, the sentiment among African people and even their leaders was that despite what had been achieved - independence; end of apartheid, and economic and political mechanisms established to reinforce African unity and integration - a great deal still remained to be done. African leaders then agreed to replace the OAU with a new regional body, the AU. The AU Constitutive Act was adopted in Lome, Togo, in July 1999,⁴⁶ and came into force in May 2002. The AU held its inaugural summit in Durban, South Africa, in July 2002.

During the 37th and last session of the OAU Assembly of Heads of State and Government held in July 2001 in Lusaka, Zambia, African leaders adopted the Strategic Policy Framework and a new vision for the revival and development of Africa, the New African Initiative (NAI) that became NEPAD⁴⁷ later on.

⁴⁵ Article III of the OAU Charter.

⁴⁶ During the OAU Summit held from 10 to 12 July 2001 in Lome, Togo.

⁴⁷ See 2001 AHG/Declaration 1 (XXXVII).

NEPAD received the support of the UN General Assembly, which recommended that NEPAD should be used as the framework for Africa's development and commended it as an innovative and important development.⁴⁸ The 2001 OAU Lusaka summit established the NEPAD Heads of State and Government Implementation Committee (HSGIC), which was placed under the chairmanship of the then Nigerian President, General Olusegun Obasanjo.

At the Durban AU inaugural summit, African leaders adopted a Declaration on the Implementation of NEPAD⁴⁹ that endorsed the Progress Report and Initial Action Plan⁵⁰ and encouraged member states to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)⁵¹ and to accede to the African Peer-Review Mechanism (APRM).⁵² The APRM was annexed to this Declaration.

The objective of NEPAD is to “eradicate poverty and to place African countries, individually and collectively, on the path of sustainable growth and African development and, at the same time, to participate actively in the world economy and body politic on equal footing”⁵³

NEPAD's twin objectives are therefore the eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance.⁵⁴

The APRM was inaugurated as NEPAD's lynchpin. It is pivotal to NEPAD and constitutes the most essential test of its credibility. It was established as a mechanism to implement NEPAD.⁵⁵ It was provided for in the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG) and

The APRM base document was adopted at the 6th summit of the NEPAD Head of State and Government Implementation Committee (HSGIC) held in Abuja, Nigeria, in March 2003. It was launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from Friday 13 to Saturday 14 February 2004.

⁴⁸ UN General Assembly Declaration A/RES/57/2, A/RES/57/7, RES/A/57/3000.

⁴⁹ Assembly/AU/Declaration (n 2).

⁵⁰ AHG/235 (XXXVIII).

⁵¹ AHG/235 (XXXVIII) Annex I.

⁵² AHG/235 (XXXVIII) Annex II.

⁵³ Mangu, A M B, “The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court”, *Netherlands Quarterly of Human Rights*, No 23(3), 2005, 389; Document AHG/235 (XXXVIII, Annex I), paragraph 2.

⁵⁴ Mangu “The Changing human rights landscape” op cit 389; Document AHG/235 (XXXVIII, Annex I), paragraph 5.

⁵⁵ Mangu “The changing human rights landscape” op cit 380, 388, 389.

The APRM is a self-monitoring mechanism adopted by AU member states within the framework of NEPAD.⁵⁶ It aims to promote democracy and good political governance alongside economic and corporate governance.⁵⁷ The APRM Base Document⁵⁸ and Memorandum of Understanding (MOU)⁵⁹ were adopted at the 6th summit of the NEPAD HSGIC held in March 2003 in Abuja, Nigeria.⁶⁰ The APRM was officially launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from the 13th to 14th February 2004.⁶¹ Out of twenty-seven (27) African countries that joined the APRM between 2003 and September 2007, seven (7) were Southern African countries, namely Angola, Lesotho, Malawi, Mauritius, Mozambique, South Africa, and Zambia. The peer review of both South Africa and Algeria was conducted at the 7th Summit of the Committee of heads of State and Government participating in the APRM (APR Forum), which was held on 01 July 2007 in Accra, Ghana. Until now, the APRM process has been completed for Ghana, Rwanda, Kenya, and South Africa.

It is worth examining the AU Constitutive Act and the NEPAD and APRM instruments as well as the practice to find out how serious African leaders have been about the separation of powers, independence of the judiciary and good governance.

3.1 Separation of Powers, Independence of the Judiciary, and Good Governance under the AU Constitutive Act

The separation of powers, independence of the judiciary and good governance feature prominently among the objectives and principles of the AU. However, unlike good governance, which is expressly provided, the separation of powers and independence of the judiciary can be said to be implicit objectives as they are crucial for democracy.

The AU Constitutive Act⁶² provides that the objectives of the AU are *inter alia* to:

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- promote democratic principles and institutions, popular participation and good governance;
- promote respect for human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- promote co-operation in all fields of human activity to raise the living standards of African peoples;
- work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

⁵⁶ Document AHG/235 paragraph 1.

⁵⁷ *Idem* paragraph 5.

⁵⁸ Document AHG/235.

⁵⁹ NEPAD/HSGIC/03-2003/APRM/MOU.

⁶⁰ *Idem* paragraph 17.

⁶¹ Mangu "The changing human rights landscape in Africa" *op cit* 388.

⁶² AU Constitutive Act, Article 3 (g), (h), (k) & (n).

The AU⁶³ is also expected to work according to the following principles:

- the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- promotion of gender equality;
- respect for democratic principles , human rights, the rule of law and good governance;
- promotion of social justice to ensure balanced economic development;
- respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; and
- condemnation and rejection of unconstitutional changes of governments.

In view of the above, good governance is stressed as both one of the objectives and principles of the AU but so are the separation of powers and independence of the judiciary since they are required for the promotion of or respect for democratic principles and institutions, human rights and the rule of law also highlighted among the AU objectives and principles.

Apart from their embodiment in the AU objectives and principles, the AU Constitutive Act established institutions aimed at promoting the separation of powers, independence of the judiciary and good governance. These include the African Court of Justice,⁶⁴ the Economic, Social and Cultural Council,⁶⁵ and the pan-African Parliament.⁶⁶

On the other hand, a protocol to the Treaty⁶⁷ establishing the African Economic Community (AEC) provided for a Pan-African Parliament as one of the organs of the AEC.⁶⁸ The objectives of the Pan-African Parliament include the promotion of the principles of human rights and democracy⁶⁹ as well as good governance, transparency, and accountability of governments.⁷⁰ The Pan-African parliament was retained among the organs of the AU.⁷¹

Since all African countries, with the exception of Morocco, are AU member states, they are bound by its Constitutive Act. The promotion of or respect for the principles of the separation of powers, independence of the judiciary and good governance, is one of the obligations binding on AU member states in terms of the AU Constitutive Act.

⁶³ AU Constitutive Act, Article 4 (h), (l), (m), (n), (o) & (p).

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⁶⁶ See Articles 7 and 14 of the Treaty establishing the African Economic Community and Article 2 of the Protocol thereto related to Pan-African Parliament.

⁶⁷ Adopted on 3 June 1991 in Abuja, Nigeria. Articles 7 and 14 related to Pan-African Parliament as one of the organs of the African Economic Community.

⁶⁸ Article 2 (1).

⁶⁹ Article 3(2).

⁷⁰ Article 3 (3).

⁷¹ Article 5 of the AU Constitutive Act.

How this is achieved in the practice of the governments of AU member states is, however, another problem. In Africa, perhaps more than anywhere else, there is a huge gap between what is provided for in legal instruments and political resolutions and their actual enforcement.

Despite the lofty objectives and principles of the separation of powers, independence of the judiciary and good governance entrenched in the AU Constitutive Act, in numerous declarations, resolutions and other instruments adopted by African leaders at the regional or national level, including the national Constitutions, the reality is sadly different. In many African states, abuse or confiscation of powers by the executive has replaced limitation or separation of powers. Most parliaments enjoy little autonomy and are rather rubberstamp machineries of the decisions made by the executive under the leadership of a powerful president who is actually unaccountable. Parliamentarians may call the members of the government to account but there is no consequence in cases they have failed to deliver.

In the Democratic Republic of Congo, for instance, despite numerous motions of no confidence initiated, not a single one has been adopted to result in the dismissal or resignation of a member of the government. The logic of “majority” has always prevailed and parliamentarians belonging to the ruling “presidential majority”⁷² have been instructed or dictated never to vote against a member of their government.

As for the legislature, the judiciary is reduced to an administrative arm of the executive, prosecuting or sentencing when the executive or the President insisted that some people generally in the opposition or those who had fell into presidential disgrace had to be prosecuted or sentenced. The judiciary lacks independence and impartiality, especially when the members of the executive are involved. The only independence or impartiality they seem to enjoy is when they embark on corruption and make rulings to benefit those who can afford to “buy justice” to the detriment of the masses of the poor who cannot.

Corruption, bad governance, impunity, authoritarianism, disrespect for the Constitution and the rule of law have come to be closely associated with governance in Africa. Africa is known as a continent where there is little separation of powers and independence of the judiciary and “bad governance” has come to mean “African governance” in much of the political and even intellectual discourse on Africa, which is Afro-pessimistic.

⁷² Following the 2006 elections, the *Parti du Peuple pour la Reconstruction et le Progrès* (PPRD), which is President’s Kabila party, did not manage to win an outright majority in Parliament in order to form its own cabinet. An alliance was therefore formed with other parties, namely PALU and UDEMO, to constitute a coalition government that has since ruled the DRC.

3.2 Separation of Powers Independence of the Judiciary, and Good Governance under NEPAD and the APRM

Arguably, by stressing the promotion of democracy in their instruments, NEPAD and APRM favour the separation of powers and the independence of the judiciary on which any modern democracy is based. They committed to ensuring the effective functioning of Parliaments in their countries. They also vowed to respect their constitutions and the rule of law through a judiciary that should be truly independent and impartial.

As far as the promotion of good governance is concerned, African leaders of AU member states participating in NEPAD agreed to adopt clear codes, standards and indicators of good governance at the national, sub-regional and continental levels. They also agreed to fight against corruption through parliamentary committees, anti-corruption bodies, and mainly an independent judicial system that would also help prevent abuse of power.⁷³

Finally, they agreed to promote and respect human rights as entrenched in their national constitutions as well as in regional and international human rights instruments that they ratified.⁷⁴

The adoption of the NEPAD and APRM instruments, numerous AU resolutions and declarations, and the provisions contained in several national constitutions sent a strong message that African leaders were committed to democracy, including the separation of powers and the independence of the judiciary and to good governance more than at any time since independence.

Unfortunately, this is contradicted by the assessment of democracy and good political governance by APRM panels after the review of the three first AU member states and by recent developments in some of these countries. After assessing compliance with the nine (9) NEPAD objectives⁷⁵ that should be achieved by any country under the APRM in the area of democracy and good political governance, the APRM panels came to some disappointing conclusions.

⁷³ DDPECG paragraph 14.

⁷⁴ *Idem* 15.

⁷⁵ See APRM questionnaire for Country self-assessment report, Section 1, 1.1.1.-1.3.3. in Heyns, C & Kilander, M, (eds) *Compendium of key human rights documents*, 2e edition, Pretoria: Pretoria University Press, 2006, 302.304. The NEPAD nine (9) objectives, on which APRM is based, include prevention and reduction of intra- and interstate conflicts (Objective 1); constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizens' rights and the supremacy of the Constitution (Objective 2); promotion and protection of civil, political, economic and social rights (Objective 3); upholding the separations of powers, including the protection of an independent judiciary and an effective legislature (Objective 4); ensuring accountable, efficient and effective public office holders and civil servants, and promoting the development and participation of civil society and the media (Objective 5); fight against corruption in the public sphere (Objective 6); promotion and protection of the rights of women (Objective 7); promotion and protection of the rights of children (Objective 8); and Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees (Objective 9).

In Ghana, which was the first country to be reviewed under the APRM, the Country Self-Assessment Report (CSAR) indicated that although the rule of law was a reality, some sections of the populace were routinely denied access to justice because they could not afford legal representation. Due to poverty, the judicial system in Ghana was inaccessible to the majority of the population. The judiciary still suffered from lack of adequate capacity to administer justice. Availability of office space and courtrooms was a major problem and budgetary allocations were insufficient to meet the growing infrastructure needs of the judiciary.⁷⁶

In Rwanda, the APRM Country Review Mission (CRM) also found that though it was declared to be independent, the judiciary was actually an appointee of the executive branch of government. There was no judicial service commission, but instead a powerful body - the Superior Council of the Judiciary – vested with the responsibility to appoint and discipline judges and other judicial officers. The CSAR noted that “instead of separation of powers, there is in fact, fusion of powers” in the hands of the President.⁷⁷

The CRM rightly recommended that the Rwandan authorities ensure that the Supreme Court and the judiciary are independent of the executive branch and the bar association is represented on the Superior Council of the Judiciary.⁷⁸ The CRM also identified the promotion of political pluralism and competition of ideas, separation of powers and the protection of the rights of vulnerable groups as the overarching issues of governance in Rwanda.⁷⁹ In Kenya, the APRM panel held that the judiciary was not independent.⁸⁰

As far as the legislature is concerned, the APRM panel found that Parliament was neither effective nor independent of the executive branch, and parliamentary committees were too weak to provide the much needed oversight the power on the executive in Ghana.⁸¹ In Rwanda, lack of the separation of powers resulted in the subordination of Parliament to the president.⁸² In Kenya, the president could at any time dissolve Parliament, which was subordinate to the executive in law-making and could not perform its oversight functions.⁸³ The CRM rightly recommended that appropriate capacity should be provided to parliamentary committees to enable them to perform their functions efficiently in overseeing and providing effective checks and balances against the executive, as stipulated in the constitution. The CRM also found that lack of a suitable constitution was probably the main challenge to democracy and good political governance in Kenya.⁸⁴

⁷⁶ Ghana’s Report 21.

⁷⁷ Rwanda’s Report 44, paragraphs 119-120.

⁷⁸ *Idem* 44-45, paragraphs 120-121.

⁷⁹ Rwanda’s Report 136, paragraph 439.

⁸⁰ *Idem* 71.

⁸¹ Ghana’s Report 29, paragraph 63.

⁸² Rwanda’s Report 44, paragraphs 119-120.

⁸³ Kenya’s Report 71 & 72.

⁸⁴ *Idem* 24-25, 27.

Accordingly, “constitutional reform” reform was identified as one of the overarching issues of governance.⁸⁵

With regard to “good governance”, the CRM found that “corruption is regarded as a major governance problem” in Ghana.⁸⁶ It then encouraged the implementation of the recommendations of anticorruption bodies and the establishment of a central organ within the government, but independent of it, which would be vested with exclusive jurisdiction to fight corruption.⁸⁷

“Corruption” was among the overarching issues singled out in the review of governance in Kenya.⁸⁸ Drastic measures were recommended to the Government of Kenya to fight corruption in the public service and to speed up the strengthening of capacity for investigating and evidencing cases in the Attorney General’s Office.⁸⁹

Although Rwanda was commended for its efforts to combat corruption, the CRM advised Rwanda to consider creating an all-embracing institution comprising all existing agencies dealing with corruption, to institute an offence for false declaration of assets and to strengthen citizens’ right of access to administrative documents and information.⁹⁰

Apart from numerous and serious deficiencies the APRM found in the area of democracy and good political governance, it also commended states for some “best practices”. Ghana⁹¹ was commended for institutionalising democracy and promoting good governance through the creation of unique institutions and processes such as the Annual Governance Forum⁹² and the Peoples’ Assembly.⁹³ The Forum and Assembly have expanded the political space for ordinary people and have brought the government somewhat closer to them. These institutions have certainly demystified the government, rendering it less abstract and remote. Other examples of “best practices” that can be emulated by other African countries include the National Commission for Civil Education (NCCE)⁹⁴ and the Commission for Human Rights and Administrative Justice (CHRAJ).

⁸⁵ Kenya’s Report 23-25.

⁸⁶ Ghana’s Report 31 & 33, paragraphs 69, 75-76.

⁸⁷ *Idem* 35, paragraph 84.

⁸⁸ Kenya’s Report 23-25.

⁸⁹ Kenya’s Report 97.

⁹⁰ Rwanda’s Report 49, paragraphs 135.

⁹¹ Ghana’s Report p 20, Box 2.1: Dividends of Democracy in Ghana.

⁹² The Annual Governance Forum has been held every year since 1998, initially under the auspices of the National Institutional Renewal Programme and Parliament and, more recently, the National Governance Programme. It allows stakeholders to discuss selected issues on democracy and good governance.

⁹³ The Peoples’ Assembly was instituted in 2001 as an annual unstructured interaction between the President and the people. The Peoples’ Assembly allows Ghanaians from all walks of life to pose any question to the President.

⁹⁴ The NCCE is constitutionally mandated to create and sustain within the Ghanaian society the awareness of the principles and objectives of the Constitution as the fundamental law of the people of Ghana, and to educate or encourage the people to defend the Constitution. It is intended to promote and consolidate citizenship transparency and accountability in public life. It is competent to formulate

However, the CRM identified a number of major deficiencies to be addressed by the Ghanaians to achieve the objectives of NEPAD. These deficiencies were found in the practical workings of the Constitution and democracy, the institutional capacities, the delivery of public services, the electoral process, and the performance of governance institutions at the various levels of the governance system.⁹⁵

Rwanda was commended for its current Constitution that provides for the sharing of power among political organisations and ethnic groups to deal with the legacy of genocide,⁹⁶ and for “best practice” in promoting the rights to health and access to education⁹⁷ as well as the rights of women (nearly half – 49% of the members of the Chamber of Deputies).⁹⁸

Considering compliance with the first NEPAD objective (prevention and reduction of intra- interstate conflicts), Kenya was found to be an “Island and haven of peace for the region.”⁹⁹ This made it clear that some progress was made and is being made in AU member states in the area of democracy with regard to the promotion of and respect for the principles of the separation of powers, independence of the judiciary and good governance. However, there still remains a long and hard road ahead when one considers the major deficiencies that were identified in APRM Country self-assessment reports and Country review missions. There are many cases of failure characterised *inter alia* by vote rigging; repeated violations of the Constitutions and human rights; non-respect for the separation of powers, independence of the judiciary and autonomy of the legislature; absence of an effective administration and an accountable and efficient public service; lack of a strong civil society and by rampant corruption in the public sphere.

4. Conclusion

Good governance and democracy are interrelated and mutually reinforcing. For Africans, good governance is necessarily democratic governance and constitutes a prerequisite for African renaissance. The separation of powers and independence of the judiciary as requirements for constitutional and democratic rule are also critical for good governance.

The AU Constitutive Act and the NEPAD and APRM instruments aimed at achieving this kind of governance in AU member states. Several provisions of these instruments express African leaders’ commitment to the separation of powers, independence of the judiciary and good governance.

programmes for consideration by the government aimed at realising the objectives of the Constitution. It should design, implement and monitor programmes for educating Ghanaians about their citizenship entitlements and responsibilities. See Ghana’s Report 22, paragraphs 35-36; 23, Box 2.3: Successful democratic institutions in Ghana.

⁹⁵ Ghana’s Report 14, paragraph 9.

⁹⁶ Rwanda Report 38, paragraph 101.

⁹⁷ *Idem* 43, paragraph 117 (Box 2.1) and 55, paragraph 156 (Box 2.3)

⁹⁸ *Idem* 51-52, paragraph 143 (Box 2.2)

⁹⁹ Kenya’s Report 63, Box 3.1

However, the reality on the ground has been changing slowly. The separation of powers, independence of the judiciary and good governance remain dead letters in many AU member states as demonstrated by rampant corruption in the public sphere and the tendency of the executive, especially the president, to violate the Constitution and ignore the separation of powers by subordinating both Parliament and the judiciary.

The removal of the Speaker and all other officers of the National Assembly who were forced to resign in February - March 2009 and their replacement by people considered more loyal to the president bear testimony to the concentration of executive and legislative powers in the hands of the president of the Democratic Republic of Congo (DRC). The judiciary is also hardly independent. In 2008, the President appointed and dismissed some of the highest judicial officers in the country - prosecutors and judges in the Supreme Court of Justice - without consulting the judicial commission (*Haut conseil de la magistrature*) in violation of the Constitution.

In the DRC, as in many other AU member states, the attitude of the judiciary seems to be dictated by the body language of the President. Since the coming into force of the 2006 Constitution, it has always ruled in favour of the President, his government or political leaders associated with them. In March 2009, the members of the Supreme Court of Justice boycotted the opening of the ordinary session of the National Assembly by Honourable Vital Kamerhe just because the President and his political allies within the *Alliance de la majorité présidentielle* (AMP) - Alliance for the Presidential Majority - did no longer want him as the Speaker. However, they were back in the house to applaud the new Speaker appointed by the President also acting as *de facto* head of the national legislature.

The most recent case of non respect for the principles of the separation of powers and independence of the judiciary has come from Niger. In this AU member state, President Mamadou Tanja is clinging to power despite the expiration of his second and last constitutional term of office. He dissolved the National Assembly for its opposition to constitutional change needed to maintain him in power. The Supreme Court of Justice was also disbanded for its ruling that such change whether by presidential decree or referendum would not pass constitutional muster.

Earlier on, the army seized power in Conakry, Guinea, instead of abiding by the Constitution that provided that the Speaker of Parliament should become the interim president and organise new elections in case of death of the incumbent leader.

Arguably, Swaziland is the worst case scenario of non-respect for the separation of powers and independence of the judiciary in Africa. This AU member state remains an absolute monarchy, the one that has so far survived in Africa. All powers in Swaziland are virtually vested in the King.

Lack of separation of powers and independence of the judiciary breeds corruption, which remains rampant in the African public sphere.

However, there are also good news from Africa as far as the separation of powers, independence of the judiciary and good governance. Such news have come from AU member states like Benin, Botswana, Ghana, Lesotho, Mali, Mozambique, and South Africa, which are constitutional democracies and tremendous progress has been made to fight corruption. These are exceptions that fortunately infirm the rule of concentration of powers, authoritarian rule, and bad governance.

Respect for the principles of the separation of powers, independence of the judiciary and good governance also depends on the political leadership. Africa needs political leaders who are committed to constitutionalism and democracy, which are critical for good governance and African renaissance. These include the President, Cabinet members, members of Parliaments and political leaders in the opposition.

The judiciary should also play a role in securing and preserving its independence. While championing the independence of the judiciary, we should emphasise that it does not mean lack of accountability. Neither in the USA nor in Africa did the people establish a government of the judges. Judges are subject to the Constitution adopted by the sovereign people and are accountable. The independence of the judiciary is not granted once for all. It is deserved and should be owned every day. Corruption, which is rampant in the judiciary and the Congolese President complained of in his speech on the commemoration of the 49th anniversary of the independence, is unlikely to serve the independence of the judiciary. Some prominent members of the judiciary have become themselves responsible for non-respect of the independence of their institution by perfecting the “art of corruption”, by selling “justice” to the haves, by consistently ruling in favour of the executive or the government of the day, and by alienating the masses of African people who can not afford to buy justice and are left out.

Responsibility for the promotion of the separation of powers, independence of the judiciary and good governance in Africa also lies in the members of the civil society and in the academics that should provide the intellectual leadership so much needed to achieve African renaissance. It is sad that some prominent members of the African intellectual community, including academics and constitutional lawyers, have become accomplices of authoritarian and corrupt leaders or their agents in the enterprise of bad governance.

As they gather in Abuja, Nigeria, during the meeting of their association, African constitutional lawyers should deplore that in line of the “politics of the belly” once deplored by French political scientist Jean-François Bayart,¹⁰⁰ some of their colleagues have become the minds and hands by which Constitutions are violated, authoritarian and corrupt rule established or consolidated in a number of AU member states. The Abuja meeting will only be a successful one if its theme could help us recommit to good governance, both in theories and deeds, and if it could sound as our collective wake-up call not only to African political leaders, judges and citizens, but also and even primarily to those of us who have betrayed the ideals of constitutionalism, democracy and justice and should them make amend to promote good governance in Africa.

Bibliography

- Andrews, W G, *Constitutions and Constitutionalism*, Princeton: New Jersey, 1968
- Bayart, J F , *The State in Africa: The Politics of the Belly*, New York: Longman, 1993.
- Boeninger, E., “Governance and Development: Issues of Governance,” *Proceedings of the World Bank Annual Conference on Development Economics*, Washington, DC: World Bank, 1992
- Carpenter, G., “Public Law: Constitutional Law”, in Hosten, W J *et al* (eds), *Introduction to South African Law and Legal Theory*, Durban: Butterworths, 1997
- Cooper, S W, “Considering ‘power’ in separation of powers” *Standard Law Review*, 1994
- Chandler, R C, Enselen, R A & Renstrom, P G *The Constitutional Law Dictionary*, Vol 1, ABC-CLIO, Oxford, England, 1985
- Feliciano F P “The application of law: some recurring aspects of the process of judicial review and decision-making” *The American Journal of Jurisprudence*, 1992
- Heyns, C & Kilander, M, (eds) *Compendium of key human rights documents*, 2e edition, Pretoria: Pretoria University Press, 2006
- Hyden, G., “Governance and the Reconstruction of Political Order,” in Joseph, R., (ed), *State, Conflict, and Democracy in Africa*, Boulder & London: Lynne Rienner Publishers, 1999
- Ihonvber, J O, *Towards a new constitutionalism in Africa*, London: CDD Occasional Papers, 2000
- Iverson, D., “Pluralism and the Hobbesian logic of negative constitutionalism” *Political Studies*, Vol XLVII, 1999
- Lafrance G “Montesquieu and Rousseau on Constitutional Theory”, in Rosenbaum, A S (ed) *Constitutionalism: The Philosophical Dimension*, Greenwood Press, New York, 1988
- Levi, E H “Some aspects of separation of powers” *Columbia Law Review*, 1976, Vol 76
- Mangu A M B *Separation of Powers and Federalism in Post-colonial Africa: The South African Case*, unpublished LLM Dissertation, Pretoria, University of South Africa, 1998

¹⁰⁰ Bayart, J F , *The State in Africa: The Politics of the Belly*, New York: Longman, 1993.

- Mangu, A M B, "The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court", *Netherlands Quarterly of Human Rights*, No 23(3), 2005
- McIlwain, C H, *Constitutionalism: Ancient and Modern*, Ithaca, New York: Cornell Review Press (Revisited edition), 1947
- Mojekwu, C C, "Nigerian Constitutionalism", in Pennock, J R & Chapman, J W (eds) *Constitutionalism*, New York: New York University Press, 1979
- Olivier, P.J.J., "Constitutionalism in the New South Africa", in Licht, R A & De Villiers, B (eds) *South Africa's Crisis of Constitutional Democracy. Can the U S Constitution Help?* Johannesburg & Washington: Juta & The AEI Press, 1994
- Rabkin, J., "The Success of the separation of powers and its contemporary failings" *Birmingham Young University Law Review*, 1987
- Rosenfeld, M., "Modern constitutionalism as interplay between identity and diversity", in Rosenfeld, M, (ed) *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Durham & London: Duke University Press, 1994
- Shivji, I G, "State and Constitutionalism: A New Democratic Perspective", in Shivji, I G (ed) *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES, 1991
- Van der Vyver , J D "Political power constraints and the American Constitution" *SALJ*, 1987
- Van der Vyver J D "The separation of powers" *SAPR/PL*, 1993
- Vile, M J C, *Constitutionalism and the separation of powers*, Oxford: Clarendon Press, 1967.
- Zoethout, C M & Boon, P J "Defining constitutionalism and democracy: An introduction", in Zoethout, C M *et al* (eds) *Constitutionalism in Africa. A Quest for autochthonous principles*, Gouda Quint-Deventer, 1996.