The paradigm of constitutional democracy: Genesis, implications and limitations

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Introduction

Today's constitutional democracies are products of the historical Enlightenment whose centre of gravity was 18th-century France, but which transected geography and time, in particular England, Scotland, and North America, where it reached its fullest contemporary realisation. The roots of these democracies lie in the scientific, political, and philosophical ideas of the 17th century.

Reference to *Enlightenment values* is an even larger matter, because this term not only denotes the ideas and ideals of the historical Enlightenment, but also those that underpin the paradigm of *constitutional democracy*, are derived from them, and are very much alive in defining a rational, liberal, scientifically-minded, rights-based, limited and accountable government and democratic outlook.[1]

Because the historical circumstances are, of course, as different between the 17th and 18th centuries as those centuries are from the 21st (one major motor of that change having been the Enlightenment itself), *Enlightenment values* in today's sense have to be understood as the evolved descendants of – and not as identical to – the values of the historical Enlightenment. Nonetheless, the core values of the historical Enlightenment have endured and continue to ground today's notions of *constitutional democracy*, namely reason, tolerance, autonomy, limited government, conceptions of the rights of humankind, the application of scientific method to social and political thinking, and the democratic notion of *popular power*.

Democracy: Contested and complex

Democracy is an old word, but its meanings have always been contested and complex. It came into the English language in the 16th century, from the French *démocratie* and the Latin *democratia*, in turn being a translation of the Greek *demokratia*, from *demos* meaning "people" and *kratos* meaning "rule".[2]

It is at once evident from the Greek *demokratia* that much depends on the meaning given to *people* and *rule*. In the Latin, *popularis potentia*, the idea of 'community', comes to the fore. Both the Greek and the Latin notions of *democracy* imply the notion of the primacy of popular power, the popular will, the consent of the governed and of law. Both

1 Grayling (2008:ix–x).

2 Williams (1976:82).

Thucydides and Aristotle, the latter more famously in his *Politics,* IV, saw *democracy* as "a state where the freemen and the poor, being in the majority, are invested with the power of the state".[1] Yet much depends here on what is meant by *invested with the power*: whether it is ultimate sovereignty or, at the other extreme, practical and unshared power. Plato made Socrates say that –[2]

> … democracy comes into being after the poor have conquered their opponents, slaughtering some and banishing some, while to the remainder they give an equal share of freedom and power.

Democracy is now often traced back to medieval precedents and given a Greek authority. But the fact is that, with only occasional exceptions, until the 19th century, democracy was a strongly pejorative term; and it is only since the late 19th and early 20th centuries that a growing number of political parties and tendencies have united in declaring their belief in it. This is the most striking historical fact – and one of the most significant events in recent political history.

Aquinas defined *democracy* as "popular power", where the ordinary people, by force of numbers, governed (i.e. oppressed) the rich.[3] This strong class sense remained the predominant meaning until the late 18th and early 19th centuries, and was still present in the mid-19th century argument. To this definition of the *people* as the "multitude" was added a sense of the consequent type of rule: a *democracy* was a state in which all had the right to rule and did actually rule; it was even contrasted[4] with a state in which there was rule by representatives, including elected representatives. It was in this sense that the first political constitution to use the term *democracy* – that of Rhode Island in 1641 – understood it:[5]

> Popular government; that is to say it is in the power of the body of freemen orderly assembled, or a major part of them, to make or constitute just Laws, by which they will be regulated, and to depute from among themselves such ministers as shall see them faithfully execute between man and man.

The last clause in the above sentence needs to be emphasised, since a new meaning of *democracy* was eventually arrived at by an alteration of the concept here embodied. In the case of Rhode Island, the people or the major part of them made laws in orderly assembly; the ministers 'faithfully executed' them.

This is not the same as the *representative democracy* defined by Hamilton in 1777.[6] He was referring to the earlier sense of *democracy* when he observed that –

1 Aristotle (1948:4).
2 Ferguson (1970:25).
3 Aquinas (1965:54).
4 For example, by Spinoza; quoted in Wolfson (1983:108).
5 *Constitution of Rhode Island*, 1641.
6 Hamilton (1788/1987:303).

> … when the deliberative or judicial powers are vested wholly or partly in the collective body of the people, you must expect error, confusion and instability. But a representative democracy, where the right of election is well secured and regulated, and the exercise of the legislative, executive and judicial authorities are vested in select persons, may justly be pronounced the very definition of tyranny.

It is from this modified North American use that a dominant modern sense developed. Jeremy Bentham (1748–1832), for example, formulated a general sense of *democracy* as "rule by the majority of the people", and then distinguished between *direct democracy* and *representative democracy*, recommending the latter because it provided continuity and could be extended to large societies. These practical arguments are, of course, serious and in many circumstances decisive.

The second principal change has to do with interpretation of *the people*. There is a significant history in the various attempts to limit 'the people' to certain qualified groups: freemen, owners of property, the wise, white men, men, and so on. Where *democracy* is defined by a process of election, such limited constitutions can be claimed to be 'democratic': the mode of choosing representatives is taken as more important than the proportion of 'the people' who have no part in this process. The development of democracy is traced through institutions using this mode rather than through the relations between all the people and a form of government. This interpretation is orthodox in most accounts of the development of English democracy. Indeed *democracy* is said to have been 'extended' stage by stage, where what is meant is clearly the right to vote for representatives rather than the old (and, until the early 19th century, normal English) sense of "popular power". The distinction became critical in the period of the French Revolution of 1789. Burke was expressing an orthodox view when he wrote that "a perfect democracy" was "the most shameless thing in the world".[7]

For Burke and many other thinkers of his time, *democracy* was taken to be an 'uncontrolled' popular power under which, among other things, minorities (including especially the minority which held substantial property) would be suppressed or oppressed. *Democracy* was still a revolutionary or at least a radical term in the mid-19th century, and the development of the idea of *representative democracy* was at least in part a reaction to this, but above all the practical reason for extent and continuity.

It is from this point in the argument that two contemporary meanings of *democracy* can be seen to diverge. In what is left of the socialist tradition, *democracy* continues to mean "popular power"*:* a state in which the interests of the majority of the people are paramount and in which those interests are practically exercised and controlled by the majority. In the liberal tradition, *democracy* means the open election of representatives and certain conditions such as democratic rights, including freedom of speech, conscience and assembly; the separation of powers; the rule of law; and the supremacy of the constitution – all of which maintain space for non-violent political argument.

7 Burke ([1790] 1968).

In the 20th century the virtues of *democracy* have been widely proclaimed by politicians of different ideological bent – liberals, conservatives, socialists, communists, anarchists and even fascists. No wonder that, in the words of British philosopher Bernard Crick, "democracy is perhaps the most promiscuous word in the world of public affairs".[8] As the attractions of other ideologies have faded, and the merits of global capitalism have been called into question, *democracy* has emerged as one of the most enduring principles in the postmodern political landscape.[9]

The lineage of *democracy* goes back to the classical, if imperfect, model of democracy, based on the *polis*, or city state, of ancient Greece, and particularly to the system of rule that developed in the largest and most powerful its city-states, Athens. The form of direct democracy that operated in Athens during the 4th and 5th centuries Before Contemporary Events (BCE) had considerable impact on later philosophers and thinkers such as Jean-Jacques Rousseau (1712–1778) and Karl Marx (1818–1883).

What made the Athenian democracy so remarkable was the level of political activity of some of its citizens. Not only did they participate in regular meetings of the Assembly, but they did so in large numbers, prepared to shoulder the responsibility of public office and decision-making. However, participation was restricted to Athenian-born males over 20 years of age. Slaves (the majority of the population), women and foreigners had no political rights whatsoever. In this light, the Athenian *polis* could be seen as the very antithesis of the democratic ideal.

When democratic ideals were revived in the 17th and 18th centuries, they appeared in a form very different from the classical direct 'democracy' of ancient Greece. In particular, *democracy* was seen less as a mechanism though which citizens could participate in political life, and more as a device through which citizens could protect themselves from arbitrary government power, hence *protective democracy*. This view appealed particularly to early liberal thinkers whose concern was, above all, to create the widest realm of individual liberty. The desire to protect the individual from arbitrary government power was arguably the earliest of all democratic sentiments. As Aristotle responded to Plato, "Q*uis custodiet custodies*?" ("Who will guard the guardians?").

The same concern with unchecked power was taken up in the 17th century by the English philosopher John Locke (1632–1704), who argued that the right to vote was based on the existence of natural rights and, in particular, on the right to property. If government, through taxation, possessed the power to expatriate property, citizens were entitled to protect themselves by controlling the composition of the tax-setting body: the legislature. In other words, *democracy* came to mean a system of 'government by consent', operating through a representative assembly.[10]

8 Crick (1993:12).

9 Heywood (1997:66).

10 Locke himself was not a democrat by modern standards, as he believed that only property owners should vote – on the basis that only they had natural rights that could be infringed by government.

The more radical notion of *universal suffrage* was advanced from the late 18th century onward by utilitarian theorists such as Jeremy Bentham and James Mill (1773–1836). The utilitarian case for democracy is based on the need to protect or advance individual interests.

However, to justify democracy on protective grounds is to provide only a qualified endorsement of democratic governance. In short, *protective democracy* is but a limited and indirect form of democracy. In practice, the consent of the governed is exercised through voting in regular and competitive elections. Thereby the accountability of those who govern is assured. *Political equality*, therefore, in technical terms, is understood to mean "equal voting rights". If the right to vote was a means of defending individual liberty, it was imperative that liberty should also be safeguarded via the creation of a separate executive, legislature and judiciary, and by the maintenance of basic human rights and freedoms, such as freedom of expression, freedom of assembly and movement, and freedom from arbitrary arrest.

The argument for *developmental democracy* was first made in the liberal writings of John Stuart Mill (1806–1873). For Mill, the central virtue of democracy was that it promoted the "highest and harmonious" development of individual capacities. As a result, Mill proposed the broadening of popular participation, arguing that the franchise should be extended to all but those who are illiterate. In the process, he suggested – radically, for his time – that suffrage should also be extended to women. In addition, he advocated strong and independent local authorities in the belief that this would broaden the opportunities available for holding public office.[11]

The confluence of democracy and constitutionalism

By and large, modern constitutionalism is a product of the 18th century, more particularly of the American Constitution. In his celebrated tract, *The rights of man*, published in 1795, Thomas Paine famously wrote: "Government without a Constitution is Power without Right".[12] More recently, with successive waves of democratisation, constitutional questions have moved to the centre of many political debates.

Traditionally, constitutions were seen as important for two principal reasons. Firstly, they were believed to provide a description of government itself, a framing of key public institutions and their roles. Secondly, they were regarded, perhaps wrongly, as the keystone of liberal democracy, even its defining feature. Sadly, neither view is

11 Following Plato, Mill did not believe that all political opinions were of equal value. Consequently, he proposed a system of plural voting: unskilled workers would have a single vote, skilled workers two votes, and graduates and members of the learned professions five to six votes. However, his principal reservation about democracy was derived from the more typical liberal fear of what Alexis de Tocqueville (1805–1859) famously described as "the tyranny of the majority".

12 Paine (1795).

correct. While constitutions may aim to lay down a framework in which government and political activity is conducted, few have been entirely successful in this respect. Similarly, although the idea of *constitutionalism* is closely linked to liberal values and precepts, there is nothing to prevent a constitution being undemocratic or authoritarian.

Despite the above observations, constitutions are important for they lay down certain meta-rules for the operations of the political system. Ultimately, they embody rules that govern the government itself. Just as government establishes ordered rule in society at large, one of the key purposes of a constitution is to bring stability, predictability and order to the actions of government.

The idea of a code of rules providing guidance for the conduct of government has an ancient lineage. These codes originally drew on the idea of a higher moral power, often religious in character, to which worldly affairs were supposed to conform.[13]

Constitutions are a relatively recent development. Although the evolution of the British Constitution is sometimes traced back to the Bill or Rights of 1689 and the Act of Settlement of 1701, or even to the Magna Carta (1215), it is more helpful to think of constitutions as a late 18th-century phenomenon. The 'age of constitutions' was initiated by the enactment of the first 'written' constitutions: the Constitution (Declaration of Independence) of the United States of America in 1787, and the French Declaration of the Rights of Man and the Citizen in 1789.

The enactment of a constitution marks a major breach in political continuity, usually resulting from an upheaval such as a war, an extended liberation struggle, a revolution, or national independence. In this sense, constitutions are primarily a means of establishing a new political order following the rejection, collapse or failure of an old order.

Constitutions can be classified in many different ways. These include the following:

- The form of the constitution and status of its rules (whether the constitution is written or unwritten, or codified or uncodified)
- The ease with which the constitution can be amended (whether it is rigid or flexible)
- The degree to which the constitution is observed in practice (whether it is an effective, nominal or a façade constitution), and

13 Egyptian pharaohs acknowledged the authority of Maát or "justice". Chinese emperors were subject to Tién or "heaven", while Jewish kings conformed to the Mosaic Law, and Islamic caliphs paid respect to Shari'a law. Not uncommonly, 'higher principles' were also enacted in ordinary law, as seen, for example, in the distinction in the Athenian constitution between the *nomos* (decrees that could only be changed by a special procedure) and the *psephismata* (decrees that could be passed by a resolution of the Assembly). However, such ancient codes did not amount to constitutions in the modern sense, in that they generally failed to specify provisions relating to the authority and responsibilities of the various institutions, and rarely established authoritative mechanisms through which provisions could be enforced and breaches of the fundamental law punished.

- The content of the constitution and the institutional architecture that it establishes (whether it is, for example, monarchical or republican, federal or unitary, or presidential or parliamentary).

Traditionally, considerable emphasis has been placed on the distinction between *written* and *unwritten* constitutions. This was wrongly thought to draw a distinction between constitutions that are enshrined in law and ones that are embodied in custom and tradition.[14]

Every constitution, then, is a blend of written and unwritten rules, although the balance between these varies significantly. In states such as the Federal Republic of Germany and France, in which constitutions act as state codes, specifying in considerable detail the powers and responsibilities of political institutions, the emphasis is clearly on codified rules. The US constitution is, however, a document of only 7,000 words which confines itself, in the main, to broad principles. Other constitutions, while not entirely unwritten, place considerable emphasis on conventions. For example, the ability of United Kingdom (UK) ministers to exercise the powers of the Royal Prerogative (technically, the monarch's powers) and their responsibility, individually and collectively, to Parliament is based entirely on convention.

The global trend, however, is to favour the adoption of written and formal rules. Not only has the number of unwritten constitutions diminished, but also, within them, there has been a growing reliance on legal rules.

More helpful than the written/unwritten distinction is the contrast between *codified* and *uncodified* constitutions. A *codified* constitution, like that of the Republic of Namibia, is one in which key constitutional provisions are collected together within a single legal document, popularly known as a *written constitution* or *the constitution*. The significance of codification includes, among other advantages, the following:

- Firstly, in a codified constitution, the document itself is authoritative in the sense that it constitutes 'higher' or 'basic' law, indeed, the highest law of the land. True to the notion of *constitutional democracy*, the constitution binds all political institutions, including those that enact ordinary law. Thus, the existence of a codified constitution enables a hierarchy of laws. In unitary states, such as Namibia, the constitution stands above any statute law made by the national legislature. In federal states such as the Federal Republic of Germany, there is a third tier in the form of 'lower' state or provincial laws.

14 This system of classification has now been largely abandoned. Only three liberal democracies (Israel, New Zealand and the United Kingdom) continue to have unwritten constitutions, together with a few non-democratic states such as Bhutan, Oman and Saudi Arabia. Moreover, the classification has always been misleading: no constitution is entirely written in the sense that all its rules are formal and legally enforceable. Few constitutions, for instance, specify the roles of, or even mention, political parties and interest groups. Similarly, no constitution is entirely unwritten in the sense that none of its provisions have any legal substance, all of them being conventions, customs or traditions.

- Secondly, the legal status and integrity of the codified document is ensured by the fact that at least certain provisions are entrenched. For example, Chapter 3 of the Constitution of the Republic of Namibia deals with fundamental human rights and freedoms.
- Finally, the logic of codification dictates that, as the constitution sets out the duties, powers and functions of government institutions in terms of 'higher' law, it must be *justiciable*, meaning that all political institutions (inclusive of Parliament, the executive, the Ombudsman, Regional and Local Government, the Public Service Commission, the security sector and the National Planning Commission in Namibia, for example) have to be subject to the authority of the courts, and in particular a Supreme or Constitutional Court**.** This provision substantially enhances the importance of judges, particularly of senior judges, who become, in effect, the final arbiters of the constitution, and thereby acquire the power of judicial review.[15]

The few *uncodified* constitutions in the world have a different character. The British Constitution, for instance, draws on a variety of sources. Chief among these are statute law, which is made by Parliament; common law; conventions; and various works of authority that clarify that Constitution's unwritten elements. The absence of a codified constitution implies, most importantly, that the legislature enjoys near-sovereign authority. It has the right to make or unmake any law: no body has the right to override or set aside its laws. By virtue of their legislative supremacy, the UK Parliament and the Knesset in Israel are able to function as the ultimate arbiters of the constitution.

Namibia, in common with most other countries, has a codified constitution. The strengths of a codified constitution include the following:[16]

- Major governance principles and key constitutional principles are entrenched, safeguarding them from interference from the government of the day.
- The power of the legislature is constrained, limiting its sovereignty.
- Non-political judges are able to ensure that constitutional provisions are being upheld by public institutions.
- Individual liberty is generally more securely protected, and
- They have considerable educational value, in that they embody the core values and overall goals of the political system.

Some constitutional scholars, however, also emphasise the drawbacks of codification. These include the following:[17]

15 Chapter 9 of the Namibian Constitution that deals with the Administration of Justice, particularly in Article 79(2), vests the Supreme Court with the authority to interpret, implement and uphold the Constitution and the fundamental human rights and freedoms guaranteed thereunder.

16 In addition to provisions on citizenship (Chapter 2), the Namibian Constitution also provides for entrenched Fundamental Human Rights and Freedoms (Chapter 3), and for Principles of State Policy (Chapter 11).

17 See e.g. Finn (1991).

- Codified constitutions can be more rigid, and may therefore be less responsive to fast-changing social conditions.
- With a codified constitution, constitutional supremacy resides with non-elected judges rather than with publicly accountable politicians.
- Constitutional provisions grounded in custom and convention may be more widely respected because they have been endorsed by history and not 'invented'.
- Constitutions endorse one set of values and principles in preference to others, meaning that, in culturally diverse societies, they may precipitate conflict.

An *effective* constitution is one that fulfils two basic criteria. Firstly, in major respects at least, the practical design and operations of government correspond to the provisions of the constitution. Secondly, this occurs because the constitution has the capacity, through determined means, to limit governmental power.

An effective constitution, therefore, requires not merely the existence of constitutional rules, but also the capacity of those rules to constrain government and establish robust constitutionalism. All constitutions can be violated to a greater or lesser extent; the real issue, thus, is the significance, nature and regularity of such violations. Some constitutions are *nominal* in the sense that they accurately describe government and the principles according to which it should behave, but fail to limit government in any meaningful sense.

Constitutions can also be classified in terms of their content and, specifically, by the institutional structure they underpin. This enables a number of distinctions to be made. For example, constitutions have traditionally been classified as either *monarchical* or *republican*. In theory, the former invest constitutional supremacy in a dynastic ruler, while in the latter political authority is derived from the people. The emergence of constitutional monarchies, has, however, effectively transferred supremacy to representative institutions. A more useful distinction is that between *unitary* and *federal* constitutions. The key defining element here is the concentration of sovereignty in a single national body and its division between two distinct levels of government.

A more recent approach is to distinguish between *parliamentary* and *presidential* constitutions. The key here is the relationship between the executive and the legislature. In *parliamentary* systems, at least in theory, the executive is derived from and accountable to the legislature; in *presidential* systems, the two branches of government function independently on the basis of a separation of powers.

Constitutionalism, in a narrow sense, then, is the practice of limited government ensured by the existence of a constitution. Constitutionalism, in this limited sense, be therefore be said to exist when government institutions and processes are effectively constrained by constitutional provisions. More broadly and usefully, *constitutionalism* is a set of political values and aspirations that are anchored on the desire to protect liberty through the establishment of internal and external checks on government power. In this sense,

constitutionalism is a key aspect of political liberalism:[18] the latter is typically expressed in the form of support for constitutional provisions that achieve this goal, for example, by way of a codified constitution, a Bill of Rights, a separation of powers, the rule of law,[19] and decentralised authority.

Constitutions constitute states; as such, they have a number of important functions. These include –

- empowering states
- establishing unifying values and societal goals
- enhancing government stability
- protecting basic freedoms and rights, and
- legitimising political regimes.

Although the popular argument about constitutions is that they limit government power, a more foundational function is that they mark out the existence of states and make claims concerning their sphere of independent authority. The creation of new states, such as was the case in Namibia two decades ago, is invariably accompanied by the enactment of a constitution. Indeed, it can be argued that such states really only come into being once they have a constitution.

In allocating functions and powers amongst the various institutions of government, constitutions act as institutional charts. As such, they formalise and regulate the relationships between political institutions and provide a key mechanism through which conflicts can be adjudicated and resolved. This is precisely why constitutions go hand in hand with institutional design and organisation. Complex patterns of social and political interaction can only be maintained if all concerned know and respect the 'rules of the game'.

In liberal democracies, such as Namibia, one of the central purposes of a constitution is to constrain government with a view towards protecting individual liberty. This is why constitutions can be regarded as mechanisms for establishing and maintaining *limited government.*[20] In the Namibian case, for example, the Constitution determines the relationship between the state and the individual citizen, marking out the respective

18 *Liberalism* is an ideology based on a commitment to individualism, freedom (liberty), toleration and consent. Contemporary liberalism differs from classical liberalism in important respects that need not concern us here.

19 The doctrine and practice of the rule of law entails the principle that the law should 'rule' in the sense that it establishes a framework to which all conduct and behaviour (both private and public) conform, applying equally to all the members of society, be they private citizens or government officials. Thus, the rule of law is a core liberal-democratic principle, embodying ideas like *constitutionalism* and *limited government*. In continental Europe it has specifically been enshrined in the German concept of the *Rechtsstaat*, a state based on law. In the US, the rule of law is closely linked to the status of that country's constitution as 'higher' law and to the doctrine of 'due process'. In the UK, on the analysis of Dicey ([1885] 1939), it is seen to be rooted in common law and to provide a viable alternative to a codified constitution.

20 The notion of *limited government* implies government operating within constraints, usually imposed by law, a constitution, or various institutional checks and balances.

spheres of government and personal freedom. This is done principally by defining civil rights and freedoms, through the means of a Bill of Fundamental Rights and Freedoms.[21] The impact of liberal constitutionalism, as embodied in the Namibian Constitution, for example, regards fundamental rights and freedom as universal and draws a distinction between *negative* and *positive* rights. *Negative* rights are of liberal bent in that they prevent the state from encroaching upon the individual, and as such they mark out a sphere of government *inactivity*. *Positive* rights include economic, social and cultural rights, such as the right to education and sustainable development. However, positive rights have caused controversy because they are linked to the expansion, not contraction, of government, and because their provision is dependent upon the economic and social resources available to the state in question.

In addition to empowering states and protecting freedom, and laying down a framework for government, constitutions invariably embody a broader set of political values, ideals and goals. This is why constitutions cannot be neutral: they are always entangled, more or less explicitly, with ideological priorities.[22]

The drafters of constitutions therefore seek to invest their political regime with a set of unifying values, a sense of ideological purpose, and a language that can be used in the conduct of politics. In many cases, these aims are embodied in preambles to constitutions which often function as statements of national ideals. In the case of Namibia, these ideals include a commitment to "the inherent dignity and the equal and inalienable rights of all members of the human family" as "indispensable for freedom, justice and peace".[23]

The final function of a constitution is to help build legitimacy. This explains the widespread use of constitutions, even by states with constitutions that are merely nominal or a complete façade. This legitimation process has two key dimensions. Firstly, the existence of a constitution is almost a prerequisite for a state's membership of the international community and for its recognition by other states. More significant, however, is the ability to use a constitution to build legitimacy within a state through the promotion of respect and compliance amongst the population. This is possible because a constitution both symbolises and disseminates the values of the governing elite, and invests the governmental system with a cloak of legality. In some cases, veneration for the constitution is promoted – either as a document of historical importance, a symbol of national purpose and identity, or both – as in the case of Namibia.

Having chronicled the genesis and evolution of *constitutional democracy* as well as some of its principal implications and limitations, the last part of the chapter focuses on how well Namibia has been doing in upholding the precepts of a *constitutional democracy* over the past two decades.

21 Chapter 3 of the Namibian Constitution, entitled "Fundamental Rights and Freedoms", provides for a justiciable Bill of Rights. See also Diescho (1994:56–57).

22 Heywood (1997:280).

23 Republic of Namibia (1990:1).

Namibia as a constitutional democracy – A brief note

From the above brief exposition, it is evident that Namibia mirrors most of the features of a liberal constitutional democracy. These include a codified constitution that frames the nature of the country's public institutions, such as the assembly, the executive, judiciary and security system. The Namibian Constitution is the basic law of the land, and available evidence and research suggest that the judiciary has hitherto been manifestly independent with little proof of executive interference.[24] This, however, does not mean that the judiciary has entirely escaped public attacks on its functioning and some of its rulings, as illustrated by the recent labour hire case.[25]

The Namibian Constitution has acquired the status of a symbol of national purpose, nationhood and identity formation. This was evident at the 20th anniversary of the acceptance of the Constitution during the February 2010 celebration of Constitution Day. While the Constitution is by no means beyond criticism, no single political party in the country has called for its abolition. The drafting and acceptance of the Constitution by consensus remains one of the most significant events of the past two decades.

Research findings in four rounds of the national AfroBarometer Survey also consistently indicate widespread acceptance of the Constitution, with over 60% of Namibians expressing their support for its core provisions such as free political activity, a free press, and freedom of association and assembly.[26] In addition to the findings of these surveys, there is ample evidence in the print media in the form of readers' letters and SMSs[27] in *The Namibian* newspaper, for example, that Namibians generally value the liberal ideals and ideas embodied in the Constitution.

For a constitutional democracy to work effectively, however, other formal and informal requirements need to be met. These include the capacity of the courts to develop and practise a coherent and enlightened jurisprudence, steering a balanced course between justifiable limitations of the enshrined rights and the equality and socio-economic rights of all citizens, promoting a deliberative democracy, and making jurisprudence more accessible, particularly to marginal communities and the poor. There is also the important matter of the functioning of the criminal justice system itself – for justice delayed is justice denied. The last aspect, delaying justice, is a matter of serious concern in Namibia.

The logic of a constitutional democracy implies a judicialisation of politics. This is almost inevitable. Whereas, in the past, politics were fought amongst political parties and, to a lesser extent, in Parliament and in other political arenas, the new terrain has become the courtroom. The Namibian judiciary has, especially in the past five years,

24 See e.g. Horn & Bösl (2008).

25 *Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia & Others*, No. A4/2008.

26 See Research Facilitation Services (2008:9–11).

27 Messages sent by cell phones via the short message service (SMS).

delivered rulings with wide political implications, for example in matters of labour hire, press freedom and defamation.

Grinding poverty makes it difficult for many Namibians to possess the means to address their grievances by way of meaningful participation in the polity. Without meaningful poverty reduction and greater socio-economic equality, constitutional democracy may arguably be more difficult to sustain than over the first two decades of independence.

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