

# AFRICA'S CONSTITUTIONAL RENEWAL? STOCK TAKING IN THE 21<sup>ST</sup> CENTURY [First draft – incomplete]

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## ABSTRACT

Over the past three decades many African countries have engaged in constitutional renewal or redrafting processes. The purposes of this paper are twofold: to survey some of the literature and developments in constitutional renewal in African countries particularly in the 21<sup>st</sup> century and further, to assess the extent to which this renewal has included a participatory process involving civil society in selected African countries. In conclusion, several observations will be made as to the workability of the constitutional renewal or redrafting processes undertaken in African countries.

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## Introduction

Constitutionalism and its many dimensions including constitution amending and writing initiatives are at present prevalent in many African countries and further afield. Besides the practical dimension of constitution amending and writing, the literature on constitutionalism continues to burgeon on Africa in the 21<sup>st</sup> century (Ihonvbere 2000, Hyden and Venter 2001, Olaka-Onyango 2001, Hatchard, Ndulo, Slinn 2004, Akiba 2004, Cottrell and Ghai 2004, Mangu 2005, Olivier 2007, Prempeh 2007, Deng 2008 and Widner 2008) signifying a continuing academic interest on the topic of constitutionalism and the practice of constitution amending and writing. According to Widner (2008:1513) during the past forty years, over two hundred new constitutions have emerged in countries at risk of internal violence.

An academic and practical interest in constitutionalism and constitutional reform continues through the activities of a number of institutions. For example, the National Democratic Institute for International Affairs (2006) ([www.ndi.org/global/gov/programsgov](http://www.ndi.org/global/gov/programsgov) accessed 29 August 2008) lists eleven countries involved in constitutional reform including three African countries, the International Institute for Democracy and Electoral Assistance (IDEA) ([www.idea.int](http://www.idea.int) accessed 29 August 2008) also has a vigorous publishing division of constitutionalism and is establishing a web-based resource centre for

those participating in constitution building referred to as ConstitutionNet ([www.constitutionnet.org](http://www.constitutionnet.org) Accessed 5 March 2009). In the practical field the Government of Benin together with the African Union (AU) Commission and the International Institute for Democracy and Electoral Assistance (International IDEA) hosted an African Conference on Constitution Building on 25 to 27 November 2008 (...). The Open Society Initiative for Southern Africa OSISA) also publishes on constitutional issues as well as United States Institute of Peace (2003) ([www.usip.org](http://www.usip.org) Accessed 29 August 2008). The academic writing on the topic of constitutionalism and the activity and practical processes involved in constitution writing in the African context in the 21<sup>st</sup> century – which is the main focus of this paper - was given impetus by the Namibian and South African constitution writing processes in the latter part of the 20<sup>th</sup> century and later embraced under the heading of an African Renaissance or African Renewal. (See Napier in Solomon and Liebenberg 2000 Footnote.)

In the African context on which this article focusses, several calls have been made for amending and the fundamental re-drafting and re-visions of constitutions. Example a call was made in Botswana to amend its constitution to provide for a directly elected president ([www.mmegi.bw/2008/February/Monday 11/10.php](http://www.mmegi.bw/2008/February/Monday%2011/10.php)) in South Africa also to elect a President directly, in Kenya to accommodate a disputed election result and likewise in Zimbabwe to provide for a national unity government.

Africa is at present in ‘The Fourth Phase – Post 1990’ (Napier in Solomon et al 2000:51) One may conceptualise the evolution of African constitutions in four phases,’ beginning with (1) pre-colonial Africa; (2) colonial Africa; (3) the post-colonial phase up until about 1990; and (4) a post-1990 phase of cautious reassessment and renewal. These phases are not watertight but are convenient for the analysis of Africa’s constitutional evolution. The one phase was a building block for the next – each having in varying degrees influenced the following one.’ (Napier in Solomon et al 2000:48) It is the fourth phase post 2000 which is of concern in this article.

## SOME THEORETICAL AND METHODOLOGICAL ISSUES

Constitution drafting is also encapsulated under the broad headings of ‘strengthening the workings of democracy’, ‘building democratic governance’, ‘constitution building’ and ‘constitutionalism’.

Constitutionalism is defined in several ways but generally refers to a commitment to the limitation of ordinary political power and seeks to balance state power with individual and collective rights. Constitution writing, drafting or redrafting refers to the processes involved in producing a constitution for a

particular country that draws on the particular historical circumstances of a country and which addresses areas of possible conflict and ultimately becomes part of the consciousness of the public of that country. There are many problems and criticisms of the present day constitution writing process and the resulting legitimacy of many constitutions is called into question. The challenge in the minds of those involved in constitution drafting is how to avoid these problems. Much writing has been done on this issue recently as illustrated above.

The focus since the early 1990s when many constitutions were re-written was to 'give greater emphasis on the importance of process-led constitution making. Many new leaders now believe that constitution making must include active participation of the broad spectrum of civil society that has erstwhile been neglected such as professional bodies, student associations, women, workers and peasants. Their priorities and preferences are considered to be important guidelines for defining the major contours of the constitution and the general political order to be followed (Ihonvbere.. Akiba 2004:10).

Participation in constitution drafting has now become the buzz word and even a right and a necessity. The right according to the United States Institute of Peace (USIP)(Special Report 107:2003) is established in international declarations and conventions adopted by most countries. For example the African Charter on Human and Peoples' Rights (1981: Article 13.1) declares a general right to political participation as a fundamental principle. In the African context, popular participation was recognised by the Arusha Conference of February 1990, described as 'Putting the People First', and convened under the United Nations Economic Commission for Africa. The importance of popular participation in building a democratic society and the overcoming of Africa's perpetual economic crisis was underscored at the Arusha Conference (Kpundeh, 1992:34). Successive documents and judicial interpretations have expanded the content of participation according to the USIP (2003:8) to include the right to participate in 'public affairs' although the meaning and actual content of such participation is unclear. The USIP (2003) also refers to a General Comment on Article 25 of the ICCPR (United Nations High Commission for Refugees)(UNHCR)which is authoritative but not binding, which declares that, '*Citizens also participate directly in the conduct of public affairs when they choose or change their constitution.*' Article 10 2. of the African Charter on Democracy, elections and governance (2007) states that 'State Parties the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.'

Therefore in international law and various declarations, and their interpretation, there is an abundance of support for 'public participation' although its actual operationalisation is not always spelled out.

The advocacy of public participation in general terms is supported in a burgeoning body of literature on the topic both recent and older material. A new emphasis in the literature is coming to the fore on how government can be made to work better and how development initiatives can be better pursued. Some of the many ideas advanced include privatisation, contracting out, decentralisation of decision making, and the emphasis on monitoring and evaluation. Another argument advanced is that it has become necessary to work through networks, give greater recognition to diversity and division in contemporary society, promote deeper responsiveness to service constituencies and engage in the reshaping of accountability relationships. The idea of participation has therefore come to the fore with civil society becoming the organising vehicle for participatory governance (Lovan, Murray & Shaffer, 2004:1-2).

Cornwall (2002:1) argues that around the world there has been a growing interest in ways to enhance public involvement in governance and with it the quality and legitimacy of decision making. A new architecture of democratic practice is emerging, creating new political and policy spaces for citizen involvement in decision making that complement conventional models of political participation. Knight, Chigudu and Tandon (2002:162) argue that a new consensus with regard to development needs which include the need for a strong state and a strong civil society, a “deepened” democracy and a democratic culture, and an enlarged role for citizens has emerged. This argument I believe, can be extended to the constitution drafting process.

This approach to public participation in constitution drafting is evident in Africa – which is the focus of this paper – although tentatively – and as evidenced by the processes involved in the drafting of the South African constitution in the early 1990s.

The conceptualisation of participatory governance or popular participation or public participation is fraught with methodological difficulties as discussed below. The goals for public participation are not always clearly set out. It is generally accepted that the principle of public participation is the cornerstone for democracy and good governance. Questions arise as to at what level citizens participate, how do they participate, the extent to which they can participate in evaluating complex issues, and what the goals are for participation. Participation for the purposes of this article will be viewed at various levels – participation in a narrow sense by a few in a legislature for example for or against a constitutional amendment or participation in a broader sense for or against an amendment or a comprehensive redrafting of a constitution.

Arnstein (1969:217) writes of eight rungs or levels or gradations of citizen participation. They are as follows beginning at the lowest:

manipulation  
therapy  
informing  
consultation  
placation  
partnership  
delegated power  
citizen control

These eight rungs could possibly be placed on a continuum, the lowest level being a simple ritual to the highest being the holding of real power to obtain an outcome or to influence or change a decision to be made. To expand on each level of citizen participation, Arnstein (1969:217) argues that ‘manipulation’ and ‘therapy’ describe levels of non-participation and are contrived by some as a substitute for genuine participation. ‘Informing’ and ‘consultation’ progress to levels of tokenism which allow the have-nots or those excluded from decision making to have a voice. Those citizens participating at this level, lack the power to have their voices heeded by the powerful, and no assurance of changing the status quo.

‘Placation’ is a higher level of tokenism which allows the have-nots to advise, but the power holders retain the continued right to decide. ‘Partnership’ enables citizens to engage in trade-offs with traditional power holders, whereas with ‘delegated power’ and ‘citizen control’, have-not citizens obtain the majority of seats in a decision-making body or have full managerial control.

This typology does have its limitations as one requires a further operational definition to state precisely when public participation occurs, and to what extent a participant influences or does not influence a decision made when applied to constitution drafting. The goals of public participation are not always clearly spelt out although in constitution drafting the main goal seems to be to legitimise the emerging constitution and to place the resulting constitution in the consciousness of a public.

The question arises as to where public participation takes place. Constitution drafting can take place at various levels from drafting a document as a fresh start to building on a previous document with fundamental changes to simply amending certain provisions to the amendment of certain wording of an existing document. Each stage permits greater or lesser public participation. The forums created for such purposes would determine this. The holding of a constitutional convention would perhaps permit the greatest degree of public participation,

whereas minor amendments to an existing document would probably only permit the involvement of legislators. The extent of constitutional re-drafting would determine the extent of public participation.

## CONSTITUTIONS IN THE 21<sup>ST</sup> CENTURY

The second purpose of this article is to look at selected examples of constitution writing initiatives in the 21<sup>st</sup> century, and further to argue that constitutional reform or renewal continues but continues to be a top-down or a placation process which is far from complete. The idea is to suggest how constitutions were written in the past and how they should or should not be written in the future. The main issue that is of concern, is the process through which African countries which have engaged recently in a constitution drafting process and have attained their constitutions rather than an analysis of the content of those constitutions.

One should also distinguish between two further stages in the constitution re-drafting process - early suggestions for constitution amending, and a process involving the actual re-drafting itself – whether it be a partial re-drafting of certain clauses of an existing constitution or the re-drafting *ab initio*. The public are involved at various stages and to varying degrees.

Much of post colonial constitutional reform or revision has been about technical changes or limited amendments to inherited constitutions providing space for example, opposition parties to function freely and term limits on presidential candidates. These reforms involved technical experts, legislatures and protagonists in conflict situations. They are generally elite driven to address exigencies of the day and involve little if any general public participation in the process. As Prempeh (2008:501) states it, “Elite agitation for political change in Africa has been driven by a desire not so much to reform or transform government as to be part *of* government. Access to the “political kingdom”, but not reform of the kingdom itself has dominated transition politics in contemporary Africa.’

At this point it should be mentioned that constitutional renewal in the 1990s was pursued under the umbrella of the ‘African renaissance’ – it was seen as a component part of an African renaissance. In the 21<sup>st</sup> century the rhetoric of a ‘renaissance has fallen away and been superceded by other catch phrases like ‘African renewal’ embodied in the framework of NEPAD. The idea and activity around constitutional renewal is still very evident in several African countries.

An array of methods may be utilised to amend or redraft constitutions including the holding of constitutional conferences or national conventions, processes initiated by the executive or legislature, proposals by constitutional commissions or initiatives from civil society. Widner (2008:1527-1528) identifies thirteen methods involving various processes in drafting constitutions. They are as follows: specially elected constituent assembly; national conference; round table among warring parties or major parties; legislature sitting in special session as a constituent assembly; normal legislature, no special procedures; commission appointed by the legislature; executive branch officials; parties to peace negotiations similar to a round table but mediated; commission appointed by the executive; appointed transitional legislature; decolonization conference; central committee of ruling party or party congress.

Widner (2008:1528-1529) also refers to a number of methods of appointing delegates to a deliberative or drafting body which can also affect the outcome of a constitution drafting process. Expand .....

A number of cases of constitutional reform will be referred to in the African context, some of limited extent, and others more extensive involving greater numbers of the public.

## ANGOLA

Angola has recently established a Constitutional Commission and held its first plenary session in February 2009 to consider matters concerning the composition of a technical commission, the appointment of administrative personnel and the nomination of a spokesman (EISA Regional Roundup 20 February 2009).

## BOTSWANA

A call has been made in Botswana to amend Sections 32 and 35 of the Constitution of that country to directly elect the president and abolish the automatic succession by the vice president on the death or resignation of the holder of that office. The proposal has not been implemented despite a claim that over half of the population support the amending of the constitution to achieve this result ([www.mmegi.bw/2008/February/Monday11/10.php](http://www.mmegi.bw/2008/February/Monday11/10.php)).

## CAMEROON

In early 2008, a group of students and workers in Cameroon formed a movement to oppose President Paul Biya's plan to amend the Cameroonian constitution to extend his term of office. Protest rallies were banned by the

government to limit popular opposition to this proposal ([www.mg.co.za/article](http://www.mg.co.za/article). 18 February 2008).

## NIGERIA

Recently suggestions have been made in Nigeria that constitutional revision was necessary to address issues such as the creation of local government, and the role of federal and state governments in issues such as education. The retort has been from the former President of the Senate, Chief Pius Anyim Pius that the 1999 Nigerian constitution is not the problem in addressing these issues but the poor performance of elected public office holders should take responsibility for the failure to address issues referred to above (EISA Regional Roundup. 10 February 2009).

## THE AFRICAN UNION CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

One continent wide initiative is the adoption of the African Union Charter on Democracy, Elections and Governance adopted in 2007, and International IDEA and the African Union Commission, formalized a relationship in a Memorandum of Understanding on 30 June 2007 in which a five-year Joint Action Plan was drafted which included support for constitution-building processes ([www.idea.int/africa/idea\\_au\\_partnership.cfm](http://www.idea.int/africa/idea_au_partnership.cfm)).

## THE BENIN CONFERENCE – SOME KEY OBSERVATIONS

On 25 to 27 November 2008, the Government of Benin, the AU Commission and International IDEA organized an international conference held in Cotonou Benin on constitution building in Africa attended by one hundred and fifty delegates from over sixty countries. The delegates were mostly from African countries but included a number from the international community. This was the first stage in a five year activity plan agreed upon by the AU and IDEA ‘to strengthen the working of democracy in Africa... and sets an agenda for moving the continent on a new path to constitutional development based on shared values and principles’ ([www.idea.int/africa/constitutinal\\_democracy.cfm](http://www.idea.int/africa/constitutinal_democracy.cfm)). In commenting on the Benin conference proceedings, the Secretary-General of International IDEA Mr Vidar Helgesen, maintained that the conference was ‘more evidence of the increasingly important role constitutions are playing as crucial building blocks for democracy throughout the world’. The Secretary-General continued that, ‘The underlying principle of International IDEA’s work in supporting democratization is national or local ownership. In this light, participation in constitution building is imperative as it is the means by which

traditionally marginalized groups can access political and social life.’ The Secretary-General elaborates on what is understood by political participation. He sees it as being about tolerance and ‘equality of voice between diverse groups and citizens. It is about structured dialogue through frequent exchanges between citizens and elected leaders. It is about how leaders and officials make decisions that reflect obligations of accountability and transparency. It is also about gender equality and respecting differences.’  
([www.idea.int/africa/idea\\_au\\_partnership.cfm](http://www.idea.int/africa/idea_au_partnership.cfm))

The conference made several recommendations concerning constitution building in Africa. They included amongst others, the need for African Union members states to encourage and establish ongoing activities on their constitutions, to encourage open debate for the internalization of their constitutions, to ensure that constitutions ensure a better distribution of power, and constitutions should be popularized and disseminated so that populations should understand them, and greater participation should be ensured so that all players should be involved in processes to strengthen constitutional processes (IDEA Joint Press Release 27 November 2008).

The challenge then if ‘participation’ is accepted as a key, is how to give it substance in the implementation process.

Constitution drafting processes in Africa vary considerably from country to country. Three case studies are randomly selected below in an attempt to establish degrees of participation in constitution drafting.

## SWAZILAND

Swaziland is perhaps the pre-eminent example of a country which has undergone a top-down constitutional reform process and still in 2008 has not drafted a constitution broadly acceptable and seen as legitimate in the eyes of the people of that country. The country is probably the last African redoubt when it comes to fundamental constitutional reform.

A brief review of the evolution of the constitution in that country will be made. The Swaziland Constitution Order of 1967 formed the basis for the independence constitution for that country. This was essentially an ‘export’ constitution. This constitution was followed by the Swaziland Constitution of 1968 providing for independence and was essentially a product of a bargaining process between a Swazi delegation and the British government.

In September 1973, King Sobuza II appointed a Royal Constitutional Commission (RCC) to draft a new constitution for the country. The RCC was

tasked with taking evidence from the population in general and in neighbouring countries as to what the content of a new constitution should be. The final constitution accepted by King Sobuza II and enacted by Proclamation entrenched monarchical and traditionalist political power with a parliament being elected through traditional structures. Towards the late 1990s opposition began to grow amongst various youth and cultural organizations to the role of the monarch in the constitutional order and the need for constitutional reform. A committee known as Vusela I was instituted in 1991 to conduct a series of political forums throughout the country to elicit opinion on political reform. Vusela I was again rejected by various youth and cultural organizations and Vusela 2 was appointed to review the recommendations of Vusela I. The recommendations of Vusela II were dismissed by pro-democracy organizations because it was believed that traditional structures were still being entrenched.

In 1996 a new constitutional review commission was appointed and produced a new constitution draft which was adopted in 2005. The new constitution was again criticized by pro democracy groups as giving the Monarch absolute power and political parties were still not accommodated in the new political order (Matlou H M. 2007).

The Swaziland experience in constitution drafting is still illustrative of an incomplete process involving a very strong top-down element which could be equated with 'placation' and following the model of a 'commission appointed by the executive'. I believe one can expect further constitution re-drafting in this country in the future. The process is far from complete.

## ZIMBABWE

Zimbabwe at present is undergoing a constitution redrafting process in attempting to address the dire economic crisis in that country following violent conflict and the disputed electoral outcomes of the March 2008 parliamentary and presidential elections. The redrafting process is essentially being undertaken by political elites involving a 'round table among warring parties with external mediators'. Again 'placation' of the participating parties is evident.

A brief overview of the Zimbabwean constitution drafting process needs to be made. The process has evolved from the time of colonial rule from a restricted process pursued by elites, to a general public participatory process at the turn of the 20<sup>th</sup> century to a narrow process again pursued by elites.

Under colonial or minority rule, successive constitution drafting exercises were undertaken by commissions generally appointed by the executive. A 'round table process among warring parties' which was termed the Lancaster House

process was negotiated and resulted in the implementation of the 1979 agreement in 1980. This was a process engaged in amongst elites primarily to bring the guerilla war to an end and legalise the independence of Zimbabwe.

The Lancaster House process was preceded in 1997 (See Napier in Solomon and Liebenberg, 2000:53-54) by the formation of a civil society group called the National Constitutional Assembly (NCA). It was launched with the aim of highlighting the weaknesses of the 1979 Lancaster House constitution. In response, President Robert Mugabe, late in 1998 appointed a committee to look into the drafting of a new constitution for the country and produced a draft document which was submitted to the electorate in a referendum in March 2000 for approval or rejection. The constitution was rejected by a margin of 54 to 46 percent of the vote. Preceding the referendum, the Centre for Democracy and Development (CDD) reported a model process which included public hearings, an outreach program of town hall meetings and other community activities, a multilingual campaign, scientific polling and the holding of an international conference. According to the CDD, the Presidential Commission was controlled by the President's ZANU(PF) party and bitter disputes followed as to its acceptability (USIP, 2003:9).

Since the rejection of the draft constitution, fundamental constitution reform involving civil society has largely been downplayed and the focus has been on land distribution policies and the general economic decline in the country.

As stated above, the constitution re-drafting process as reverted to an elite driven process revolving around the powers that a president and executive should exercise to achieve a political settlement between the MDC and ZANU(PF). The negotiating process revolved around the splitting of the roles of head of state and head of government. The question outstanding is how will any negotiated changes to the power and authority structures in that country be incorporated, legalized and legitimated in the constitution of that country? Will they simply be legislated by fiat with the promise of a future inclusive public participation process involving civil society? The answer is not clear.

## KENYA

Kenya like Zimbabwe embarked upon an elite constitutional redrafting constitutional process following a disputed election result. Like Zimbabwe, a constitutional review process was initiated by former President Daniel arap Moi. In 1997 he appointed a constitutional commission in response to the formation of a National Convention Executive Committee (NCEC) comprising member of opposition and human rights groupings. Following the implementation of the independence constitution in 1963, the constitution was

amended on several occasions providing for a massive centralization of power resulting in oppressive government.

The Moi constitutional commission was criticized from the start as not including a wide range of civil society organizations. A parallel commission was constituted by members of civic groups but eventually these two groupings were brought together and functioned under the Constitution of Kenya Review Act (1997). The process in reviewing this constitution was to be 'people driven' and to be inclusive of the Kenyan people (Cottrell and Ghai, 2004:6). The critical decision making bodies were a National Constitutional Conference (NCC) and the National Assembly (NA), the latter being the Kenyan parliament. Once a draft constitution had been approved by the NCC it would be enacted by the NA. During the drafting process, the public response was overwhelming and some 37 000 submissions were received both from institutions, and groups and individuals. Hearings were conducted in each of the 210 parliamentary constituencies (Cotterell et al 2004:11). A new government under Kibaki was elected in December 2002 which did not show much enthusiasm for the new constitution and was also opposed by strong lobby groups. With a new government taking charge, the urgency for constitutional reform was removed. Subsequently the draft constitution was submitted to the population by way of a referendum and like the case of Zimbabwe – rejected.

Following a closely contested election held in December 2007 and subsequent disputes around the results, a series of violent clashes broke out throughout the country. A negotiation process commenced with the assistance of international mediation and an agreement was reached whereby the offices of head of government and head of state were separated. This negotiation process in effect resulted in a partial constitution redraft by certain elites, following a 'roundtable among warring parties' process with international mediation like Zimbabwe. It is not clear how these changes will be incorporated in a final constitution for the country. Violent conflict brought about constitutional change rather than through a comprehensive public participation process.

## GENERAL OBSERVATIONS AND CONCLUSION

Depending upon the nature of the constitutional amendments, the levels of participation vary considerably. Limited changes may be initiated within a legislature by individuals and have very little reference to even party or community participation. Brokered deals between competing parties may also not involve much participation beyond those negotiating the deal, whereas initiatives to re-draft constitutions ab initio may involve general public participation. International and continental initiative may involve many individuals but not necessarily those affected by a constitutional change.

Constitution re-drafting is still an issue in many parts of Africa. It does not have the fervour accompanying constitution drafting in the 1990s. A new approach involving a public participatory process is gradually being accepted in some parts of the continent although severe reversals of this process took place in Zimbabwe and Kenya following disputed election results. Countries in crisis do not follow broad based participatory processes in constitution re-drafting although South Africa and Kenya are exceptions. Commitment to public participatory processes in constitution redrafting amongst elites and civil society is required before such a process can succeed. There is often resistance amongst certain key groups who are likely to be deprived of special relationships and access to resources by such changes.

Time and resources are necessary to make inclusive public participatory constitution drafting processes succeed. Citizen control in the cases referred to above is far from being achieved. Public participation is now in many parts of the world promoted as a right and a necessity not only with regard to conventional policy making processes but also constitution drafting processes. The right is set out in international declarations and conventions as well as in many country constitutions such as that of South Africa. Difficulties still remain with regard to the implementation of constitution drafting processes – how in practical terms to involve civil society in such a process? The process followed in the cases referred to above is unlikely to ensure an outcome that is legitimate and functional.

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