

The Constitutional state in the developing world in the age of globalisation: from limited government to minimum democracy

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1 INTRODUCTION

Located at the heart of the concept of contemporary constitutionalism – the concept that underwrites the constitutional state – is democracy. While conditions that define both constitutionalism and democracy are intractably controversial,¹ few would deny that both strive towards assumed ideal conditions of political, institutional and civic arrangements suited for human self-actualisation. Because of this convergence democracy has come to be accepted as one of the critical pillars integral to the definition of constitutionalism.² Notwithstanding this fact the norms that define democracy have become even more of a contested territory in the age of globalisation. Accentuating the contestation are attempts by the dominant ideology to link free market capitalism and political democracy as though they were inseparable, if not indistinguishable.³ In this discourse “(d)emocratisation”, argues Amin, “is considered the necessary and natural product of submission to the rationality of the world wide market. A simple dual equation is deduced from this logic: capitalism = democracy, democracy = capitalism”.⁴ To give credence to

1 Defining constitutionalism itself has been a subject of rich controversial discourse especially by African scholars, many of whom have challenged the concept that has exercised sway in the western liberal democracies. See for example, Shivji I G “State and Constitutionalism: A new Democratic Perspective”; Okoth-Ogendo H W O “Constitutions without Constitutionalism: Reflections on an African Political Paradox” both chapters in Shivji I G (ed) *State and Constitutionalism: An African Debate on Democracy* (Harare, 1991). See also Amisshah A “Constitutionalism and Law in Africa” in Ronen D (ed) *Democracy and Pluralism in Africa* (Colorado, 1986) and Ojwang J B “Constitutionalism in classical terms in African Nationhood” *Lesotho Law Journal* 1990, Vol. 6, No. 1.

2 De Smith S A *The New Commonwealth and Its Constitutions* (London, 1964), explicitly arguing from a liberal democratic perspective, emphatically places democracy at the centre of constitutionalism (106). He contends that one would not be persuaded to proclaim the existence of constitutionalism where, among others, the following conditions associated with democracy do not exist: a government genuinely accountable to an organ distinct from itself; a government freely elected on a wide franchise at regular intervals; political parties able to freely organise in opposition to government and fundamental civil liberties enforced by independent courts.

3 Frank A G “Marketing Democracy in an undemocratic market” in Gills B, Rocamara J and Wilson R (eds) *Low Intensity Democracy: Political Power in the New World Order* (Pluto Press, London, 1993) 45.

4 Amin S “The Issues of Democracy in the Contemporary Third World” in *Low Intensity Democracy: Political Power in the New World Order* (fn 3) 60.

this reductionist logic, democracy is defined in minimalist ways that steam-roll it within the strictures of market imperatives. According to Chomsky, this is achieved by way of establishing democracy in one sense of the term while blocking it in a different sense.⁵

This touted sense of democracy is one that abstracts it from a living and inexorably unfolding human experience continually expanding and enriching conditions of human existence. It reifies democratic norms to a constricted form that projects Western liberal democracy, in the words of Fukuyama, “as the final form of human government”.⁶ Through reification, Marks observes, human beings cease to recognise the social world as an outcome of human endeavour but see it as a fixed and unchangeable object of contemplation rather than a domain of action. Reification, she elaborates, helps to support relations of domination by ensuring that those relations seem eternal, rather than historically specific, and necessary rather than contingent.⁷ Thus, in the context of constitutionalism, the limited norms born of liberal democracy are depicted as some kind of natural law which human development is destined never to transcend.

This article is a contribution to the debate about the relationship between constitutionalism and democracy. It seeks to interrogate the concept of democracy underwritten by the currently unfolding constitutional dispensations in the Third World largely driven from a neo-liberal perspective. The central argument is that while the post-1990s emergent constitutional state has by and large displaced overtly authoritarian dispensations in most of the developing world, the extent to which the disjuncture with authoritarianism has been achieved is moot. Underlying this development is the simple fact that neo-liberal globalisation has consciously crafted a minimalist concept of democracy. While this concept provides for elected government, in the same vein it constrains and emasculates participatory democracy, the centrality of social justice in the mission of the state and state sovereignty.

The discussion is divided into three parts. The first is an historical overview of the inception and evolution of the western concept of constitutionalism. The second looks into the impact of globalisation on the constitutional state with a particular slant on its impact on democracy. The article concludes by focusing on a set of proposals that may remedy the democracy deficits in the current concept of the constitutional state.

2 CONSTITUTIONALISM IN AN HISTORICAL PERSPECTIVE

In a very broad sense there are two conditions of governance that lie at the core of the concept of constitutionalism. The idea of control over governmental power, which assumes the form of normative limitations and institutional

5 Chomsky N “The Struggle for Democracy in the New World Order” in *Low Intensity Democracy: Political Power in the New World Order* (fn 3) 80.

6 Fukuyama F quoted by Marks S *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000) 16.

7 Marks (fn 6) 21.

diversification, is the oldest of these conditions. It is operationalised in the rule of law and a specific mode of organising the institutions of government and their interplay. This condition is at the root of what is known as limited government. The second aspect is the broad consensus that underwrites the acceptance of the institutions of government and defines their mission in society. Democracy, as shall be argued later, seems to be the cornerstone of that consensus. The article will now analyse these conditions in detail.

2.1 The liberal foundations

The institutional and normative conditions that underpin constitutionalism can historically be traced to Europe as both the products of the centralising force of absolutism as well as its antithesis.⁸ It was in the vortex of the struggle led by the emergent mercantile bourgeoisie against the doctrine of divine rights that underpinned the unlimited powers of absolute monarchs that a raft of political and constitutional doctrines, which in the course of time shaped constitutionalism, emerged. The first of these doctrines, the rule of law, sought to control the whims of rulers by subordinating their acts to the law. In its general application the rule of law ensured that citizens, the state and its institutions – including, of course, the kings – were all subjected to the supremacy of the law.⁹ The rule of law formed the basis of a state strong enough to secure order and free commercial activity, but limited in its competence by the restrictions of the law. Ghai correctly explains that capitalism's need for predictability, calculability and security of property rights and transactions constituted the material basis of the rule of law.¹⁰

On the political plane the rule of law signified a landmark transformation of the absolutist state to a liberal constitutional state.¹¹ This was a state born of the political victory of the emerging bourgeoisie against the exclusive political power of the monarchs. Hence Friedrich is correct in asserting that the bourgeoisie furnished everywhere the mainstay of political support for constitutionalism.¹² Hall throws into sharp relief the nature of political power landscape instituted and underwritten by the rule of law. He says that the principles of market and contract became the metaphor for a new conception of the state: a contractual state, where power was shared between the upper

8 Hall S "The State in Question" in G McLennan, Held D and Hall S (eds) *The Idea of the Modern State* (Open University Press, 1990) contends that, precisely because it fused and concentrated every element of rule within a national secular center, absolutism helped to prepare the way through which the constitutional 'bourgeois' state emerged. This developed against a backdrop of conditions in which, on the one hand, the consolidation of nation-states spurred the emergence of national economies and uniform enforcement of law and order – conditions favourable to the growth of the emerging mercantile bourgeoisie, while, on the other hand, the absolute monarchs' interference with trade ran into conflict with the further consolidation of this emergent class (8).

9 Dicey A V *Introduction to the Study of Law of the Constitution* (London, 1960) was later credited with this refined and largely accepted tenet of the Rule of Law.

10 Ghai Y "The Theory of the State in the Third World and the Problem of Constitutionalism" *Connecticut Journal of International Law* 1991, Vol. 6, 413.

11 In the economic arena the *laissez faire* doctrine, expressing the right to freely enter into contract, became what the rule of law was on the constitutional and political planes.

12 Friedrich C J *Constitutional Government and Democracy* (London, 1967) 179.

and middle ranks of society and the ruler. This contractual state, he contends, was guaranteed by law and formalised in a constitutional system.¹³

It is against this background that scholars of constitutional theory regard the original and indeed still more salient edifice of constitutionalism as the subordination of the exercise of governmental power to legal rules. De Smith puts it thus:

“The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. The rules may be, at one extreme (as in the United Kingdom) mere conventional norms, and at the other directions, prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law”.¹⁴

Central to the idea of government under the rules is the need to secure space for citizens’ liberties through the establishment of a legal cordon around that space. It is rooted in the need to keep the state at bay and, in this way, in the belief that the scope of arbitrariness is drastically reduced and the autonomy of the individual preserved by a constitutional regimen in which acts of government are based on pre-determined rules. “Constitutionalism,” De Smith further expounds, “becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty”.¹⁵ Thus it is mainly due to the rule of law that constitutionalism is counterpoised to tyranny. “It is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law”, emphasises Nwabueze.¹⁶

We would hasten to add, however, that by itself the rule of law would probably be the proverbial pie in the sky, incapable of enforcement, were it not buttressed by a particular mode of organisation of the structure of government. The principal doctrine in this regard is that of separation of powers. Its leading and authoritative exponent was the eighteenth century Frenchman, Montesquieu,¹⁷ whose exposition has since been regarded by constitutional theorists as one of the basic tenets of constitutionalism. Montesquieu argues that the powers of government are essentially of three distinct kinds, i.e. the executive, the legislative and the adjudicative. He opines that the concentration of these powers in one person or body of persons bred tyranny. He argues forcefully that

“(w)hen legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the

13 Hall (fn 8) 9.

14 De Smith (fn 2) 106.

15 De Smith (fn 2) 106.

16 Nwabueze B O *Constitutionalism in the Emergent States* (London, 1973) 1.

17 Montesquieu *The Spirit of the Laws* Cohler A, Milles B and Stone H (eds) (Cambridge, 1989).

power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor".¹⁸

From these premises Montesquieu contended that executive, adjudicative and legislative powers should vest in separate organs of government as a sure way of securing the liberties of citizens, thus vicariously bequeathing the doctrine its name derived from this postulate in the organisation of state power.

But Montesquieu's articulation of separation of powers is not without problems. It implies the fragmentation of state and government, a fact that betrays a simplistic grasp of fairly complex and dynamic interactions among the three arms of government. Vile rightly says that, standing alone as a theory of government, separation of powers has uniformly failed to provide an adequate basis for an effective and stable political system. He maintains that it is on that account that it has had to be combined with other political ideas, such as mixed government and checks and balances, to form the complex constitutional theories that anchor the modern western political system.¹⁹ Together, these concepts allow for a degree of autonomy of organs of government while also permitting a significant measure of overlap as well as the competence of one to intervene in the sphere of others under defined conditions. Such a complex interplay ensures the cohesion of the political system.

Needless to emphasise, whatever conceptual deficiencies separation of powers betrays, it emerged historically as part and parcel of an array of political devices in the struggle to weaken the authority of absolutist monarchs. It was a theory that justified the removal from the monarchs' immediate and direct remits some of their erstwhile powers – notably legislative and judicial powers. Thus, in sharp departure from theories celebrating the omnipotence and indivisibility of power, Vile argues, defenders of liberty stressed the division of power.²⁰ From another tangent, however, Gramsci contends for a different understanding of separation of powers, positing that, in fact, all three powers are organs of the political hegemony of the bourgeoisie, but in different degrees. Parliament (the legislative organ), he argues, is more closely linked with civil society, while the judiciary, seemingly located between the executive arm and parliament, represents both the continuity and predominance of written law.²¹

What is beyond controversy, however, is that along with those other political ideas and devices – such as the rule of law, checks and balances and an independent judiciary – the doctrine historically formed part of institutional arrangements constraining the power of government and thus created a legal, political and social environment commensurate to conditions of constitutionalism.

18 Montesquieu (fn 17) 157.

19 Vile M J C *Constitutionalism and the Separation of Powers* (Oxford, 1967) 2.

20 Vile (fn 19) 4.

21 Gramsci A in Hoore Q and Smith G N (eds) *Selections from the Prison Notebooks of Antonio Gramsci* (London, 1971) 246.

Judicial independence is a doctrine that evolved logically and organically from separation of powers as the latter envisaged different spheres of operation for each of the three principal arms of government. "The general principle of the independence of the judiciary", writes Friedrich, "has come to be universally accepted as a basic tenet of constitutionalism and government according to law".²² Judicial independence, Heuston says, implies freedom of the courts of law from interference by the executive or the legislature in the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner.²³ Nwabueze expounds that "(i)t means independence from political influence, whether exerted by the political organs of government or by the public or brought in by judges themselves through involvement in politics".²⁴

Most critically, however, it can also be contended that judicial independence serves an important ideological function that sustains the political and social order.²⁵ The apparent autonomy of the courts from the executive and the legislature reinforces the perception that they are disinterested and impartial arbiters of rights. The ideological function served by the perception that the courts of law are independent helps to promote the claim, real or fictional, that legal rules are applied fairly and impartially in the Weberian formal-rational sense.

Thus, among them, the doctrines explored above laid the foundation of limited government that lies at the heart of the liberal constitutional state. Collectively they reflected a little disguised antipathy to state power. It is an antipathy well articulated by Sher, who contends that the idea that the sheer magnitude of the state's power is a threat to its citizens, and that this threat must somehow be tamed, has long been a prominent theme of the liberal thought.²⁶

2.2 The democratic foundations

From the tangent of citizens' liberties, limited government was, without doubt, a progressive development. It provided space for those who could thrive unaided by government if only the law could provide them with protection from government and other citizens. It can, however, be argued that this constitutional model did not only limit the writ of government, but also significantly limited its legitimacy.²⁷ Thus the legitimacy deficit of the liberal constitutional state was a pernicious matter of which resolution had to be found in two interrelated processes. These two aspects can be distinguished

22 Friedrich (fn 12) 179.

23 Heuston R F V *Essays in Constitutional Law* (London 1964) 52-53.

24 Nwabueze B O *Judicialism in Commonwealth Africa* (London, 1977) 280.

25 This is in the sense that courts are portrayed as the individual citizen's ultimate sanctuary of redress against oppressive encroachments on his rights by the organs of the state or by other citizens.

26 Sher R "Rights, Neutrality and the Oppressive Power of the State" in *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy* May 1975, Vol. 14, No 2, 185.

27 Its narrow social (class) base and mission was otherwise its cardinal Achilles heel, countermanding its acceptance by the broader society.

as the procedural and substantive aspects of democracy, to whose brief exploration we now turn.

(1) Procedural democracy

Participation by the citizenry in the political process in the liberal state was historically a right circumscribed on all sides by a plethora of exclusions. It was a state in which the right to elect rulers was confined to the privileged few defined by class, race and sex.²⁸ Hall highlights the fact that almost the entire landscape of civil and political rights nowadays taken for granted was beyond the reach of the majority, who could neither assemble as they chose, 'publish and be damned', join a trade union, hold many posts if they were Dissenters, vote or dispose of property if they were women.²⁹

The constitutionalisation of a universal franchise was added only when the working class that had been produced by the capitalist market society had become strong enough to demand that it should have some weight in the competitive process.³⁰ As an historic development universal suffrage in the West became a norm well into the twentieth century – for example, only being constitutionally secured in Britain with the enactment of the Representation of the People Acts of 1918 and 1928.³¹

Thus it would be correct to contend that, contrary to conventional wisdom, democracy became a reality not as an organic by-product of the liberal constitutional state but as its antithesis.³² Significantly, the extension of civil and political rights to hitherto marginalised groups broadened political consensus or what some scholars term procedural consensus. Forman observes that "(e)ver since the successive extensions of the franchise in the nineteenth and early twentieth centuries, this kind of consensus has been signified by widespread agreement upon the desirability of using parliamentary channels for the implementation of political change".³³ Thus procedural consensus buttressed constitutionalism to the extent that its point of departure was further to legitimise the existing institutions and the entrenchment of the so-called rules of the game, spelling out how political power play should be conducted. It seems plausible, therefore, to argue that it laid the basis for a relatively settled political culture and stability associated with Western democracies and constitutionalism.

28 Marks (fn 6) 30.

29 Hall (fn 8) 10.

30 MacPherson C B *The Real World of Democracy*, (Oxford, 1966) 35.

31 Turpin C *British Government and the Constitution*, (London, 1985) 19. The first of the Acts extended suffrage to all men and women of over thirty years while the second extended it to women of over twenty-one.

32 It seems that in more or less the same way that the rule of law, separation of powers and all the other constitutional political devices had evolved to constrain absolutism and harmonise government with the interests of the bourgeoisie, democracy became a vehicle for the lower classes to influence the liberal state.

33 Forman F N *British Politics* (London, 1979) 7.

(2) Social-democratic orientation

And yet it should be clear that, in itself, procedural democracy was not significant in transforming the basic feature of the constituted state which, as Hall correctly observes, it only modified by deepening its popular base and content.³⁴ When the transformation of the basic characteristic of the state did happen, it was founded on a consensus that developed around an enlarged writ for government to intervene in the social and economic spheres influenced largely by the socially marginalised classes. The dominant classes supported this newly-found role for the state in the name of greater 'national efficiency', while the working classes, the poor and unemployed supported it because they believed that only through the state would reforms be imposed on industrial capitalism in order to improve their living conditions, provide greater economic equality and social justice.³⁵ Writing specifically of Great Britain, Forman contends that consensus in the economic and social sphere was forged around the goals contained in the 1942 Beveridge Report and the Keynesian White Papers of 1944. The former, he says, "foreshadowed the principal elements of the postwar Welfare State", while the latter "established the postwar objective of full employment".³⁶ It was thus the enlarged government writ that gave birth to a panoply of socio-economic rights, or what came to be known as second-generation rights, anchored around the emergent welfare state or social democracy.

It can be seen from this account that, from a constitutional theory perspective, a critical departure from the nineteenth century model of state had thus been established. In this new dispensation the discretionary powers of the government, albeit within defined legal parameters, were reincarnated. General rules were no longer concerned with the ousting of government involvement in economic and social management but with ousting arbitrariness when government does so. Thus it now became possible to take tentative practical steps to bridge the gap between formal justice as proclaimed by the notion that all are equal before the law, on the one hand, and substantive justice achieved through the competence of the state to intervene in the social and economic spheres and direct material resources and services to areas of social need, on the other.

But for exponents and adherents of classical liberalism, such as Hayek,³⁷ the threshold had been ominously traversed. They saw the new state as a threat to individual liberties and the Rule of Law – the latter being conceived merely in terms of formal (and certainly not substantive) justice. Hayek, for example, vigorously criticised this newly crafted feature of the constitutional state, arguing that

"(a) necessary, and only apparently paradoxical, result of this is that formal equality before the law is in conflict, and in fact incompatible, with any activity of the government deliberately aiming at the material or substantive equality of different people, and that

34 Hall (fn 8) 10-11.

35 Hall (fn 8) 11.

36 Forman (fn 33) 5.

37 Hayek F A *The Road to Serfdom* (London, 1949).

any policy directly aiming at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law".³⁸

Central to Hayek's thesis was the argument that the exercise of discretionary powers by governmental institutions necessarily involved discriminating between individuals on the basis of the authorities' *ad hoc* notions of what is morally right or otherwise. More importantly, Hayek felt that the appropriation of the right of choice by governmental institutions necessarily implied that the individual herself or himself lost the liberty to make the choice.

Despite detractions such as these, it is true that for about forty years governments' right to intervene, manage and re-order socio-economic affairs within the law and for public good was a key feature of how the constitutional state was conceived. Deducing from this newly established state competence Ghai concludes that "(a)n essential basis of contemporary western constitutionalism is a social compact between capital and labour under which the market system is accepted within the context of a welfare state, designed to mitigate the worst social consequences of the market and to ensure a reasonable standard".³⁹

3 THE CONSTITUTIONAL STATE IN THE DEVELOPING WORLD UNDER GLOBALISATION: IS DEMOCRACY IN RETREAT?

3.1 Globalisation problematised

A necessary prelude to the discussion of the impact of globalisation on the practice of the constitutional state and, in particular, on its shaping of how democracy is institutionalised, lies in how globalisation is problematised and understood. Far too often commentators project 'globalisation' as if it were one and the same thing as 'internationalisation'. For example, in their otherwise insightful contribution Mhone and Edigheji remark that

"(t)he world has witnessed significant changes in the last three decades – generally termed globalisation. By this we mean the intensification and greater integration of economic, socio-cultural and political relations and activities across regions and continents".⁴⁰

It is contended, however, that the processes defined by these scholars certainly predate globalisation. Per se these developments define internationalisation, although globalisation may have given them accelerated impetus in recent years. How then would we define globalisation?

A definition of 'globalisation' that sheds light rather than cast the phenomenon in an obscurantist cloak is one invoked by Saul, who opines that it is a form of internationalisation in which human civilisation is reformed from the perspective, not of human leadership, but of the innate force of economics at work in the marketplace.⁴¹ He contends that while globalisation is presented

38 Hayek (fn 37) 59.

39 Ghai (fn 10) 452.

40 Mhone G and Edigheji O "Economic liberalisation, governance and development in Southern Africa in the era of globalisation" in Landsberg C and Mackay S (eds) *Southern Africa Post-Apartheid? The Search for Democratic Governance* (Cape Town, 2004) 138 (emphasis added).

41 Saul J R *The Collapse of Globalism and the Reinvention of the World* (London, 2005) 19.

as a value-free and inevitable force of modernisation, in fact it is infected from the beginning by a political tendency known as neo-liberalism or economic rationalism.⁴² From this tangent, it can therefore be contended that 'globalisation' is an ideological project serving to shape global economic and political systems in a manner congruent to the specific agenda of corporate capitalism. It seems to have steadily established its sway in the aftermath of what Hobsbawm terms the "return among politicians and ideologists to an ultra-radical laissez-faire critique of the state which holds that the role of the state must be diminished at all costs".⁴³ Its ideological and philosophical inspiration draws heavily from erstwhile expositions such as that of Hayek, discussed earlier.⁴⁴

This section of the article will thus interrogate and highlight how this ideological project is predicated on a kind of liberalisation modelled to ensure that a dominant, if not universal, character of the emergent constitutional state is consciously crafted around the notion of limited democracy. In this sense, limited democracy implies not so much the generally accepted idea that, in a functioning democracy, minority will checks and tempers majority will. On the contrary, the concept here refers to the constitutionalisation of patterns of state practices and processes intended to disconnect, or having the effect of disconnecting, citizens as the *locus of imperium*, and of emasculating in extreme situations, or constraining or limiting in others, the essence of popular will.⁴⁵ Three permutations of this model of the constitutional state will now be discussed.

3.2 Markets liberalisation and democratic sovereignty

Situating globalisation within the neo-liberal framework of the Washington Consensus, Mhone and Edigheji argue that the thrust of the framework is to free global markets from state control through deregulation, the privatisation and commercialisation of public enterprises, the institutionalisation of flexible labour markets and the creation of a minimalist state achieved through the reduction of its size and role in society. They highlight particularly how this development has considerably shifted power away from the political domain and democratic control to global companies.⁴⁶ Driving the totality of all these measures is the ideology of economic and political liberalisation pushed, at one level, mainly by international pressures led by the World Bank (WB) and

42 Saul (fn 41) 32. Castells M in Muller J, Cloete N and Badat S (eds) "The new global economy" in *Challenges of globalisation* (Cape Town, 2001) agrees that globalisation is, among others, a code word for the emerging world system and at the same time the banner to rally the determined march of global corporate capitalism (3).

43 Hobsbawm E *Globalisation, Democracy and Terrorism* (Great Britain, 2007) 103.

44 Saul (fn 41) 93.

45 Matlosa K "Caught between transition and democratic consolidation: Dilemmas of political change in Southern Africa" in *Southern Africa Post-Apartheid? The Search for Democratic Governance*, (fn 40) poses the question whether the transitions from authoritarian rule in Southern Africa were anything more than a simple political liberalisation because of their ambivalence towards participatory democracy. He calls the emergent political systems 'formal democracy' in contrast with what he refers to as 'substantive democracy' (18).

46 Mhone and Edigheji (fn, 40) 138.

the International Monetary Fund (IMF) on state authorities as a condition for aid and continued engagement, and at another by the internal struggles of organisations of civil society which saw democratisation of the state as the best way of cutting their losses in the economy resulting from structural adjustments imposed by the former.⁴⁷

Significant, albeit contradictory, political and constitutional consequences arise directly from liberalisation. Firstly, political liberalisation of the state helps to dismantle the authoritarian state and open political space for tentative democratisation – which is undoubtedly a positive constitutional development. But then, and more significantly, economic liberalisation is part and parcel of an international process of freeing global capitalism and the markets from the legal purview of the political state. Thus, while it is trite that state political institutions' external expression of sovereignty and their domestic competence respectively can only be legally limited by the operation of norms of international law and clearly defined constitutional rules and other domestic laws,⁴⁸ this conception of the constitutional state is challenged by the emergence of global markets operating as extra-judicial, extra-jurisdictional or supra-national phenomena anchored around the ideology and practice of globalisation. Globalisation has ensured that, notwithstanding their sway in national economies over domestic policy and state behaviour, global markets are beyond the reach of either municipal or international law. By so doing some kind of "markets sovereignty" – or, in the words of former South African President Thabo Mbeki, "the notion of 'the market' as the modern god, a supernatural phenomenon to whose dictates everything human must bow in a spirit of powerlessness"⁴⁹ – is unleashed. Such a situation holds grave implications for national constitutional systems and is a challenge to the integrity of the constitutional state. It renders the constitutional state a repository of political sovereignty it cannot exercise in full measure.

This reality indicts democratic rule directly. Democracy is inexorably predicated on popular sovereignty, by which is meant that national political authorities are not only formally mandated to make key decisions but are also accountable to the citizenry for them. But, as Hobsbawm correctly contends, the idea of market sovereignty is not a complement of democracy but an alternative to it – and, indeed, to politics – since it denies the need for political decisions which are substituted by the pursuit of individual choices offered by the markets. In this way the concept 'citizens', which is at the heart of politics, is substituted by that of 'consumers', which is at the heart of markets.⁵⁰ Arguing from the same perspective, Saul observes that in the

47 Bangura Y "Authoritarian Rule and Democracy in Africa: A Theoretical Discourse" in Gibbon P, Bangura Y and Ofstad A (eds) *Authoritarianism, Democracy and Adjustment: Politics of Reform in Africa* (Uppsala, 1992) 44-48.

48 The latter understanding lies at the heart of the doctrine of constitutional supremacy that sets out the parameters of the powers of state institutions.

49 Mbeki T "Prologue" in Makgoba M W (ed) *African Renaissance: The New Struggle* (Mafube Publishing (Pty) Ltd, Cape Town, 1999) xviii.

50 Hobsbawm (fn 43) 104.

world dominated by international corporate capitalism, the most important decisions – those related to the economy – are beyond the control of national power holders.⁵¹ Frank agrees that the global economy precludes the exercise of real national sovereignty and the implementation of truly democratic decisions by the people. The backdrop to this, Frank observes, is the severe structural limitation to democratic participation by the people in the world economy which ensures that they cannot and do not have control over it. This leaves effective democratic control of state political institutions limited to the formulation of relatively unimportant domestic political policy, while the most important decisions are made outside the range of democracy.⁵²

It is therefore axiomatic that the loss of sovereign authority by national political institutions to global markets is a significant departure from the constitutional state as hitherto known. This development imports a distortion to one of the more significant principles underlying the constitutional state – the principle of democratic accountability. In this landscape the political and legal accountability of state institutions, the very essence of democratic agency, and the power reposing in international corporate capitalism and exercised within the nation state, are at tension. This is so even as global markets are themselves not accountable in any way for their actions. The consequence is that the sovereign territorial state, which is the essential framework of democratic, or any, politics, is today weaker than before⁵³.

3.3 Is democracy no more than frequent elections?

Also intriguing in the emergent constitutional state configured by the ethos of globalisation is its predication on minimalist conditions of democracy. To be sure, most new constitutions make an effort to enshrine most, if not all, of the formalities of constitutional democracy such as bills of rights, recognition of the right of dissention, plural politics, periodic elections, etc. Poignantly, however, the model is designed to limit citizens' participation and role in government to the election of leaders who, alone and to the exclusion of the citizenry, must be seized with the business of decision-making and governing. Periodic elections, contends Shivji, "presumably, constitutes the participation of citizens in the running of the government as well as the government's accountability to them".⁵⁴ They thus constitute the final act of citizens' participation in governance and define the limits of their influence on the mission and behaviour of the state and its functionaries. Ironically, this minimalist conception in the participation of the citizenry is the antithesis of the mass mobilisation of 1970s and 80s that drove out the dictators in the developing world who had privatised public space and politics.

The point, however, is that the limited notion of democracy – a notion that reduces democracy narrowly to the periodic election of rulers – is not accidental at all. It underscores a reconceptualised form of a constitutional

51 Saul (fn 41) 19.

52 Frank (fn 3) 49.

53 Hobsbawm (fn 43) 104-105.

54 Shivji (fn 1) 36.

state consciously crafted to be weak in relation to the sway of global markets, while also sufficiently barricaded against the day-to-day influence of ordinary citizens and civil society. This is a state in which citizens' control over elected officials is removed while accountability, transparency and public participation are undermined.⁵⁵ Paraphrasing Schumpeter, this model's leading exponent, Marks articulates the underlying philosophy thus:

"It follows that a realistic account of democratic politics must put aside romantic notions about citizenship and popular sovereignty, emancipation and social justice, and place at its centre the selection of representatives and the competitive struggle for office. While every citizen must have the right to take part in electoral processes, Schumpeter remarks that one feature of his account is that it gives proper recognition to 'the vital fact of leadership'".⁵⁶

In the age of globalisation, therefore, the ritual of periodic elections characterises not the means to the end in the involvement of the citizens in the democratic process, nor one of the several manifestations of democratic participation: it is supposedly the end itself.

At least one significant development bearing directly on constitutionalism flows logically from this conception of democracy. Gills, Rocamora and Wilson point out that, on the one hand, this 'cosmetic' democratisation brings some limited positive change in civil and human rights culture and widens the legal space in which popular mobilisation for change can take place.⁵⁷ But such popular mobilisation may be perceived by state power-holders as a challenge to their authority and an illegitimate interference with what they conceive as their exclusive prerogative to govern. In many Third World countries this contradiction belies the weakness of the political system and forces the state to resolve it through the re-institution of repressive practices, amounting to what Okoth-Ogendo calls the shrinking of the political arena⁵⁸ that was the hallmark of erstwhile authoritarian regimes. In consequence, "after an initial loosening of political repression, repressive measures are re-introduced".⁵⁹ It is thus fair to conclude that the minimalist conception of democracy does not in the long term enhance democratic constitutionalism but inexorably leads to sublime authoritarianism.

3.4 Social justice abandoned

The ethos of globalisation is undoubtedly responsible in a major respect for the vitiation of the principle that the exercise of state power must seek to advance the ends of society, which Okoth-Ogendo terms the essence of constitutionalism.⁶⁰ At the heart of the conundrum is a division of labour entrenched by the Washington Consensus whereby, on the one hand, markets are the principal drivers of social and economic development while the state, on the other, is consigned by and large to merely ensuring a conducive environ-

55 Mhone and Edigheji (fn 1, 40) 139.

56 Marks (fn 6) 50 – 51.

57 Gills, Rocamora and Wilson (fn 3) 21.

58 Okoth-Ogendo (fn 1) 15-16 discusses the features of this phenomenon.

59 Marks (fn 6) 58.

60 Okoth-Ogendo (fn 1) 20.

ment. A prognosis of development based on this division of labour overlooks the fact that markets are not competent to ensure social justice.⁶¹ The state's marginalisation in socio-economic development thus forms the background of a socio-economic system in most Third World countries characterised by permanent, institutionalised high employment and slow growth,⁶² normalisation of poverty⁶³ and institutionalised job insecurity.⁶⁴

These features challenge the concept of constitutionalism in fundamental ways. Firstly, the division of labour between the markets and the state, imposing a highly circumscribed mandate on the latter, is inimical to a vibrant democracy. Invariably it results in the policies of political parties competing for office having very little to distinguish them. In consequence, the electorate is effectively deprived of an important right – the right to a meaningful choice between programmes addressing vital political and socio-economic issues. Elections in this context tend to be a mere formality, perhaps limited to a choice of personalities and styles. Secondly, the state's primary responsibility of advancing social justice and striving for the achievement of substantive equality in society is dramatically weakened, changing in the process the content of the social contract between citizens and governments.⁶⁵ It cannot be overemphasised that such a social contract is both the bedrock of societal consensus and the legitimacy of the constitutional state. Thus the dissolution of the contract in this manner strikes at the very heart of the essence of the constitutional state as it has come to be understood.

4 RE-LOCATING DEMOCRACY AT THE HEART OF THE CONSTITUTIONAL STATE

The characteristics outlined above clearly indicate the parlous state of democracy in the age of globalisation. Writing in a different context, Hutchison poses rhetorically a question equally pertinent here:

“The more pressing conundrum, therefore, is that, if democratic procedures do not guarantee democratic outcomes and democratic outcomes need not result from democratic procedures, how can we best organise constitutional arrangements so that democracy as a whole is more than less likely to prevail?”⁶⁶

It is indeed true that the democracy deficits identified above are a by-product of a particular form of constitutional state. Thus the constitutional landscape must be re-arranged to provide a framework that would ensure that “democratic politics is less a matter of forms and events than an affair of relationships and processes, an open-ended and continually re-contextualised agenda of enhancing control by citizens of decision-making which affects them and overcoming disparities in the distribution of citizenship rights and

61 Mhone and Edigheji (fn 40) 139.

62 Saul (fn 41) 123.

63 Saul (fn 41) 131.

64 Saul (fn 41) 148.

65 Edigheji O quoted in Mhone and Edigheji (fn 40) 139.

66 Hutchison A C “Judges and politics: an essay from Canada” in *Legal Studies: The Journal of the Society of Legal Scholar* Vol, 24, Issues 1 and 2, March 2004, 284.

opportunities".⁶⁷ This is a concept of democracy clearly at variance with that advocated by the neo-liberal thought. A few things can be done to advance in this direction, central to which must be the review of the entire constitutional landscape to bring about proper balance between the executive and other organs of the state and civil society.

Firstly, while the principal form of modern governance draws on the concept of representative government, a simultaneous embedding of cooperative governance would establish and strengthen an evolving, continuous and dynamic relationship between the citizens and governance and give democracy a much needed new lease of life. Cooperative governance – implying parallel direct citizens' participation in government along with representative government – holds the potential to enrich the democratic project. A number of constitutions around the world already allow citizens, for example, to give the final stamp of approval by way of referenda to designated or controversial critical public issues.

In the developing world, the South African constitution provides interesting, albeit tentative, mechanisms of mandatory community or interest groups consultations on matters directly affecting them. Two recent Constitutional Court decisions, in which the court repudiated Acts passed by Parliament on the grounds that constitutionally sanctioned consultations with relevant communities and interest groups had been flouted, amply highlight the significance of such provisions thus underscoring elements of cooperative governance.⁶⁸ But the limits of the South African constitutional arrangements were exposed by the majority judgment in *Merafong Demarcation Forum and 10 Others v The President of the Republic South Africa and 15 Others*.⁶⁹ While the Court extolled the importance of the participative mechanisms in strengthening the legitimacy of legislation and as a significant counterweight to influence-peddling and secret lobbying, it nonetheless put a damper on legal enforceability of the wishes of the public expressed in that process if they are in conflict with policies of government. It ruled:

"There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, *but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them*".⁷⁰

While in its generality the fundamental constitutional principle expressed by the Court may be correct, it nonetheless betrays the need creatively to develop

67 Marks (fn 6) 109-110.

68 See *Matatiele Municipality and Others v The President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) and *Doctors for Life International v The Speaker of the National Assembly and 11 Others* 2006 (12) BCLR 1399 (CC).

69 Unreported Case CCT 41/07; discussed elsewhere in this issue: see Linda Nyati "Public Participation: What has the Constitutional Court given the public?" (below).

70 Fn 69, at para 50 (emphasis added).

principles that would ensure that participatory democracy is more than a cynical exercise of going through the motions to legitimise decisions already taken by organs of government. The answer seems to lie in the concept of self-rule or self-determination advocated by lateral constitutional theorists.⁷¹ Obviously there is scope for amplifying multiple forms of direct participation by the citizenry to expand and enrich the democratic project.

Secondly, the traditional distinction between civil and political rights on the one hand, and socio-economic rights on the other, calls for vigorous interrogation. While the level of economic development in some countries may justify the distinction, power should be vested in oversight institutions such as state human rights organisations to scrutinise and evaluate, on an on-going basis, the state's capacity to deliver on socio-economic rights. On the one hand their reports could serve before legislative bodies to enable the latter to critique governments' management of the public purse and provide necessary checks in an area long abandoned as the exclusive preserve of the executive. On the other, those organisations could use the reports in litigation to appear as "friends of the court" in matters where the state claims incapacity to assist particularly indigent litigants. Reports of this nature would undoubtedly also be critical assets to civil society lobby groups to influence the distribution of resources.

Thirdly, given the inescapable fact that the current norms run counter to the realisation, not to mention the optimisation, of public good, courts of law cannot afford a business-as-usual jurisprudential posture. They should be more activist, particularly in matters concerning social justice. In this regard we are persuaded by Hutchison, who makes a salient point: while it is important to recognise that there are constitutional boundaries to judicial action, those boundaries are not gratuitously handed to the courts but are developed and negotiated in the field of practice by the courts themselves. From that tangent he argues that, once the principle of democracy is accepted to have a substantive as well as a formal dimension, judicial activism must also be viewed in its substantive and formal justifications. Thus Hutchison argues for judicial activism, contending that the work of the courts must be evaluated not in terms of their capacity for ostensible objectivity or impartiality but in terms of their choices and the contribution that their decisions make to the advancement of substantive democracy.⁷²

Finally, the parliamentary system of government adopted by many developing countries and historically borrowed from Westminster is plainly weak in affording an effective countervailing role to the executive and in ensuring that the latter's role remains driven at all times by the interests of the electorate. Explaining the structural defect underlining the parliamentary system, Webber contends that "(i)n parliamentary systems, the executive is nested entirely within the legislature, so that it is (at least in theory) the creature of

71 The concept of self-governance or self-determination to enhance democracy at local level is advocated by Shivji (fn 1) 42-44. See also Marks (fn 6) 59.

72 Hutchison (fn 66) 283 - 284.

the legislature. Indeed, the party system has further reshaped the relationship so that it is now one of intense symbiosis, in which the legislative majority sees its fate as tied to the executive's and the latter consequently wields considerable influence over the former".⁷³ Delinking the executive from the legislature is therefore imperative if the latter is to be freed from the clutches of the former and to allow it to reclaim its full oversight potential over the executive. At least in theory, models of the presidential system go some way towards breaking the politically imperative grovelling support of the parliamentary majority to the executive. Properly exercising its functions, a legislature freed from the domination of the executive and steadfastly committed to citizens' aspirations can be a useful counterweight and a steadying hand to an executive weakened by the role of supra-national interests such as global markets – and, thus, of reinforcing political sovereignty and meaningful democracy in a constitutional state.

5 CONCLUSION

This article has attempted to situate the emergence and evolution of the constitutional state in an historical context. In the first section an effort is made to trace the trajectory of the constitutional state from its inception in Europe and to map out the various pillars that shaped it and the social conditions that gave rise to those pillars. A recurrent theme in all these developments is the fact that the various forms the constitutional state assumed at different times were clearly linked with political and social struggles. In its early phase the overarching challenge was to create conditions for liberty ushered in through a complex system characterised, inter alia, by division of powers, subjection of rulers to the law and the sharing of powers between rulers and upper classes. The emergent capitalist class was undoubtedly the purveyor of the struggles that shaped this phase, constitutionalising a social contract based on the notion of limited government, introducing a legislative body separate from the executive, an independent judiciary and representative government.

On the other hand it is apparent from this historical overview that, while democracy arose from within the vortex of conditions created by capitalist development, it impacted differently on, and necessitated the reconceptualisation of, the constitutional state. Contrary to seeing the state as an enemy to be put at bay, the social classes that shaped the state's democratisation ensured that it became a useful countervailing force to the dominance of capital. An enlarged writ conferred on government to mediate adverse effects of capital and to provide public goods established for the first time a concrete link between formal equality and substantive justice, thus giving the rule of law a new constitutional meaning.

The section discussing the impact of globalisation highlights not only a myriad of distortions, but also restrictions wrought by neo-liberal thought

73 Webber J "Supreme Courts, independence and democratic agency" in *Legal Studies: The Journal of the Society of Legal Scholars* March 2004, Vol. 24 No 1 and 2, 60.

on the further development of the constitutional state. It is apparent that the over-emphasis on forms and rituals, to the exclusion of a dynamic and on-going relationship between governance and active citizens' participation, has by-and-large expunged the essence of democratic politics and distorted the mission of the state away from social justice and public good. Thus, while democracy is upheld in forms and rituals, it is otherwise highly circumscribed and limited in practice as a function of a calculated concept intended to render it so. In no time a constitutional state anchored in such limitations forgoes its legitimacy; often forcing it to be defensive and to seek sanctuary in authoritarian means. The proposals advocated in the penultimate section of this article may go some distance towards overcoming and dislodging these systemic and structural strictures and to rehabilitate democracy and public good at the heart of the conceptualisation and practice of the constitutional state.

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