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**Law, Politics and Ethics in the African Public Sphere:
Constitutionalism, Democracy and Good Political
Governance in African Union Member States**

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1 Introduction

“Public sphere” has come to be one of the most contentious concepts in social sciences and humanities. While its definition remains a contested terrain, it provides a ground for robust inter-disciplinary and multidisciplinary exchanges.

Habermas’s writings and criticisms contributed to a renewal of its philosophical and sociological interest but “public sphere” also has legal, political, ethical, economic, social, cultural, geographical, demographical, linguistic, and even religious dimensions. It is local, national, sub-regional, regional, or international. Accordingly, it may be analysed from different angles. Unfortunately, the “African public sphere” has so far attracted little attention from African social scientists. The Council for the Development of Social Science Research in Africa (CODESRIA) should therefore be commended for bringing it to the fore by selecting “Governing the African public sphere” as the theme of its 12th general assembly.

As any public sphere, the African public sphere is subject to law, politics and ethics. After the failure of their “dictatorships of development” (Mangu 2002: 44; Sklar 1996: 1-30), which had the backing of international organisations such as the World Bank and the International Monetary Fund (IMF) and even some key Western democratic states, African leaders acknowledged that peace, security, democracy, good governance, human rights and sound economic management were critical for sustainable development (NEPAD 2001: par 71; Heyns & Killander 2006: 291).

Good political governance became synonymous with democratic governance, based on respect for the rule of law, the separation of powers, the supremacy of the Constitution, the independence of the judiciary and the promotion and respect for human and peoples’ rights (Mangu 2007 : 360).

Governing the African public sphere in the 21st century raises a number of questions that should be addressed by African social scientists in general and by African legal scholars in particular.

These questions include the following:

- What is “public sphere” or “African public sphere”?
- How related and important are law, politics and ethics in governing the African public sphere?

- How relevant are democracy and constitutionalism for good governance of the African public sphere?
- What role has the African Union (AU), the New Partnership for Africa's Development (NEPAD) and its African Peer Review Mechanism (APRM) played through law, politics and ethics in improving the governance of the African public sphere at both the national and regional levels?
- How can we assess the governance of the African public sphere in the light of the (peer) review of democracy and political governance in some African countries participating in NEPAD and the APRM and in view of the AU's responses to African crises of constitutionalism and democracy?

This paper purports to investigate the importance and the relationship between law, politics and ethics in governing the African public sphere and will discuss the above questions. It posits that the African public sphere has gone through tremendous change since the creation of the AU and the establishment of NEPAD and its APRM, which focus on constitutionalism and democracy as the hallmarks of a good political governance besides closely related to a better economic, social, and corporate governance.

While democracy implies the government of the people by public officials who are accountable and chosen during free, fair and competitive elections (Mangu 2007: 360-361), the main pillars of constitutionalism are limitation of powers, respect for the Constitution and the rule of law, and protection of individual and collective human rights, be they civil, political, social, economic or cultural rights (Rosenfeld 1994: 28).

The paper first revisits the notions of "public sphere," "African public sphere," and point to their relation to law, politics and ethics. It then considers some legal and political African instruments and the role played by the AU, NEPAD and the APRM to improve the governance of the African public sphere. It also assesses the contribution of the African organisation against the background of the review of democracy and good political governance in some countries that acceded to the APRM and in the light of the AU's responses to some crises of constitutionalism and democracy on the continent. The paper ends with a brief conclusion reiterating the importance of constitutionalism and democracy as underpinning values of law, politics and ethics in improving the governance of the African public sphere and stressing the role that African social scientists should play as intellectuals and African citizens in the process leading to the much claimed African renaissance.

2 Revisiting public sphere, the African public sphere and their relation to law, politics and ethics

As the debate during CODESRIA 12th general assembly is likely to demonstrate, defining the public sphere is a contentious issue and a terrain for enriching exchanges that will hopefully result in an African consensus on how African social scientists see the African public sphere and think its governance can be improved.

From a legal perspective, the definition of the public sphere can be related to the distinction made since Roman law – the *summa divisio* – between private and public law as the two main branches of law, each comprising its own internal sub-divisions.

Jurists generally define law as a set of binding rules and principles. Public law rules and principles are aimed at promoting public interest and governing the public sphere while private law is mainly concerned with the promotion and protection of private interests and governs the relationships in the private sector or sphere.

As a matter of principle, private law relationships are based on the principle of equality while those of public law are characterized by inequality between parties as public persons are not considered to be equal to private ones. The former contribute to setting up and enforcing the rules that the latter are generally required to comply with. On the other hand, private persons, which are mainly involved in private law relationships are said to be more preoccupied with their own (private) interests while public organs or persons are more concerned with public interest.

However, the distinction between public and private law has evolved. States and other public persons more and more engage in relationships with private persons where the search for a certain profit is not totally excluded. On the other hand, some private persons are more powerful than others and cannot be said to be equal to them. Moreover, they may perform activities of public interest. This has contributed to blurring the erstwhile distinction made between public and private law. Nevertheless, the distinction still retains its interest.

Public law is divided into domestic and international law. Domestic or national law consists of rules and principles that apply at the national level and govern the relationships among state organs or between them and individuals. On the other hand, public international law

governs the relationships among states and international organisations. The need to better protect the rights of individuals in the world has given rise to new international law disciplines such as international human rights law, international criminal law, and international environmental law. Public International law can also be divided into sub-regional, regional or universal law depending on whether its rules are set to apply at the sub-regional, regional or universal level.

In the light of the above distinction made in public law, the public sphere can be national or international (sub-regional, continental or universal). The African public sphere is the public sphere of African states taken individually or collectively as members of regional organisations or of the AU as the continental body to which all belong with the exception of Morocco.

As any public sphere, the African public sphere is subject to law, politics, and ethics. The law sets up general rules and principles of governance. Politics relates to the manner in which these rules and principles are actually enforced and how different actors behave themselves. Ethics refers to the moral principles that should govern their behaviour. Of particular importance is the ethics of the political leaders and public officials who play a crucial role in governing the public sphere. Such ethics is also based on the law and politics. Accordingly, law, politics, and ethics are closely related in governing the public sphere, including the African public sphere.

On the other hand, there is a dialectical relationship between the governance of a regional public sphere such as the African and the governance of the public sphere at the national level. A well governed and managed regional public sphere is likely to impact positively on the quality of governance of the national sphere and *vice-versa*, but there are also tensions that may arise between them. The same kind of relationships exists between the governance of the public sphere and that of the private sector.

Arguably, the African public sphere has changed tremendously since the creation AU, which superseded the now defunct Organisation of African Unity (OAU).

For many years after independence, democracy, constitutionalism and the rule of law were not given a pride of place in governing the African public sphere, which was subject to the

whims of the leaders and in which politics and ethics were mainly about the preservation of their personal interests rather than the promotion of the public good.

Also for decades, African leaders used to turn a blind eye to human rights abuses, corruption and *coups d'état* that characterised the governance of the African public sphere. Agreeing that a state's internal affairs were no one else's concern, many leaders plundered for personal gain, destroyed constitutional checks and balances and trampled on the rights of their citizens (Herbert & Gruzd 2008: 3). The establishment of the AU, NEPAD and the APRM introduced unprecedented change in the law, politics and ethics governing the African public sphere.

3 AU, NEPAD, the APRM and good governance in the African public sphere

The governance of the African public sphere is now premised on the AU, NEPAD and APRM instruments that promote good and democratic governance, free and fair elections, respect for human rights and the rule of law. These instruments include the AU Constitutive Act (Heyns & Killander 2006: 4-11), the NEPAD Declaration on Democracy, Political, Economic, and Corporate Governance (Heyns & Killander 2006: 290-306), and on APRM standards and codes of democracy and good political governance.

3.1. The AU and the Promotion of Constitutionalism and Democracy in Governing the African Public Sphere

The AU Constitutive Act was adopted in Lomé, Togo, in July 2000. It entered into force in May 2001. The inaugural meeting of the AU was held in Durban, South Africa, in July 2002. The AU Constitutive Act, the African Charter and the Protocol thereto establishing an African Court on Human and Peoples' Rights (Heyns & Killander 2006: 23-41), the Convention on Preventing and Combating Corruption (AU 2003; Heyns & Killander 2006: 76-80), and the Declaration on Unconstitutional Changes of Government (AU 2000; Heyns & Killander 2006: 85-88), the African Charter on Democracy, Elections and Governance (AU 2007), and other human rights related instruments constitute the law that is to apply and in terms of which politics is to be conducted, driven by a new ethics that is to be observed in governing the African public sphere.

The AU Constitutive Act is primarily a legal instrument. However, as the founding instrument of the African regional body, it is also political and contains ethical norms related to the governance of the African public sphere. It is worth focussing on this Act, which is the major legal instrument governing the African public sphere.

In the Preamble to the AU Constitutive Act, African Heads of State and Government stressed that they were

Inspired by the noble principles which guided the founding fathers of our continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and co-operation among the peoples of Africa...;

Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda...; and

Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law (AU 2001: Preamble; Heyns & Killander 2006: 4).

One would disagree on the binding nature of the preambles to legal instruments generally considered useful for the purpose of interpretation. However, they encapsulate the ideals and highlight the founding values of the instrument. They should not be read in isolation from the substantive provisions of the convention, especially the objectives and principles.

The objectives of the AU are, *inter alia*:

- to defend the sovereignty, territorial integrity and independence of its member states;
- to promote peace, security, and stability on the continent...;
- to promote democratic principles and institutions, popular participation and good governance;
- promote and protect human and peoples' rights and other relevant human rights instruments; and
- to promote sustainable development at the economic, social and cultural levels as well as the integration of African economies (AU 2001: Art 3 (b), (f)-(h); Heyns & Killander 2006: 5-6)

The AU is to function in accordance with a number of principles, including

- participation of the African peoples in the activities of the Union;
- peaceful resolution of conflicts among member states of the Union;
- prohibition of the use of force or threat to the use of force among member states;
- non-interference by any member state in the internal affairs of another state;
- the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- promotion of gender equality;
- respect for democratic principles, human rights, the rule of law and good governance;
- promotion of social justice to ensure balanced economic development;
- respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- and condemnation and rejection of unconstitutional changes of government. (AU 2001: Art 4 (c), (e)-(h), (l)-(p); Heyns & Killander 2006: 6)

If taken seriously, these objectives and principles were to impact positively on the governance of the African public sphere. Unfortunately, principles such as “non-interference in the domestic affairs” and “rejection of acts of terrorism and subversive activities” were likely to justify any violation of democratic principles and human rights. Moreover, exclusion is not envisaged.

The only sanction provided by the AU Constitutive Act is a “suspension” of governments which came to power through unconstitutional means that should not be allowed to participate in the activities of the AU. Member states can also be suspended for default in the payment of their contributions to the budget of the AU. Their right to vote or to nominate candidates to fill positions within the organisation can also be suspended (AU 2001: Arts 30, 23; Heyns & Killander 2006: 10, 9).

The AU established a number of organs to achieve its objectives and ensure a good governance of the African public sphere, namely the Assembly, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural

Council, and the Financial Institutions (AU 2001: Arts 5(1) - 22; Heyns & Killander 2006: 6-9). The Assembly as the highest organ can also decide to establish other organs. (AU 2001: Art 5(1); Heyns & Killander 2006: 6).

3.2. NEPAD, APRM, and the promotion of democracy and good political governance

3.2.1 NEPAD and the promotion of democracy and good political governance

3.2.1.1. NEPAD Base Document

The NEPAD Declaration (NEPAD 2001; Heyns & Killander 2006: 290-293) was adopted at the first meeting of the Heads of State and Government Implementation Committee of NEPAD in Abuja, Nigeria, in October 2001. This Declaration stresses that

African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and sub-regions and on the continent. (NEPAD 2001: par 71; Heyns & Killander 2006: 291)

Several initiatives were launched to promote democracy and good political governance under NEPAD. In order to strengthen political governance and build capacity to meet these commitments, the leadership of NEPAD committed to undertake a process of targeted capacity-building initiatives to focus on:

- Administrative and civil services;
- Strengthening parliamentary oversight;
- Promoting participatory decision-making;
- Adopting effective measures to combat corruption and embezzlement;
- Undertaking judicial reforms. (NEPAD 2001: par 83; Heyns & Killander 2006: 292)

3.2.1.2. NEPAD Declaration on democracy and good political governance

This Declaration was adopted by the AU Assembly of Heads of State and Government during the inaugural summit of the AU that was held in Durban, South Africa, in July 2002 (NEPAD 2002; Heyns & Killander 2006: 293-298).

In their declaration, the promotion of democracy and good political governance is the first of the four objectives that African Heads of State and Government participating in NEPAD agreed to work on together in policy and action. The three other objectives are economic and corporate governance, socio-economic development and African Peer Review Mechanism.

African Heads of State and Government also agreed to work with renewed determination to enforce:

- the rule of law;
- the equality of all citizens before the law and the liberty of the individual;
- individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the Constitution;
- equality of opportunity of all;
- the inalienable right of the individuals to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and
- adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments. (NEPAD 2002: par 7; Heyns & Killander 2006: 295)

In support of democracy and the democratic process, they agreed to:

- ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance;
- promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment;
- enforce strict adherence to the position of the African Union on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security;

- strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies, in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and credible;
- reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures; and
- heighten public awareness of the African Charter on Human and Peoples' Rights, especially in our educational institutions. (NEPAD 2002: par 13; Heyns & Killander 2006: 295)

In support of good governance, they committed to:

- adopt clear codes, standards and indicators of good governance at the national, sub-regional and continental levels...;
- ensure the effective functioning of parliaments and other accountability institutions in our respective countries, including parliamentary committees and anti-corruption bodies; and
- ensure the independence of the judicial system that will be able to prevent abuse of power and corruption. (NEPAD 2002: 14; Heyns & Killander 2006: 296)

To promote and protect human rights, African Heads of State and Government agreed to:

- facilitate the development of vibrant civil society organizations, including strengthening human rights institutions at the national, sub-regional and regional levels;
- support the Charter, African Commission and Court on Human and peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights;
- strengthen cooperation with the UN High Commission for Human rights; and
- ensure responsible free expression, inclusive of the freedom of the press. (NEPAD 2002: par 15; Heyns & Killander 2006: 296)

African leaders finally agreed to establish an African peer review mechanism (APRM) to promote adherence to and fulfilment of the commitments contained in the Declaration.

3.2.2 APRM and the promotion of democracy and good political governance

The APRM is a system of peer review to which states voluntarily submit themselves and receive feedback on their compliance with NEPAD governance standards, including political governance and human rights.

The APRM is NEPAD's linchpin. The review is based on the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance and is conducted on the basis of a number of standards and codes. The process of review itself consists of several stages.

3.2.2.1 APRM standards and codes of democracy and good political governance

As outlined in the Country Self-Assessment (APRM 2003; 2004; NEPAD 2004; Heyns & Killander 2006: 301-306), the APRM standards and codes of democracy and good political governance are made of international and regional instruments protecting human rights, preventing abuse of powers, combating bribery and corruption, and promoting the separation of powers, and democratic elections and constitutional changes of government.

Regional instruments include the Peace and Security Protocol and NEPAD framework documents. They also include declarations to promote democratic elections, to prevent and combat corruption, to prevent, manage and resolve conflicts, to promote security, stability, development and cooperation in Africa, and to control illicit drug trafficking and abuse. Unlike conventions, declarations are not directly enforceable or binding. To some extent, they can, however, be considered as embodying principles of customary international law, which is binding.

3.2.2.2 APRM review process

The APRM process is outlined in the APRM Base Document (APRM 2003a; Heyns & Killander 2006: 298-301). The mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

At the point of formally acceding to the peer review process, each state should clearly define a time-bound Programme of Action for implementing the Declaration, including periodic reviews. There are four types of reviews:

- The first country review is the base review that is carried out within 18 months of a country becoming a member of the APRM process;
- Then there is a periodic review that takes place every two to four years;
- A voluntary review that can be asked for by a member country, for its own reasons; and
- A review that can be instituted by participating Heads of State and Government in a spirit of helpfulness to assist the Government of a member country due to early signs of impending political or economic crisis in this country. (APRM 2003a)

Each of these four reviews consists of the following stages:

- Stage One will involve a study of the political, economic, and corporate governance and development environment in the country to be reviewed, based principally on up-to-date background documentation prepared by the APRM Secretariat and provided by national, sub-regional, regional and international institutions;
- Stage Two is Review Team's visit to carry out the widest possible range of consultations with the government, officials, political parties, parliamentarians and representatives of civil society organisations (including the media, academia, trade unions, business, professional bodies);
- Stage Three is the preparation of the Team's report, which must be measured against the applicable political, economic and corporate governance commitments made and the Programme of Action;
- Stage Four begins when the Team's report is submitted to the participating Heads of State and Government through the APRM Secretariat. The consideration and adoption of the final report by the participating Heads of State and Government, including their decision in this regard, marks the end of this stage;
- Stage Five is the final stage with the formal and public tabling of the report in key regional and sub-regional structures such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the Peace and Security Council, and the Economic, Social and Cultural Council (ECOSOC) of the AU. (APRM 2003a: pars 15-26; Heyns & Killander 2006: 298-301)

The duration of the review process per country should not be longer than six months, commencing on the date of the inception of Stage One up to the date the report is submitted for the consideration of the Heads of State and Government.

Funding will be provided by contributions from participating member states. To enhance the dynamism of the process, the Conference of the participating countries will review the APRM once every five years. (APRM 2003a: par 27: Heyns & Killander 2006: 301)

So far the review process has been completed for five countries only, namely Ghana, Rwanda, Kenya, Algeria and South Africa.

4. Assessing the AU contribution to promoting law, politics and ethics in the governing of the African public sphere

An assessment of the contribution that the AU has made to promote law, politics and ethics in governing the African public sphere can be made in the light of the review of democracy and good political governance in some countries participating in the APRM and of the AU's responses to crises of constitutionalism and democracy in Africa.

4.1. APRM review of democracy and good political governance in participating AU members states

A review of democracy and good political governance in a country participating in the APRM is based on its compliance with the APRM standards and codes on the one hand and with the NEPAD objectives on the other hand.

4.1.1 Compliance with APRM standards and codes

Almost all the countries reviewed have ratified or adopted the major UN and AU instruments listed among the APRM international and regional standards and codes.

However, the country review reports found that some important international conventions still needed to be ratified and those already ratified were not incorporated in the domestic system to become enforceable in some countries (Mangu 2007: 368, 369). In some cases, countries had made reservations to these international instruments, making some of their provisions unenforceable. In other cases, despite the fact that international instruments had been incorporated, there was a demonstrable lack of enforcement capacity and countries had not complied with their reporting obligations.

In general, the most common problems in relation to international and regional standards and codes of democracy and good political governance are tardiness of countries in acceding to them, poor reporting or failure to report timely on their implementation; and inadequate domestication (Mangu 2007: 369).

4.1.2 Compliance with NEPAD objectives

Peer review under the APRM is also based on compliance with the NEPAD objectives, which involve law, politics and ethics.

4.1.2.1 Objective One : Prevention and reduction of intra-and interstate conflicts

Ghana was commended as a stable country and an oasis of peace in an otherwise volatile sub-region that had been characterised by violent conflicts, insecurity and instability as well as for its contribution to sub-regional and international peacekeeping. (APRM 2005a)

South Africa was also commended for its peaceful transition from an authoritarian and racial state under apartheid to a united, democratic and constitutional country and for its contribution to peace-keeping in other African countries such as Burundi and the Democratic Republic of Congo (APRM 2007).

Several African countries, which were reviewed, are still confronted with internal conflicts. In Kenya, for instance, violent post-electoral conflicts that erupted demonstrated that Kenya was far from being an “Island and haven of peace for the region” it was accredited for (APRM 2006). In Rwanda, reconciliation between Hutu and Tutsi still needs to be achieved.

Accordingly, despite commending Rwanda for establishing a National Unity and National Reconciliation Commission to reconcile its people, as South Africa did after Apartheid, the Country Review Mission advised the government to deepen its national reconciliation effort. (APRM 2005b) However, the Country Review Mission was silent on the involvement of Rwanda in the Democratic Republic of Congo, which continues to accuse this country of invasion and interference in its domestic affairs.

The South African government also did little to prevent and even stop the deadly xenophobic attacks that people from other African countries suffered in May 2008. Against this background, the African public sphere has been affected by violent conflicts, whether armed or not, intra or interstate.

4.1.2.2 Objective Two: Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizens' rights and the supremacy of the Constitution

Each country reviewed under the APRM proclaims itself a constitutional democracy and adopted a constitution as the supreme law of the land. The Constitution generally provides for the rule of law, citizens' rights, and the organisation of periodic, free and fair elections. All these countries have actually held several elections in a recent past or plan to organise new ones in the near future.

However, the fact of having a constitution does not imply that a country complies with the principle of constitutionalism, as Okoth-Ogendo rightly pointed out (Okoth-Ogendo 1991: 3-25). On the other hand, elections have not always been regular, free and fair. They rather resulted in what Claude Ake referred to as a process of "voting without choosing" (Ake 1996: 137), which led to what Thandika Mkandawire termed "choiceless democracies" (Mkandawire 1999: 119-135)

Elections-rigging to secure a *de facto* one party-system resulting into chronic political violence in these countries, repeated violations of the Constitution and human rights enshrined therein, and constant attacks on the judiciary are clear evidence that this second objective of NEPAD is also far from being achieved. The same goes for its third objective.

4.1.2.3 Objective Three: Promotion and protection of civil, political, economic and social rights

The adoption of several human rights instruments has not resulted in Africa becoming a paradise for human rights. Despite some progress that has been made to promote civil, political, economic and social rights since the creation of the AU and the establishment of NEPAD and its APRM, the violation of these rights continues unabated in many African countries.

4.1.2.4 Objective Four: Upholding the separation of powers, including the protection of an independent judiciary and an effective legislature

Many African constitutions provide for the separation of powers between the executive, the legislature and the judiciary. In fact, these constitutional provisions are not complied with. Real politics has been characterised by the confiscation of powers by the executive, the

ineffectiveness of a legislature whose main task is to rubber stamp its decisions, and by the lack of independence of the judiciary that tends to act as its judicial arm.

4.1.2.5 Objective Five: Ensuring accountable, efficient and effective public office holders and civil servants, and promoting the development and participation of civil society and the media

Public office holders and civil servants are the main actors in the public sphere. For many years, the governance of the African public sphere has suffered from lack of accountable, efficient and effective public office holders and civil servants, which manifested through corruption, embezzlement, and abuse of power. Yet, improvement in the governance of the African public sphere requires such accountable, efficient and effective public office holders and civil servants.

The participation of civil society and the media is also crucial to promote their accountability, efficiency and effectiveness. Many African countries have passed legislation and adopted international instruments in order to achieve this objective.

The findings of the APRM teams unfortunately demonstrate that public office holders and civil servants in these countries remain unaccountable, inefficient and ineffective. On the other hand, autonomous civil society and media that would help promote their accountability are inexistent or underdeveloped. The result is poor delivery and widespread corruption that need to be combated in governing the African public sphere.

4.1.2.6 Objective Six: The fight against corruption in the public sphere

Corruption remains a major governance problem in Ghana, Rwanda, Kenya, and South Africa (APRM 2005a; 2005b; 2006; 2007) and in the rest of the African continent. APRM country review missions condemned the interference of the government in the work of the anti-corruption body or of the judiciary in Ghana, Kenya, and South Africa, especially when high-ranking public office holders and political leaders were involved.

Although South Africa was commended for enacting legislation to enforce the citizens' right to access to information, the APRM country review mission found that the government and public officials were reluctant or unwilling to provide such critical information required in an open and democratic society.

4.1.2.7 Objective Seven: Promotion and protection of the rights of women

Countries such as Rwanda (APRM 2005b) and South Africa (APRM 2007) were commended for promoting the participation of women in public life and their civil and political rights. However, despite their large presence in the government or in Parliament in some countries, their participation remains marginal due to a number of factors, including lack of capacity. Women are discriminated against *inter alia* on the grounds of sex and marital status.

Violence against women, sexual harassment, and rape are other forms of violations of their civil rights. Furthermore, women are particularly affected when social and economic rights such as the rights to education, work, housing, and healthcare, are violated, women are infringed.

4.1.2.8 Objective Eight: Promotion and protection of the rights of children

In many countries, children suffer the same fate as women. Despite some progress, their rights continue to be violated, especially in times of war and armed conflicts. They are equally victims of violence and even appear to be more vulnerable than women.

4.1.2.9 Objective Nine: Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees

By and large, Africa is the continent with the highest number of refugees and displaced persons in the world. This is due to chronic political violence, armed intra- and interstate conflicts, political instability, violations of civil, political, economic and social rights, authoritarian rule, and absence of regular, competitive, free and fair elections. Contrary to the conventional belief, most African refugees live on the continent, as they cannot afford to emigrate from Africa. Vulnerable persons include migrant workers, asylum seekers, the elderly, disabled, and people from minority groups whose rights are also routinely violated despite the adoption of several human rights instruments.

APRM missions recommended, for instance, that countries such as Ghana and South Africa review their internal capacities and constraints to cater for the rights and needs of internally displaced people, migrant workers, the aged, people living with and children orphaned by HIV/AIDS while Rwanda should engage an in-depth dialogue with the Batwa minority. (APRM 2005a; 2007, 2005b)

In addition to the above findings and recommendations to achieve the NEPAD objectives, APRM panels identified and made recommendations on some cross-cutting over-arching governance issues to improve the governance of the African public sphere. These issues included capacity constraints and the marginalisation of women (Ghana, Kenya), corruption (Ghana, Kenya, South Africa), decentralisation, land issues (Ghana, Kenya, South Africa), unemployment (Ghana, Kenya, South Africa), poverty and wealth distribution (Kenya, South Africa), managing diversity in nation building (Rwanda, Kenya, South Africa), transformative leadership (Kenya), poor implementation of government policies and programmes (Kenya, South Africa), external dependency and over-reliance on external policy analysis and aid (Ghana, Rwanda), political pluralism, separation of powers and protection of the rights of the vulnerable groups (Rwanda).

4.2 AU's responses to crises of constitutionalism and democracy in Africa

As stressed earlier, respect for democratic principles, human rights, the rule of law, and good governance, promotion of gender equality, condemnation and rejection of unconstitutional changes of governments feature prominently among the objectives and principles of the AU, which also reserves the right to intervene in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. On the other hand, the APRM standards and codes as well as the NEPAD objectives set the rules, contain the principles and encapsulate the ethics to be observed in governing the African public sphere.

Unfortunately, despite the rhetoric and tons of declarations and commitments made or international instruments adopted, the AU has not adequately responded to all African crises of constitutionalism and democracy. These include the ongoing genocide in the Darfur province of Sudan, the violations of the Constitution, human rights and the rule of law established as a golden rule of governance in many African countries, elections-riggings or unconstitutional changes of governments in countries such as Zimbabwe or Mauritania, unfinished political chaos in Somalia, persistence of royal absolutism in Swaziland, *de facto* one party system, life presidency or “presidential monarchy” in countries such as Angola, Burkina Faso, Cameroon, Egypt, Equatorial Guinea, Gabon, Libya, or Tunisia, to name but a few. With the exception of a few successful stories of intervention, the AU's response to African crises has been disappointing.

Also disappointing are the responses that the AU and its member states have reserved to findings of the APRM teams or missions. The AU did not react strongly and preferred “quiet diplomacy” when the APRM missions concluded that countries had failed to comply with the APRM standards and codes or the NEPAD objectives and did not even show a demonstrable will to rectify the shortcomings in the governance of the public sphere. On the other hand, apart from AU member states such as Ghana and Kenya (APRM 2005a; 2006) that welcomed the findings and committed to do everything possible to comply in order to improve the governance of the public sphere, the remaining countries that were reviewed engaged in some sort of confrontation with the APRM, contesting almost all findings to justify their governance and bringing into question the principle of their participation in NEPAD and their adherence to the APRM.

5. Conclusion

The governance of any public sphere, whether national or regional as the African public sphere, is subject to law, politics, and ethics. The paper argued that for many decades after independence, authoritarianism inspired law, politics, and ethics in Africa and resulted in a poor governance of the African public sphere both at the national and the continental levels and good governance should be based on constitutionalism and democracy. The AU Constitutive Act, NEPAD and the APRM instruments lay down the foundations for such a shift into law, politics and ethics in governing the African public sphere.

As far as law is concerned, despite the large number of instruments that have been adopted in order to improve the governance of the African public sphere at the national and the regional levels, some critical standards and codes are still to be adopted, those adopted are hardly domesticated or enforced and relevant legislation need to be passed for their implementation. In many cases, the lofty objectives and principles entrenched in the AU Constitutive Act, NEPAD and the APRM instruments aimed at promoting democracy and constitutionalism remain dead letter. In many countries, African leaders’ commitment and re-commitment to democracy and good political governance, as expressed in many legal and political instruments, is contradicted in deeds by non-compliance with these instruments as dictated by real politics inspired by a leadership style admittedly slow to adapt to change in governing the African public sphere.

Constitutionalism, democracy, and the rule of law are still to be established and consolidated throughout the African continent. Constitutions are violated. The principle of the separation of powers is hardly complied as the executive tends to confiscate all powers and undermines the judiciary and the legislature. There have been several unconstitutional changes of governments. Vote-rigging is still the cardinal rule of the electoral game and has resulted in political violence and instability. Intra- and interstate conflicts persist on the continent.

Corruption is also rampant in the African public sphere. The civil society, including independent media, has been marginalised by public office holders and civil servants to avoid accountability. Individual and collective human rights, including civil, political, economic and social rights have been infringed, especially the rights of women, children and other vulnerable groups such as the elderly, disabled persons, asylum seekers, refugees, and migrant workers. War crimes, genocide and crimes against humanity have also been perpetrated in some countries. In most of these cases and for various reasons some of which could not be faulted on the African organisation, the AU has not been up to the challenges. It failed to adequately address the situations that negatively impacted on the governance of the African public sphere at the national, sub-regional or regional level.

This paper should in no way be seen as an anthem to celebrate Afro-pessimism. Since the creation of the AU, the establishment of NEPAD and the launching of its APRM, law, politics and ethics in Africa have undergone tremendous change and substantial progress has been made to improve the governance of the African public sphere. However, there are still problems and challenges that should be taken seriously by African people in general and African social scientists in particular.

As African citizens and social scientists committed to the idea of an African renaissance, we should work through knowledge production and action ensure that law, politics and ethics are developed and promoted to improve the governance of the African public sphere both at the domestic and at the continental levels. Social science is responsibility and social responsibility. But much so is citizenship. As African intellectuals and citizens, we should recommit to constitutionalism and democracy and actively engage to ensure that they are established and consolidated throughout our continent for the greatest benefit of our peoples. Accordingly, we should work for or sustain change in law, politics, and ethics that would promote a better governance of the African public sphere that can only be constitutional, democratic, and human rights centred. Such legal and political governance of the African

public sphere is also likely to impact positively on economic and corporate governance or on the governance of the African private sphere.

NOTE

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