

# **SAIIA OCCASIONAL PAPERS SERIES**

Analysing key policy and governance issues  
in Africa and beyond



## **UNCHECKED EXECUTIVE POWERS: LESSONS IN EFFECTIVE GOVERNMENT DESIGN**

Professor Ahmed Mohiddin

Number 1, May 2008

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## Other publications

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### Abstract

Without checks and balances, the executive branch of government will inevitably dominate governance structures. This tendency has been particularly pronounced in Africa, in part because countries inherited the structures of the colonialists and then proceeded to adapt them to the norms and needs of their own cultures without ensuring effective restraints on power along the way.

Executive dominance encouraged a trend to monopolistic power and abuses of executive authority, and ultimately was responsible for the cult of the 'Big Man' – the unchallengeable leader – in many African countries.

Professor Ahmed Mohiddin argues that a major challenge confronting good governance in Africa is how to constrain executive power and balance its discretionary authority while not diluting its ability to fulfil its constitutional obligations or its political mandate. The African Peer Review Mechanism (APRM) has put a spotlight on the problem.

Now solutions are needed. An effective legislature and judicial system are essential as counterweights, he says, and need to be bolstered. But he believes that another key lies in the hands of Africa's vibrant civil society institutions.

Poverty, illiteracy and ignorance of the real role of government have kept ordinary people in awe of authority, and made them subservient. Properly armed with information about the obligations that governments have to their citizens, effective civil society organisations can better call the executive to account, leading to better governance and greater human rights.

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## Introduction

Government is essentially a collection of people working within the institutions of governance – executive, legislature, judiciary and other agencies – using organisational methodologies and guided by the norms, traditions, values and political culture of their own society. Effectiveness depends on the people who control the institutions.

Governance is about power: how it is used, and why, and for whose interests. It is also about decision-makers: how they make decisions and how they can be made accountable for them.

As historian and moralist Lord Acton wrote in 1877: ‘Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men.’ The tendency of the executive branch to monopolise power and abuse discretionary authority has been universally observed throughout the ages. A major challenge confronting good governance in Africa is how to constrain executive power and balance its discretionary authority while not diluting its ability to fulfil its constitutional obligations, its political mandate or its effective performance. Constitutional and governance reforms have attempted to reinforce checks and balances. Yet the tendency to executive dominance remains a concern in Africa.

This paper touches on governance and related issues, providing a context for meaningful discussion of the tendency to executive dominance, and analyses the underlying reasons for this tendency. It then briefly outlines the African Peer Review Mechanism (APRM), and the conclusions from early reviews that although core structures are in place to ensure separation of powers, and reforms have tried to strengthen checks and balances, the tendency of the executive to dominate continues. Finally, it explores some of the underlying reasons and outlines what needs to be done.

## Unpacking governance

Governance is the art and skill of using collective power to manage public affairs. It is a comprehensive and holistic process. Art and skills are the products of knowledge, information, education, culture, values, historical experiences, motivations, competence and commitment to goals. Steering collective power very much depends on underlying constitutional principles, political objectives and the needs and aspirations of the people. Governance goes beyond the mere mechanics of ruling – governing, administering, allocating resources, ordering and regulating. It is a process that facilitates the release of energies, enterprise, trust and commitment, leading to efficient management that meets the needs of the people. Governance is ubiquitous. It plays a role in both public and private sectors; in small and large organisations; in village, district and city councils; in religious and cultural institutions and social and welfare societies, football clubs, community-based organisations (CBOs) and non-governmental organisations (NGOs); in small and large business enterprises.

Governance is conducted via inter-dependent institutions. Some of these structures (or domains) are critical to basic declarations by the New Partnership for Africa’s Development (Nepad). The declarations deal with four main thematic areas examined in the APRM: democracy and political governance, economic governance and management, corporate governance and socio-economic development. How these structures are organised and how they do their jobs are all subject to peer review under the APRM.

For the purpose of this paper, we can identify six operational structures. They are:

**Political governance**, involved with the participation of citizens in the decision-making processes that affect their lives and livelihood.

**Administrative governance**, concerned with implementing public policies and decisions and establishing frameworks to deliver goods and services.

**Economic governance**, concerned with the allocation of economic resources to promote growth, wealth and job creation, equity and human development.

**Corporate governance**, an aspect of economic governance specifically concerned with the working of the private sector – regulatory framework, corporate ethics and responsibility, accountability to shareholders, and relations between employers and employees.

**Civic governance**, involved with the working of civil society, relationships between voluntary and non-profit civil society organisations, and between them and the government. These organisations have their own agendas, and are not dependent on government support or pleasure. However, to the extent that civil society is part of a wider whole, it is influenced by, and has influence over, structures of governance.

**Systemic governance**, concerned with the convergence of all domains and processes of governance. It brings together government, private sector and civil society in an effective decision-making framework.

Governance is conducted by people within institutions and organisations. The people are guided by laws and cultural and traditional values, and inspired by political and ideological considerations. To better understand the dynamics – and to recognise conditions that are likely to encourage or constrain executive dominance – it is useful to group these principles and institutions in clusters, in terms of their inter-related functions. Each cluster plays an important role in sustaining the governance process, *but not necessarily in ensuring good governance*.

What is conducive to good governance is if institutions work in unison, reflect the values of the people and serve their general welfare. This typically happens when underlying principles are respected and the institutions belong to the people, are run by the people and act for the benefit of the people.

**Constitution:** The constitution is the source of authority and legitimacy for all key players in the governance system – government, private sector and civil society. It defines the powers of government and prescribes the procedures by which laws and regulations are made, and how and when they should be used. It embodies the principles of separation of powers, rule of law, due process, and independence of the judiciary

**Civil society:** As it consists of people who promote interests independently of government, it provides a counterweight to government excesses. Because politicians in democracies appeal to the population for votes, civil society can exert some influence on the composition of government and the character of its policies.

**Private sector:** The major engine of economic growth, wealth, employment and income creation – and hence the major source of government revenue – the private sector plays a critical role in ensuring that government delivers essential social services. The availability of these services is a major contributor to the legitimacy and effectiveness of the governance system. More importantly, the private sector empowers individuals and groups to be self reliant and independent, enabling them to monitor government performance.

**Public service:** Civil servants are largely responsible for implementing policies and for the administration of the country. In democracy, politicians are transient, depending on the electoral winds. Civil servants, by and large, remain even when the military takes over or political parties are voted out of office. So they are powerful agents of governance.

**Media:** By reporting on domestic and global issues, identifying abuses of power and failures of accountability and circulating the views and opinions of citizens, the media empower the people to debate issues and make intelligent decisions on policies and their implementation.

**Policy researchers:** Think-tanks and research institutes play a very important role in critiquing the conventional wisdom of those in key governance positions. They can identify abuses of power and collect and interpret data from home and abroad that enable citizens to make informed decisions about government actions.

**Democracy:** Simply put, democracy is a system of governance in which people participate in the decision-making processes that affect their lives, irrespective of race, colour, ethnicity, region or religion. It ensures government by consent; government that is accountable and transparent.

### **Executive dominance in African governance systems**

It is important to recognise that modern African governance systems are largely the products of anti-colonial struggles for self-determination and independence, and built on the systems imposed by the mainly British, French or Portuguese colonisers. These systems were subsequently modified drastically to respond to post-colonial

challenges of nation building and development, one-party and military regimes, continuous global challenges and the expectations of emerging generations.

Although all post-colonial constitutions entrenched the principle of separation of powers, the performance of the post-colonial state did not conform to the classical Weberian ideal. Unmindful of the constraints pertaining to public offices, and in the absence of effective institutional checks, state or non-state political leaders and ranking civil servants expanded their powers and authority. There are several reasons why the executive tends to monopolise power and discretionary authority. The following analysis is derived largely from the *2005 African Governance Report* produced by the United Nations Economic Commission for Africa in Addis Ababa, which was also the major source of data for the APRM in the preparation of the background and issues papers by the continental APRM Secretariat, as well as a key source for the self-assessment exercises.

The executive initiates laws, rules and regulations, and ensures compliance. It prioritises issues and policies to be discussed and thus controls the type of laws generated by the legislature and their implementation.

Supported by the civil service, it is the main provider of public goods and services, including security and defence. It is also responsible for law and order. It formulates and implements public policies, controls major material and financial resources, mobilises people and provides employment. It estimates public revenue, prepares the national budget and allocates funds.

The executive appoints bureaucrats, directors of national institutes, heads of parastatal bodies and watchdog bodies (including the ombudsman, human rights commissions, anti-corruption commissions and anti-fraud institutions). It thus effectively controls the bureaucracy, ordering the working lives of ranking civil servants. In a highly centralised system with a strong executive presidency, like Kenya, the executive appoints all important administrative positions. It appoints the chief justice, judges and magistrates and controls the judiciary's budget. It has the constitutional power to dissolve the legislature at its own discretion, thus perpetually threatening the legislators and undermining the independence and effectiveness of the legislature. In such circumstances it is very difficult for the legislature to check the powers or regulate the discretionary authority of the executive. In Ghana, for example, Article 78 of the Constitution empowers the president to appoint as many members of parliament as ministers or assistant ministers as he considers necessary, thus potentially diminishing the independence of the legislature and its powers to check the executive.

Although constitutional powers are essential to legitimise the role of the executive, there are inherent temptations for abuse.

Irrespective of structures and entrenched principles, constitutional provisions may be undermined by crude political realities. A ruling party with an overwhelming majority is likely to undermine the effectiveness of the legislature in checking the executive.

In Ethiopia's federal system, the ruling Peoples Revolutionary Democratic Front has had an overwhelming majority in parliament, and is thus able to manage and control the parliamentary proceedings and legislative outputs.

In Kenya, before the December 2002 elections, the independence of the legislature was undermined and its capacity to check the executive severely weakened because the ruling party – the Kenya African National Union (KANU) – had an overwhelming majority and had ruled for more than three decades. The large ruling-party parliamentary caucus also enabled the executive to amend the constitution at will. Kenya's powerful presidency is the consequence of incremental constitutional amendments introduced under one-party rule.

In Ghana, the executive enhances its dominance by co-opting legislature members into junior government portfolios.

These are political realities and the downside of democratic processes without political conventions. The majority is not obliged to concern itself over minorities or opposition. But it is also a reflection of the weakness and lack of commitment of the opposition in the legislature, which is often more concerned with personal interest than the interests of its constituencies.

## Institutional capacity

In a democratic governance system, the legislature debates national issues and major concerns of particular communities; articulates grievances of the people and pleads for rectifications; and calls to account the relevant authorities. The judiciary ensures that justice is done, and seen to be done. The legislature and the judiciary are thus expected to play important roles in monitoring and checking the powers and discretionary authority of the executive. While day-to-day executive functions are performed by civil servants, ultimate constitutional and political responsibility rests with the political leaders.

The extent to which the executive is called to account thus depends on the efficiency and effectiveness of the judiciary and the legislature. But in many cases these institutions lack the capacity that would enhance their independence and competence.

## Legislature

- **Limited independence:** In many African countries the executive dominates, using various methods to subdue the legislature – including intimidation, financial squeeze and patronage. Examples include Madagascar, Swaziland and Uganda
- **Lack of basic facilities and infrastructure:** In several African countries – such as The Gambia, Malawi and Zambia – legislators have inadequate office accommodation and lack basic electronic equipment to facilitate the flow of information and communication, and thus enhance efficiency.
- **Poor financial resources:** The effectiveness of legislatures in many African countries has been undermined by inadequate financial resources. For example, the Malawi parliament can afford to assemble for only between eight and ten weeks in a year.
- **Support personnel:** There is a lack of trained, professional and dedicated support staff to collect and analyse data and information into meaningful knowledge for the legislators to use in debates or committee work. Due to inadequate funding, it has not been possible to attract qualified staff or to retain them. It is a serious problem in many African legislatures, including Egypt, Kenya, Mali, Senegal and Zambia.
- **Low levels of education and low understanding of their jobs:** In general, African legislators tend to have low levels of education in relation to their expected performance. Many have inadequate comprehension of the role of parliament, and their own roles as representatives of the people and custodians of the national interest. Parliaments in Ethiopia, Kenya and Lesotho, among others, exemplify this trend.
- **Weak legislative committees:** Committees are meant to consist of people drawn from the major political parties in the legislature who have the requisite experience to critically examine proposed legislation. A variety of factors contribute to weak committees. They include insufficient education or commitment, inadequate support staff and the fact that executive patronage, not excellence, dictates appointments.
- **Lack of organised and effective opposition parties:** Parliamentary opposition parties are generally weak, undisciplined and lacking in ideological or political commitment. Members are vulnerable to executive co-optation. This was prevalent for example in Kenya before the 2002 elections, Botswana, Ethiopia and Uganda

## Judiciary

As with the legislature, the judiciary's ability to check the executive depends on capacity, which depends in turn on two factors: what the executive thinks is adequate to its needs in terms of resources, and the environment in which it operates.

- **Limited independence:** In many African countries the independence of the judiciary is eroded because the executive largely determines the appointment of senior judges, magistrates, judicial officials and ranking civil servants. Secondly, the executive branch is also responsible for their remuneration, promotion and working conditions, as well as their budget. And finally, the executive is likely – or perceived to be likely

– to affect career prospects, and thus the independence of the incumbents. This has contributed to the phenomenon of the ‘executive-minded’ judiciary that anticipates the wishes of its masters in some African countries.

- **Limited effectiveness:** Poor remuneration and working conditions have seriously undermined the professionalism, morale and ethical integrity of senior judges and magistrates. Thus demotivated, many have become susceptible to corruption and vulnerable to manipulation by the executive, thus undermining the integrity and effectiveness of the judiciary as a whole.

### **Non-state actors**

Shortages of funds and trained and dedicated people have severely undermined the performance of non-state organisations. In some African countries, the working environment is hostile as governments perceive such organisations to be enemies whose activities must be closely monitored and regulated - for instance in Egypt, Ethiopia and Kenya.

### **Political culture**

Historically, the executive has been the most powerful institution of governance, from the pre-colonial chieftaincy through the colonial era, one-party rule in the post independence period and up to recent times. So powerful has the executive been that it has given rise to the African phenomenon of the ‘Big Man’, ‘The Chief’, ‘Mzee’ – a single man so powerful that the entire governance system appears to depend on his capabilities and whims.

It is arguable that, with the expansion of the political space and democratisation, executive dominance has been gradually contained. The authoritarianism of the one-party government has been replaced by multi-party rule and good governance, and the dictatorships of the likes of Idi Amin, Bokassa, Mobutu and Sani Abacha are horror stories of the past.

Nonetheless, the cult of the ‘Big Man’ is still alive in Africa, albeit withering away under the onslaught of vibrant civil society and vigilant media.

### **The potential of peer review**

Among the objectives of the APRM are to promote policies and practices likely to lead to peace and political stability, high economic growth and sustainable human development. To meet these objectives it requires participating countries to conform to Nepal’s basic declarations on democracy and political governance, economic governance and management, corporate governance, and socio-economic development, and to adopt appropriate policies. With regard to democracy and political governance, the main objectives are: to facilitate a participatory exploration of key governance issues and problems related to development and democratisation; to promote appropriate policies and programmes; and to mobilise human and material resources.

Countries complete a Country Self-Assessment Report (CSAR) in a national process of research and consultation, and prepare a national Programme of Action (POA) to address identified governance deficiencies. An external group of African experts, the Country Review Team, then comes to the country to verify that the process was fair and rigorous, and that the report covers the key issues. Once the reports are tabled at heads of state level, the POA is implemented and reported on annually.

Reports emerging from the APRM process so far have revealed several common governance challenges in African states. These include the tendency of the executive to dominate other branches of government (and indeed society as a whole); institutional capacity deficiencies and neglect in capacity development; lack of respect for constitutions and constitutionalism; and a residual one-party political culture of authoritarianism and the ‘Big Man’ cult.

The national process of the APRM, coupled with the work of the Country Review Mission, provide a comprehensive insight into the performance of the governance system in Africa. Both should involve wide-ranging discussions.



They clarify issues and attempt to arrive at common understanding of the challenges confronting governance and possible ways to deal with them.

The exposure has revealed extensive and hitherto inaccessible information on the workings of governance that has humbled those in power, exposing their political vulnerability and sensitising them to the need to be more accountable, transparent and responsive. It has demystified governments and exposed the human faces controlling them. It has thus empowered and strengthened the confidence of the people, as human beings entitled to basic human rights and as citizens with rights and obligations. The APRM has, as it were, released the genie from the bottle. The people are now aware of their constitutional and political rights and better organised to protect and promote them. They are also more likely to be vigilant on executive abuse of power.

The APR process has legitimised the role of non-state actors in governance systems. But it has also exposed them to marginalisation, manipulation, deepening dependency and government harassment. Some non-state actors who were very active during the pro-democracy movements, for example in Kenya and South Africa, have been marginalised and intimidated because of their continued, legitimate, criticism of incumbent regimes.

Nonetheless, non-state actors now know that they have unique opportunities to play an important role in evolving African systems: promoting democracy and good political governance, empowering people and ensuring that they are vigilant and committed to identifying abuses of power. On the whole, the APR process has strengthened the role of non-state actors and, indeed, civil society. This sector is the major source of all the ingredients – human and material – needed to promote Nepal's objectives: economic growth, sustainable human development, alleviation of poverty and promotion of democracy and good governance. Civil societies are vibrant all over Africa. The potential to constrain the executive is there in abundance. But they need improved capacity and organisation and creative partnerships.

### How the powers are separated

Separation of powers in a governance system is necessary to ensure that the major institutions – legislature, executive and judiciary – are independent and perform effectively.

In essence, checks and balances are designed to constrain the dominance of one institution, the executive particularly, and to inhibit any tendency to abuse power and discretionary authority. The core structures are:

- **The Constitution**, which is the source of authority for all actors in the governance system. It affirms the supremacy of law, ensuring that no one is above it.
- **The judiciary**, supported by the courts and the necessary resources. It upholds the Rule of Law and due process, and thus the administration of justice.
- **The legislature**, consisting of elected representatives and constitutionally obliged and politically mandated to promote national interests, articulate grievances and check and balance the executive.

These core structures are in place in African governance systems, together with vibrant civil societies and vigilant media. While they appear functional, they are not as effective as similar structures in non-African systems. Why? Modern African systems are colonial creations that have been substantially amended to suit the ambitions and visions of a series of political and military leaders. The modern African state is thus, quintessentially, a cluster of adopted institutions – governance, socio-economic, cultural and the like – operating under a constitution. It is managed according to procedures and conventions originating in colonial times and adapted to African political, cultural and traditional realities.

It is basically an issue of imposed or borrowed systems operating under corrupted or bastardised practices. Notions of collective, or ministerial, responsibility are acknowledged, 'question time' is adopted, and the 'loyal opposition' is tolerated in many African governance systems – but the manner in which they are practised is something else.

In general, all institutions take time to mature and become effective. Political institutions adopted from different political cultures take even longer. Procedures and conventions need time to be understood and integrated into an

emerging culture that is constantly evolving as political leaders contest for power. In evaluating effectiveness, other factors need to be considered, like the status of the structures and the way in which they operate:

- Are they respected and obeyed, particularly by the major actors?
- Are they widely understood and accessible to the people who might need their services, or are they shrouded in awe and mystery?
- How accessible are the courts, and court officials, to ordinary, illiterate citizens? and
- How do people perceive the legislature? A place where their grievances can be addressed, or a place for those who could get more for themselves?

Structures ensuring separation of powers are essential but not sufficient to provide checks and balances in Africa. Missing are constitutionalism and supportive institutional conventions, political will and commitment. In many African countries, constitutions contain eloquent proclamations of intention, but the political will for action and adjudication is lacking.

Not enough time has been allowed for governance conventions to evolve in Africa, nor for a political commitment to grow. Conventions are products of a long historical process, of people sharing experiences, building trust and developing national consensus. It is such conventions that inhibit excessive use of a political majority in parliament. It is the conventional wisdom of people that defines notions of personal responsibilities - what is wrong and right - and distinguishes theft from possession. In some African countries a leader can be convicted in the capital for stealing public funds and yet be proclaimed a hero in his/her village for the hospital built from those funds. Reciprocity rather than legality is still the foundation of many African societies. Loyalty is to the visible existing person, not to an abstract principle. Group solidarity and consensus are more valued than independence or individual judgments. Ethics about public property or services vary from country to country. In most African countries misappropriation or executive abuse are routinely tolerated, as long as the perpetrator is 'one of us' and not 'them'.

### **What needs to be done**

The work of the APRM so far, and the more comprehensive AGR 2005, reveal that the executive tendency to dominate is still a factor in many African governance systems. APRM, a work in progress, has already exposed the manner in which systems are managed. What lessons can be learnt? What can be done to strengthen checks and balances, to ensure that the powers and discretionary authority of the executive – provided for by the constitution, mandated by voters – are not abused? What needs to be done to make the institutions work?

In the final analysis, governance is about how people manage their affairs collectively. And government is basically a collection of people managing institutions of governance. In a democracy the people are the authors of the rules that govern them, the public policies designed to improve their lives. The people – as bureaucrats, public servants, soldiers, policemen, doctors, teachers, etc. – implement public policies. And, as individual citizens or organised groups, they are the beneficiaries or victims of such public policies and executive actions.

For people to perform these functions, they need to be empowered by knowledge and information. In particular, they need to know what governments are constitutionally obliged to do, and how they can go about getting their government to do its duty. In other words, to call to account the people in power. Unaware of the purposes of their own governments, deferential to those responsible for service delivery, ignorant of their rights – such things have caused people to tend to subservience to authority and alienation from public affairs. Illiteracy and poverty have disempowered them. Perceiving government as all-powerful and untouchable, it is understandable why people have been fearful of authority and have accepted a tendency for executive dominance. Properly informed, they are likely to be more confident and vigilant in protecting their rights. Some will be able to blow the whistle on failures to deliver on electoral promises. Others will identify abuses of power and human rights violations. All will be able to participate more effectively in formulating policies that benefit their communities; and in designing governance institutions that are meaningful to them and effective in solving their problems.



## **African Perspectives. Global Insights.**

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