

ACCOUNTABLE GOVERNMENT IN AFRICA

Perspectives from Public Law and Political Studies



Edited by **DM Chirwa & L Nijzink**

Accountable Government in Africa

**Perspectives from public law and
political studies**

EDITORS

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**United Nations
University Press**

TOKYO • NEW YORK • PARIS



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Chapter 1

Accountable government in Africa: Introduction

Danwood M. Chirwa and Lia Nijzink

1. Overview

This book addresses a key issue that confronts emerging democracies in Africa: how to make governments accountable. Combining insights from public law and political studies, the specific focus of this edited volume is on various institutions and mechanisms of accountability, their effectiveness in holding governments to account and how these institutions themselves are being held accountable. The judiciary, national prosecuting authorities, human rights commissions, political parties and informal mechanisms are critically assessed in terms of their contribution to 'accountable government'. The book also discusses different sources of accountability that are specifically relevant in the context of Africa's young democracies.

The contributions to this volume fall into two categories: chapters discussing legal and political developments in a particular country and chapters that take a comparative perspective. All chapters benefit from the extensive experience of the authors in the areas and countries of their research interest. Collectively, these chapters present research findings from 10 African countries that are directly relevant to the broader policy goal of developing and deepening democracy and accountable government on the African continent.

The 16 chapters in this book are presented in a way that emphasises the notion of government accountability as a concentric circle. The book starts with a critique of the notion of accountability itself, questioning whether formal mechanisms of accountability are sufficient to ensure accountable government. It then looks at the Constitution as a source of accountability and draws our attention to the importance of the constitution-making process. Why do some processes of constitutional reform fail to produce a Constitution that embodies sufficient values and adequate mechanisms of accountability while others succeed?

The book then moves to the core branches of the state and examines various aspects of the functioning of judicial and legislative bodies. What explains the effectiveness of African judiciaries in facilitating the accountability of governments? What is the role of the judiciary in setting and enforcing norms of accountability in relation to electoral processes? What is the role of judicial review of legislative action in a constitutional democracy?

The circle subsequently expands to include specialised bodies such as national prosecutorial authorities and national human rights institutions. Here, questions arise as to who should determine whether it is in the public interest to prosecute and how those entrusted with such decisions should be held accountable. What conditions are necessary for national human rights institutions to perform their watchdog functions effectively and how have such institutions worked in practice?

The next circle investigates the role of political parties. Does the practice of floor crossing enhance or undermine the accountability of Members of Parliament (MPs)? Why are some political parties more effective than others in holding the executive to account? Is there a relationship between intra-party democracy and the ability of political parties to serve as sources of accountability?

Finally, in the outer circle, informal mechanisms and interventions of international agencies to promote accountability are discussed. What is the interplay between formal and informal mechanisms of accountability, and between domestic and external forms of accountability? How do culture, traditions, customs and local institutions facilitate or impede formal procedures, norms and institutions of accountability? Do external forms of accountability reinforce or undermine internal forms of accountability?

2. Scope and significance

Africa is arguably a continent where the problem of 'accountable government' remains most stark. The decolonisation process of the 1960s promised an era of self-rule and independence in which the new governments would be both responsive to the needs of the people and accountable to them (see, eg, Jennings 1963). Yet the regimes that decolonisation gave birth to did not meet that promise. One-party and military dictatorships mushroomed throughout the continent (see, eg, Southall 2003). Governments not only retreated from the relatively modest accountability structures that were established by the Constitutions adopted at independence but also undermined the few accountability structures they had decided to retain (see, eg, Okoth-Ogendo 1991). The democratic wave of the 1990s resuscitated the public's yearning for greater accountability and resulted in better constitutions.

However, making governments in African states accountable remains a huge challenge. The reasons for this challenge are legion and complex. Some are historical and revolve around external factors such as the colonial legacy (Owusu 1992), the Cold War (Marte 1994; Laidi 1990) and neoliberal economic policies (see, eg, Mhone 2003). Others relate to internal factors such as civil wars, military dictatorships, ethnic-based politics, corruption, the lack of a vibrant civil society and poverty (see, eg, Shivji 1991; Davidson & Munslow 1990; Adelman 1998). It is not the aim of this book to investigate why ‘accountable government’ remains stubbornly elusive in African countries. Rather, this book seeks to contribute to an understanding of the dynamics of this problem.

Owing in part to the fact that ‘accountability’ cuts across many disciplines and subjects within each discipline, the concept of accountable government in Africa tends to be dealt with in piecemeal fashion, often in the context of country or sub-regional studies that focus on select themes. In constitutional law, for example, the issue of ‘accountable government’ is often considered indirectly within debates about constitutionalism, the separation of powers, judicial independence, human rights, etc (see, eg, Oloka-Onyango 2001; Fombad & Murray 2010; Hatchard et al 2004). In political studies, accountable government features in discussions about political parties and electoral systems, legislative bodies, civil society, etc (see, eg, McNeil & Mumvuma 2006; Nijzink et al 2006; Salih & Nordlund 2007). Other disciplines, such as economics, anthropology and public administration, have also dealt with aspects of accountable governance in African countries, albeit often in isolation from other disciplines.

This book is unique in that it treats the notion of accountable government as a cross-cutting and multi-disciplinary theme. Drawing on the two main fields — public law and political studies — that are by their very nature particularly interested in ‘accountable government’, it has accountability as its main subject of inquiry. The specific focus of this book is on the nature and workings of various institutions of accountability and the role they play, or ought to play, in holding governments to account. It examines the ways in which institutions — such as the judiciary, national human rights institutions (NHRIs) and national prosecutorial authorities — foster horizontal accountability between different organs of state, while also analysing institutions, such as political parties, which promote vertical accountability of the government to its people. Furthermore, the book examines how governments are held accountable to external or international actors and the ramifications this has for domestic accountability in African countries. While most of the chapters discuss formally established institutions of accountability, some explore the role of informal mechanisms, such as family groups, town chiefs, and local norms and standards, and the interplay between these and formal mechanisms. Finally, this book discusses

different sources of accountability that are specifically relevant in the context of Africa's young democracies: Constitutions and constitutionalism, cultural norms and practices, and international accountability assistance. Because of its multi-disciplinary approach and its understanding of government accountability as a concentric circle, this book deals with the notion of accountable government more comprehensively than others do. Although it does not deal exhaustively with all the institutions and sources of accountability, we hope that the book will improve our understanding of accountable government in Africa.

It is axiomatic that an accountable government is inherently good. We need governments to account for the manner in which they allocate and spend public funds, make public policy and take decisions, which affect the people in whose name they govern. Accountability is needed to ensure fairness, equality and equity in public decision-making (Behn 2001). Without accountability, governments cannot respond effectively to the needs of the people or set national agendas that are relevant and address current and important problems. We also need an accountable government to avoid abuses of power and corruption (Olowu 1994), and to break the networks of neopatrimonialism and nepotism, which remain pervasive in African politics. An accountable government is better able to fulfil its constitutional mandate, provide public services, and implement public policies, priorities and legislation in a fair, responsive and efficient manner (Chawatama 2009).

While this book addresses issues of accountability that arise throughout Africa, it does not specifically cover all the countries on the continent. Country-specific chapters focus on Ghana, Malawi, Mali, South Africa, Tanzania, Uganda and Zambia, while comparative chapters include further references to Mozambique, Kenya and Swaziland. The choice of the country studies or mechanisms of accountability is a result of the interests and expertise of the various chapter authors and was largely influenced by the composition of the academic partnership under which this book was conceived: the 2007–2010 South–North partnership between the University of Cape Town, the University of Dar es Salaam and the University of Warwick, generously funded by the Development Partnerships in Higher Education (DeLPHÉ Programme) of the British Council and the UK Department for International Development. The aim of this partnership was to build on existing expertise at the partner institutions to accumulate comparative knowledge that would contribute to deepening democratic governance and accountable government on the African continent. Most of the authors of the chapters in this book are members of the three partner institutions, although efforts were made, within the limits of the funding that was available, to include authors from a greater number of African countries. In July 2009, the partnership organised a conference about 'Sources of

Accountability on the African Continent’ at the University of Cape Town, where a range of papers was presented. Selected papers are published in this book.

3. Defining ‘accountable government’

What is an ‘accountable government’? Despite the ubiquity of the word ‘accountability’ in common parlance and political rhetoric, its actual meaning is not straightforward. The meaning of ‘accountability’ depends on time, context, cultural orientation or ideological persuasion. ‘Accountability’ is also a contested term because of disagreements about the standards that should be used for holding actors accountable and because of the wide range of players and actors to which the term is applied.

However, all the chapters in this book proceed from the premise that ‘accountability’, in the context of the exercise of public powers, entails at least three major elements. First, it denotes the responsibility of the power holder to answer for the exercise of his or her powers — *answerability*. This, in turn, means two interrelated things: that the power holder must explain how his or her powers were exercised and justify the manner in which they were exercised; and that the power holder must be transparent in the way that he or she exercises his or her powers (see, eg, Burnell 2008; Hyden 2010).

Second, accountability requires public authorities to act in a manner that responds adequately to the needs and expectations of the public — *responsiveness* (Hyden 2010). It does not require or justify a paternalistic interpretation of the needs of the public and a top-down imposition of solutions, as was the case during the dictatorial era in Africa. Rather, responsiveness requires that people participate in public decision-making so that they can express their views and contribute to the design, development and implementation of public policies and laws and to the determination of disputes.

Third, accountability also entails the imposition of some form of sanction if the power holder fails to answer for the exercise of his or her powers or if he or she is unresponsive in the manner described above — *enforceability* (Burnell 2008). Examples of the sanctions that are commonly used to enforce accountability include dismissal, criminal prosecution, civil remedies in courts of law, disqualification from public office, electoral censure through the ballot and public opprobrium.

‘Government’ can be defined as the body that is vested with the authority to exercise public powers within a state. It includes all organs of government — the executive, legislature and judiciary, and all other institutions, bodies and agencies that exercise public powers. An ‘accountable government’ is therefore a government whose organs, institutions and agencies are open, transparent and responsive, explain or justify their acts and omissions, and enforce standards of

accountability when maladministration, an error of judgement, abuse of power or injustice occurs.

Government accountability in the African context occurs at two broad levels: domestic and external. *Domestic* government accountability is, in turn, of two types: vertical and horizontal. *Vertical accountability* occurs when the government or its organs, institutions and agencies are called upon to explain and justify their decisions to the public. This is typically done through elections, whereby citizens elect their representatives to Parliament in periodic elections — *electoral accountability*; through public decision-making, public participation, public protests, and actions of the media and civil society that expose government wrongdoing — *societal accountability* (Hyden 2010; Smulovitz & Peruzzotti 2000); and at the individual level, whereby public authorities give reasons for decisions that affect specific individuals or groups — *individual or group accountability*. *Horizontal accountability* occurs at the intra-governmental level, when one organ, institution or agency of government holds another to account. For instance, the executive and legislature are subject to judicial control for the exercise of their constitutional and statutory powers, while the legislature provides a check on the executive. Institutions such as the Ombudsperson, Auditor-General and NHRIs serve as important horizontal accountability mechanisms. In practice, the distinction between horizontal and vertical accountability is not clear, because, as the chapters in this book will demonstrate, all institutions that seek to foster government accountability are themselves also required to be accountable to the public for the manner in which they perform their watchdog functions and, indeed, some provide a mechanism by which the government is held directly accountable to the public.

Like domestic accountability, *external accountability* takes different forms. The first is inter-governmental accountability, which happens through international, regional and sub-regional bodies created by states, such as the United Nations, the African Union and the Southern African Development Community. Accountability at such inter-governmental forums occurs within a framework of the norms and procedures specifically agreed to by the states concerned. The more controversial type of external accountability is accountability to international donors. This form of accountability is tied to donor assistance received by African governments from donor countries or international financial institutions, such as the World Bank and the International Monetary Fund. It is a controversial form of accountability, because it occurs on a level unregulated by either international or domestic law and because it has a tendency to undermine or sidestep domestic accountability mechanisms. The nature and implications of this form of accountability are considered in detail in chapter 16.

4. The chapters in this book

The idea of an ‘accountable government’ is certainly not uncontested (see, eg, Haque 2000). Indeed, this book begins with a critique of contemporary notions of accountability. Andrew Nash (chapter 2) powerfully argues that our current understanding of accountability reflects a neoliberal way of thinking, which reduces accountability to a set of formal processes enforced by professionals such as lawyers and politicians on behalf of ordinary people. As a result, accountability is limited and elitist in character, deepens the chasm between the holders of public power and ordinary people and erodes ethical community. Tracing the transformation of the concept and practice of accountability in South Africa since the 1970s, Nash emphasises the importance of shared ethical values and citizens’ active participation in public decision-making.

Neo Simutanyi (chapter 3) echoes this conclusion and underscores the significance of meaningful and active public participation in constitution-making. Constitutions are important sources of government accountability because they are the supreme source of legal authority for the exercise of public powers. A Constitution that vests unlimited powers in public authorities cannot yield an accountable government. Not only do Constitutions define the powers of all organs, institutions and agents of government, they also prescribe the relationship, including checks and balances, between state organs *inter se* (horizontal relationships) and between state organs and citizens (vertical relationships). Simutanyi draws our attention to the importance of the constitution-making process. Tracing Zambia’s constitutional history from independence to date, he demonstrates that constitution-making and reform have largely been dominated by the ruling elite and have ignored the views of the public. Simutanyi attributes some of the key accountability deficits that exist in Zambia to its troubled history of constitution-making.

The next three chapters examine the role of an important mechanism of horizontal accountability—the judiciary. Siri Gloppen and Fidelis Kanyongolo (chapter 4) analyse the role that the judiciary in Malawi and Uganda has played in ensuring free and fair elections. Discussing various theories to explain the assertive role of the courts in both countries, they argue for a multi-factor explanation which takes into account the historical and socio-political context, the institutional architecture of judicial independence, and differences in the individual characteristics of judges. Jwani Mwaikusa (chapter 5), looking at the relations between Parliament and the judiciary in Tanzania, examines the role that judicial review has played in holding the legislature to account. According to Mwaikusa, the doctrine of parliamentary supremacy has in the past been used as a smokescreen for abuses of the legislative authority of Parliament.

However, since its adoption in 1984, the notion of constitutional supremacy has enhanced the accountability of the Tanzanian legislature, although it has at times heightened tensions between the legislature and the judiciary. Hugh Corder (chapter 6) follows with a similar analysis of the role of judicial review in South Africa. He demonstrates that the concept of constitutional supremacy has been used by the Constitutional Court in South Africa to hold the government to account for the manner in which it enacts legislation. Significantly, not only has legislation itself been subjected to judicial scrutiny but so too has the procedure of enacting it. South African courts have underscored the need for Parliament to ensure adequate and meaningful public participation in law-making. In a sense, therefore, this chapter echoes Nash's point that formal mechanisms of horizontal accountability should not preclude or undercut direct, participatory mechanisms of accountability.

As noted earlier, there cannot be accountability if the power holders are not liable to some form of sanction in the event of a failure to account for the exercise of their powers. Criminal prosecution serves as an important and ultimate form of sanction. Abuse of state resources can lead to charges for theft, fraud, financial mismanagement and other crimes. Failing to perform a public duty and accepting bribes while exercising public powers also constitute corruption. Through criminal prosecution, abuse of public resources and corruption can be stopped. At the same time, prosecutorial authority is an important public power that is prone to abuse by prosecutors and political leaders. In Africa, examples of the political abuse of prosecutorial powers are legion (see, eg chapter 4). It is therefore important that the prosecutorial authority is independent, effective, fair and efficient.

Philip Stenning (chapter 7) reviews the controversy surrounding prosecutorial decisions in cases of high-profile defendants in a number of countries. His chapter discusses the important questions of who determines whether it is in the public interest to prosecute such defendants and who should have the ultimate authority to determine what the public interest requires in such cases. Is it the independent prosecutors, politicians or the court, or a combination of all, or some, of these? How can we ensure that prosecutorial discretion in such cases is protected from unwanted partisan influence and that prosecutorial authorities are themselves held to account? In chapter 8, Sifuni Mchome examines recent developments in Tanzania concerning the establishment of a modern prosecutorial system. Underscoring the importance of separating the prosecution from the investigation, he draws attention to the practical steps that need to be taken to ensure a truly independent, fair and efficient civilian prosecution system in Tanzania. Although Mchome welcomes the new system,

he flags some vital concerns about the independence of the office of the Director of Public Prosecutions in Tanzania.

The next two chapters deal with a relatively new mechanism of accountability, that of NHRIs. NHRIs have become an important mechanism for closing the gap between public authorities and ordinary citizens. Not only are they more accessible to the public than the courts, the procedures of NHRIs are informal, flexible and short, hence better able than judicial remedies to respond to individual and systemic human rights violations proactively and retrospectively. Since they operate as a horizontal mechanism of accountability, NHRIs are well placed to work closely with state organs to address human rights concerns and other accountability problems.

Danwood Chirwa and Redson Kapindu (chapter 9) examine the factors that guarantee an independent and effective NHRI. After an analysis of the experience of the Malawi Human Rights Commission, they propose some ways in which NHRIs can maximise their accountability function and complement other institutions of accountability, such as the judiciary. In a similar vein, Pierre de Vos (chapter 10) discusses the so-called Chapter 9 institutions of South Africa and grapples with two key questions: whether NHRIs can be truly effective in promoting human rights and holding the legislature and executive to account without being guaranteed the institutional independence the judiciary enjoys; and, if not, what kind of independence could guarantee that these institutions perform their accountability function effectively? Drawing on the report of the South African Parliament's Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions, De Vos recommends a robust yet limited model of independence for these institutions.

Chapters 11 to 13 shift to an examination of the role of political parties in fostering government accountability in Africa. Lia Nijzink (chapter 11) considers the implications of the practice of floor crossing for the accountability of political representatives to their political parties and the electorate. Comparing the legal framework and experience of floor crossing in Malawi and South Africa, she argues that floor crossing is inimical to the vertical accountability of elected representatives in both first-past-the-post and proportional representation electoral systems. Augustine Magolowondo (chapter 12) and Nandini Patel (chapter 13) underscore the significance of intra-party democracy as a building block of government accountability. While Patel examines the dynamics of the problem of intra-party democracy in Malawi, Magolowondo investigates the extent to which formal mechanisms, such as party constitutions and party rules governing membership, funding, election of leaders, discipline and other party affairs, enhance intra-party democracy in East and Southern Africa.

Any study on government accountability in Africa would be incomplete without examining the role that informal mechanisms or factors play. Two chapters in this book address the importance of informal norms and local understandings of accountability. Looking at the impact of Mali's decentralisation programme on local communities, Martin van Vliet (chapter 14) explores the interplay between formal and informal incentives for holding local authorities accountable. He demonstrates that, although local elections create opportunities for vertical accountability, culturally shaped informal relations determine local citizens' ability to hold their representatives accountable. Diana Cammack (chapter 15) also emphasises the importance of culturally shaped local forms of accountability. She presents findings from fieldwork about MPs in Ghana and town chiefs in Malawi that demonstrate the existence of a multitude of sources and overlapping forms of accountability, including those rooted in informal, unwritten but shared understandings of culture and tradition. This chapter also suggests that, while factors such as poor information flows, large power differentials and clientelism hinder accountable government in Africa, some hybrid forms of local leadership have the potential to forge a degree of accountability that is comparable to that generated by formal institutions of accountability.

The final chapter by Peter Burnell looks at the external accountability enforced by donor countries, which ironically also aim to strengthen domestic mechanisms of accountability. This chapter investigates the tensions, paradoxes and ambiguities raised by accountability assistance, as conceived and implemented by donor countries. Burnell emphasises the need for international development organisations and African governments to develop relations that advance democratic accountability within African countries, instead of bolstering relations of external accountability or domestic arrangements that do not advance democracy.

These chapters provide valuable insights into the nature of the problem of 'accountable government' in Africa, describe the extent to which various formal and informal mechanisms of accountability work in practice, and identify ways in which African governments can be made more accountable. We hope that this book will be useful to scholars and students in public law and political studies, politicians, civil society, international organisations and other actors interested in democracy and the rule of law in Africa.

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Accountable Government in Africa: Perspectives from public law and political studies

Published in 2012 in South Africa by UCT Press

An imprint of Juta and Company Ltd

First Floor Sunclare Building

21 Dreyer Street

Claremont, 7708

South Africa

www.uctpress.co.za

© 2012 UCT Press

Published in 2012 in North America, Europe and Asia by

United Nations University Press

United Nations University, 53-70, Jingumae 5-chome,

Shibuya-ku, Tokyo 150-8925, Japan

Tel: +81-3-5467-1212 Fax: +81-3-3406-7345

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United Nations University Press is the publishing division of the United Nations University.

The views expressed in this publication are those of the authors and do not necessarily reflect the views of the publishers.

ISBN 978-1-91989-537-6 (Southern Africa)

ISBN 978-92-808-1205-3 (North America, Europe and South East Asia)

Library of Congress Cataloging-in-Publication Data

Accountable government in Africa : perspectives from public law and political studies / editors: Danwood M. Chirwa, Lia Nijzink.

p. cm.

Includes bibliographical references and index.

ISBN 978-9280812053 (pbk.)

1. Africa—Politics and government—1960– 2. Government accountability—Africa. I. Chirwa, Danwood Mzikenge. II. Nijzink, Lia.

JQ1875.A7218 2012

352.3'5096—dc23 2011040863

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Cover design: Comet Designs

Language Editor: Rae Dalton

Proofreader: Lee-Ann Ashcroft

Indexer: Cliff Perusset

Typesetter: Exemplarr

Printed in Hong Kong

Typeset in 10.5 pt on 13 pt Minion Pro

This book has been independently peer-reviewed by academics who are experts in the field.

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Accountable government is crucial for the socio-economic and political development of African states and peoples. The theme of accountable government in Africa has nevertheless been under-researched, especially from an interdisciplinary perspective, and inadequately appraised in the light of evidence on the ground. Combining insights from public law and political studies, this book critically examines various institutions and mechanisms of accountability, including constitution-making processes, national prosecutorial authorities, the judiciary, national human rights institutions, political parties, informal mechanisms of accountability and external accountability assistance.

This book brings together the work of leading experts from the continent and beyond and covers legal and political developments on accountable government in a number of African countries, including Ghana, Malawi, Mali, South Africa, Tanzania, Uganda and Zambia. It is the most up-to-date perspective on democratic governance and accountable government on the continent.

"This is an excellent manuscript. The chapters are well written, discuss a coherent topic and make a significant contribution to the governance literature."

—Muna B. Ndulo, Professor of Law and Director of the Institute for African Development, Cornell University Law School

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ISBN 978-92-808-1205-3
460p US\$42.00



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University Press

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