

Chapter 2

Translating Commonwealth Values and Principles into Democratic Practice

2.1 Constitutionalism and democracy

Ultimately, sovereignty rests not with the head of state or the ruling party but with the people. The exercise of political power should flow from the will of the people. In a representative democracy, this is discovered through contested elections that are regular, fair, credible and inclusive.

Constitutionalism

Constitutionalism, which is the foundation on which such a democracy is built, is the idea that – once elected – a government should be legally limited in its powers, and that its authority in continuing to exercise these powers depends on observing such limitations. The litmus test of constitutionalism is curbing the unfettered (or endlessly extended) exercise of government power and ensuring respect for the rule of law.

The constitution should seek to articulate and entrench the fundamental principles and values on which a country is to be governed.¹ It should commit a country to democracy and include a guarantee of the right to participate in the political process without discrimination; the right to vote in secret, form political parties and stand in elections; and the freedom to hold rallies and to receive and impart information. It should determine, in outline, when, how and by whom elections are to be conducted.

There are clear advantages of including in the constitution both the principles on which a country's democracy is to be based and the nature of its electoral administration. The constitution, in articulating a people's political rights and the mechanisms through which such rights are to be realised, provides an indispensable protection against the erosion of democratic legitimacy.

A country's constitution – which sets such limits by defining the form of government and establishing the rules and limitations of the relationship between the executive, the legislature and the judiciary – is there to protect the sovereignty of the people. This separation of powers requires a constitutional dispensation designed to ensure the legitimacy and integrity of these three branches of government and their ability to curtail each other's discretion, thus making arbitrary and abusive rule impossible.² The three branches of government must work to complement each other while, at the same time, holding each other in check.

In particular, it is the role of the judiciary, not politicians, to interpret the constitution and to ensure that it is respected.

Constitutional change

Ill-considered constitutional change, especially when driven by short-term or selfish political interests, can destabilise the democratic process. Writing or amending the constitution, therefore, should only take place on the basis of a clear national consensus, following wide consultation, and normally supported by a two-thirds majority in parliament or a plebiscite. Such safeguards are there to protect a country from succumbing to arbitrary or undemocratic rule.

In countries where a dominant political party forms the government over an extended period of time, particularly when the ruling party commands a two-thirds majority in parliament, it is important that members and supporters of the party, the parliamentary and any extra-parliamentary opposition, and civil society in general, remain especially alert to constitutional changes that may erode the people's political rights.

Giving democratic rights legal sanction

While the fundamental character of a country's democratic system is provided for in the constitution, the rights which the constitution promulgates need to be embodied unambiguously in statute law. Likewise, the details of its electoral arrangements, which may change over time, need to be dealt with in legislation and by regulation. Such legislation should, of course, always remain consistent with the principles and values of the constitution.

In most Commonwealth countries, and indeed in the majority of countries globally, the body responsible for election management is itself established through the constitution – which adds to the authority and prestige of the institution. In others, however, including some long-established democracies, such matters are dealt with under statute law.³

2.2 Elections

It is by holding credible elections to determine who will have a mandate to rule, and to elect those who will be responsible for passing legislation and for holding the government to account, that it becomes clear whether or not a country is truly democratic.

Elections are the litmus test of democracy

Elections, since there is so much at stake for so many individuals and interest groups, are inevitably fraught with tension and potential for actual conflict. Not surprisingly, therefore, they often provide the litmus test for democracy. It is the moment one can see most clearly if people are really able to exercise their fundamental human rights in regard to freedom of association and expression. In practice, however, these freedoms are sometimes so constrained, hedged or even abrogated, especially by the executive arm of government, that the process can lose much of its democratic character.

A lack of respect for the basic principles of democracy – accountability, openness, candour, public disclosure, honesty, fairness and respect for the law, which needs to apply equally in all sectors of society – means that some governments come to power (or remain in power) with at best tainted legitimacy.

Respect for the legal framework

The constitutional, legal and institutional framework for elections needs to reflect the values, culture and history of each society. It must be consistent with a country's regional and international obligations, reflecting the Commonwealth's core values and principles, and should provide a strong bulwark against legitimising fundamentally flawed elections. It is for this reason that the legal framework must at all times be respected, both in letter and in spirit.

In designing such a framework, it is important to be explicit about the principles and values on which it is to be constructed. Justice demands, for instance, that the worth of each person's vote should be of broadly equal value. This criterion may have consequences for choices about the design of the electoral system or the mechanisms used for drawing up electoral boundaries. These are not just 'technical' issues, because bad decisions may have unjust or perverse consequences. It is important, therefore, that there should be wide and informed public debate on such matters.

Elections must then be organised in strict accordance with these national laws, rules and procedures. Any material deviation from the law, or from the regulations or the electoral calendar established under the law, opens an election to potential challenge. Any substantive lack of compliance with the legal framework should not be tolerated.

This is not to say, of course, that minor infringements of the regulations, especially during the heat of an election campaign, should be used to undermine an otherwise credible election. The test is whether or not any failure to follow the letter of the legislation or regulations arose from an election management body's desire to protect the political rights of voters or candidates; whether it was applied fairly to all; whether any such failure materially disadvantaged particular candidates or parties; and whether or not such infringements in practice unfairly influenced the outcome of an election.

Confusion is the friend of the manipulator

The overall authority and responsibility of an election management body to deliver credible elections should be spelled out clearly in the constitution or in statute but, equally importantly, its specific powers and responsibilities need to be clearly articulated in legislation. The election management body should be empowered to issue regulations on the conduct of an election without political interference.

Those who might wish to manipulate the electoral process often seek to create confusion and uncertainty about the legal framework, regulations and practical arrangements for elections. The involvement of a multiplicity of agencies, especially when they have unclear or overlapping mandates, is also a recipe for such confusion and manipulation.

Competence

An election is a complex – and expensive – logistical and administrative undertaking, which must be completed within a strict and inflexible timeframe. By the time an election takes place, huge numbers of electoral staff may have to be mobilised, trained and deployed. Sensitive and non-sensitive electoral materials must be made available to (and retrieved from) polling stations in remote areas in a timely and secure fashion.

Therefore, high-level management and professional skills are essential in order to guarantee that all this happens competently and efficiently. Even seemingly small administrative failures can have a disastrous impact on the credibility of an election.

Freedom to participate

The election management body must be able to sequence and control this complex array of interrelated processes and activities: the registration of political parties; the delimitation of electoral boundaries; the registration of voters; the nomination of candidates; overseeing the election campaign and the fairness of media coverage (especially in regard to the public broadcaster); and polling, the counting of votes and the transmission of results.

If this were not difficult enough, all these activities must be undertaken under the glare of public scrutiny. Political parties, candidates, voters and civil society bodies in general must be allowed – indeed encouraged – to follow these many processes carefully. Efforts to constrain such participation unfairly through administrative or bureaucratic means or, more seriously, through intimidation, violence or the threat of violence, must never be tolerated.

Voter information campaigns are important to ensure people understand the mechanics of the electoral process, especially where and how to register and vote. Where necessary, voter and civic *education* can play an important role in helping to build confidence in the integrity of the electoral process overall, and in ensuring that people understand and are able to exercise their democratic rights.

Complaints and disputes

During these processes, infringements of the electoral law, or of any codes of conduct, need to be dealt with quickly and judiciously; and, after the results have been announced, petitions against the election outcome need to be addressed and determined speedily. It is essential, however, once the full results have been published, that parties are given reasonable time to prepare and submit such petitions.

The legal framework, therefore, needs to provide mechanisms for dealing with electoral complaints and disputes that are timely, transparent and impartial. At times, there is the risk that the normal court system fails to provide effective redress. Dedicated election tribunals, or administrative action on the part of the election management body, often linked to mediation, are more likely to be effective. Electoral

complaints, whether dealt with by the election management body or through such tribunals, need to apply a 'civil' rather than a 'criminal' standard of proof.

Those whose political rights have been trampled upon deserve speedy and effective redress – it is not sufficient that such matters should be left until the election has become a fact of history.

2.3 Role of the election management body

Whether or not an election management body is established through the constitution or by statute, it needs clearly and unambiguously to be above the fray. Why? Because experience shows that this is the best way to guarantee a fair election.

Creating a level playing field

Elections, if they are to be credible, must provide an open and fair contest among all those political parties (and individuals) who wish to compete for office – treating those who occupy government positions on an equal basis with the opposition.

Independence is essential if the election management body is to establish such a level playing field for elections. All parties, and candidates, must be treated equally. The rights of citizens not just to vote, but also to hear from and interrogate those seeking electoral office need to be respected. Parties must be permitted to campaign peacefully without interference from the state. An election must be a competition among political parties, and candidates, not an unequal contest between the state on the part of the ruling party and the opposition. In a contest of that nature, only one side is ever likely to win and, given its evident unfairness, this provides fertile ground for future conflict and instability.

Control of the electoral process

Experience, including within the Commonwealth, shows that the best way to achieve a fair contest is by creating a truly independent, constitutionally protected and well-resourced election management body with effective control over all important aspects of the electoral process. Where other institutions are involved – for instance, for the delimitation of electoral boundaries – it is essential that the election management body be fully involved in their work. The election management body must assure itself, and reassure society in general, that these activities have been undertaken in a fair and transparent manner.

Non-partisan

Those responsible for running elections must, in the first place, ensure that the electoral administrators under their authority, as well as electoral staff recruited for registration or polling, are both non-partisan and competent. Election managers and staff, from the highest to the most junior, must fully understand and accept the absolute requirement to behave with impartiality and fairness at all times.

Open and candid

The election management body must be completely open and candid in regard to its own procedures and activities. To this end, it must establish effective lines of communication with all important stakeholders, notably the political parties and candidates, through which all aspects of the electoral process can be discussed. The onus is on the election management body to make available all relevant information and documentation, so as to ensure absolute confidence in the electoral process.

Taking responsibility

Normally, an election management body is constitutionally tasked with conducting elections that are, in the time-honoured though problematic phrase, 'free and fair'. To the extent that inadequacies in the electoral framework make it difficult – if not impossible – to meet this standard, it should be the responsibility of the election management body to bring such concerns to the appropriate authorities.

Accepting election results

In the end, it is the willingness of political parties to accept the results of an election as fair, and therefore to recognise the legitimacy of a new government, which marks real success on the part of the election management body. Such legitimacy provides the basis for any such new government to assert its authority and makes political co-operation possible.

The costs of failure, on the other hand, where the outcome of an election is seriously challenged, can be devastating to peace and social harmony, and may well foreshadow long-term conflict and instability. Economic and social development is likely to be stymied in the event that a government comes to power without the requisite democratic legitimacy.

Political parties and their supporters will be more inclined to accept the results of an election if the election management body is generally seen as being impartial and competent: the higher it is held in public esteem, the more difficult it is for parties to dispute the fairness of the elections it conducts.

Of course, this need not always be the case – and parties may reject the result of an election whatever the qualities of the election management body, even if the electoral environment is generally regarded to have been fair. In such circumstances, it is a matter for the state and for local, regional and international opinion not to waver in defence of constitutional proprieties.

2.4 Conclusions

The temptation to seek unfair advantage in the competitive environment of an election is commonplace. It is essential, therefore, to have in place robust structures which ensure that the costs of succumbing to such temptation is too high, even for the most powerful.

This is not easy to achieve. A country can have a perfectly acceptable constitutional and legal framework, establish a nominally independent election management body, which speaks the language of democratic propriety, while at the same time, for instance, allowing the ruling party to manipulate the system to such an extent that other stakeholders lose faith in the electoral process.

Other countries, by dint of respect for traditional conventions, or the moral leadership provided by a charismatic leader, can deliver perfectly credible elections, even though they lack the most sophisticated management systems or an adequate constitutional framework.

It is, therefore, essential that there should be a robust national debate about these issues. Sometimes those in authority may not fully comprehend the constraints that a functioning democracy needs to place on those who seek to wield power on behalf of the people.

Either way, an informed, educated and mobilised electorate can do much to achieve compliance. In this regard, appeals to international standards, including those of the Commonwealth, are crucial for those struggling for reform to promote credible elections.

Professional politicians, and other public servants, need to understand and accept that their ability to influence the electoral process will be constrained by the election management body. For that to be the case, the threat of robust action in response to misconduct or malpractice must be credible.

Notes

- 1 Not all Commonwealth countries can point to a single constitutional document. The United Kingdom, for example, a constitutional monarchy, has no codified constitution. Its 'unwritten' constitution is the sum of various laws and principles. These laws and conventions concern both the relationship between the individual and the State, and the functioning of the legislature, the executive and judiciary. Parliament (or, technically, The Queen in Parliament) is sovereign, rather than any law or constitution,
- 2 See: *Commonwealth Principles on the Accountability of and the Relationship between the three branches of Government*. These principles – endorsed by member governments – were developed with the support of the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association.
- 3 The United Kingdom, for instance, created an Election Commission by statute in 2001. Although independent, it has very limited competence, confined mainly to regulating political parties and election finance. The Commission also sets performance standards for returning officers and referendum counting officers, and has a statutory duty to produce reports on the administration of certain elections (for example, UK parliamentary general elections) and may be asked to report on other types of election (such as local government elections). The Commission, therefore, does not meet the normal standards of a truly independent election management body. Elections in the UK, which are administered by the local authorities, are widely respected as credible by stakeholders. In contrast, the Election Commission of Namibia, although also created by statute, is a more fully-fledged and independent election management body.