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Constitutionalism in Africa

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INTRODUCTION

A continental constitutional and juridical order must be sought within the broader framework of constitutionalism. The reason for this assertion is that it is trite knowledge that constitutions exist yet abuses continue. Importantly, the constitutional and juridical framework which should be informed by constitutionalism is the one currently in existence in the form of the African Union, since as South African President Thabo Mbeki puts it, “Before you put a roof on a house, you need to build the foundations”.¹ Current institutions should be strengthened and developed rather than working on grandiose continental frameworks.

CONSTITUTIONALISM

In terms of constitutionalism, the salient aspects can be summarised as follows: the protection of human rights; limitations on majority rule in so far as it negatively affects human rights, especially minority rights, separation of church and state, limitation on the powers of the state and checks and balances between institutions; the formalisation of these principles into a higher law through a process which has been inclusive and consultative; and the constitutional principles must be maintained by the political institutions.² At a continental level, the protection of human rights, checks and balances between institutions, ensuring the separation of church/religion and state/institutions, and ensuring that the agreed upon constitutional values are upheld by the institutions are pivotal for ensuring the desired credibility and legitimacy needed for any continental structure to flourish.

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Unfortunately, constitutionalism at a state level in Africa has not taken root. Instead, states after independence, driven by the developmental agenda, believed that dissent which thrived in multi-party politics and active civil society engagement would derail this agenda. As a result, a shift towards authoritarianism became the norm.³ Of course this movement was made easier with the assistance of the inherited colonial legal apparatus. The colonial powers implemented legal structures which were used solely to exploit, suppress and control.⁴

The 1990s ushered in multi-party elections and the democratic wave. However, in this new context, corruption and mismanagement have remained rampant, abuse by public officials continues unabated and control of power and policy remains vested in an elite group usually comprised of the head of state and his closest allies.⁵ The argument goes that Africa may have adopted democracy, but

failed to adopt constitutionalism, the foundations necessarily for limiting political abuse and protecting fundamental rights.⁶

IMPLICATIONS

This obviously has implications at a continental level. Although the African Union seeks to be more democratically structured than its predecessor the Organisation of African Unity⁷, it still fails to respond appropriately at an Assembly level to human rights abuses, and tends to close ranks at this level. Nonetheless, the African Union does have structures which can be utilised to strengthen constitutionalism at a continental level. Strengthening existing structures, examining the current problems and suggesting ways of remedying them, are far more effective ways of proceeding. Moreover evidence does suggest progress in this area. The Protocol on the African Court on Human and Peoples' Rights has finally been ratified by the required number of states, judges have been elected and they are to start work soon. The African Charter on Democracy, Elections and Governance was adopted at the beginning of this year which incorporates many of the fundamental principles of constitutionalism.

The African Court on Human and People's Rights and the African Union Commission must become more active in ensuring constitutionalism at a continental level

These efforts can effectively legitimise the continental structure; however there has not been sufficient follow through. The African Court of Justice has been subsumed under the African Court on Human and Peoples' Rights which means that legal developments at a continental level, such as those witnessed under the European Union, may be constrained. Moreover the African Court of Justice could have dealt with disputes which could not be heard by the African Court on Human and Peoples' Rights because they did not fall within the human rights ambit, such as border disputes. The most severe defect of the African Court on Human and Peoples' Rights is that the court lacks criminal jurisdiction.⁸ In addition, charters are adopted, but never ratified, as in the case of the African Charter on Democracy, Elections and Governance. Moreover, when charters are ratified, they are not implemented at the domestic level.

RECOMMENDATIONS

The African Court on Human and Peoples' Rights and the African Union Commission must become more active in ensuring constitutionalism at a continental level. This will help the African Union achieve credibility. The Commission must ensure that the principles encapsulated in the founding Constitutive Act and African Charter on Human and Peoples' Rights, infuse the structures of the African Union. And the African Court should ensure

enforcement of these principles by the institutions.⁹ At a state level, it is imperative that the Commission takes an active role in assisting states with implementing charters that have been ratified. The Commission, as the “custodian of treaties”¹⁰ is mandated with this responsibility and this responsibility is often reinforced in the treaties themselves.

Constitutionalism is imperative for a continental order to be credible in the eyes of the African people it seeks to work for, as well as for leverage, clout and legitimacy at an international level. There are already structures in place at a continental level which need to be strengthened and supported. If working, these can effectively ensure that institutions uphold the principles that the Union was founded on and that power is devolved and not vested in an institution, but rather that proper checks and balances are in place. However, more significantly, African states need to implement and ratify charters which seek to strengthen constitutionalism domestically. If a culture of constitutionalism is not taking root at state level, the continental order needs to be proactive in pushing the importance of constitutionalism. The Commission is instrumental in this process. A strong continental Africa is one based on the principles of constitutionalism, for without these principles, buy-in from the people it seeks to serve will be limited, if not non-existent

ENDNOTES

¹ Claire Soares. "Ambitious plan for a new Africa: Welcome to the U.S.A (that's the United States of Africa)", *The Independent*, 25 October 2007. [Online]. Available at: <http://news.independent.co.uk/world/africa/article2723229.ece>.

² Carlo Fusaro. *Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective*. [Online]. Available at: http://www.carlofusaro.it/in_english/costitutionalism%20in%20africa%20and%20constitutional%20trands.htm. See also Lee M Habasonda, *Presidentialism and Constitutionalism in Africa: "Third Term" phenomenon/ extension of tenure; the Zambian experience*, 1-2. [Online]. Available at: http://www.zesn.org.zw/docs/Presidentialism%20and%20Constitutionalism%20in%20Africa%20_lee%20Habasonda.ppt, and Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana", in *Boston College Third World Law Journal*. vol 25:30. 2005.

³ H. Kwasi Prempeh. Africa's "Constitutionalism Revival: False Start or New Dawn?", in *International Journal of Constitutional Law*. July 2007. For further information on the developmental agenda see Sammy Adelman, "Constitutionalism, Pluralism and Democracy in Africa", in *Journal of Legal Pluralism*, nr. 42. 1998.

⁴ See Richard Roberts and Kristen Mann, *Law in Colonial Africa*. Heinemann, 1991.

⁵ Prempeh op. cit. 484.

⁶ Ibid 506.

⁷ Ibid.

⁸ See Murray op. cit.

⁹ Ibid.

¹⁰ Chris Landsberg and Shaun Mackay op. cit.