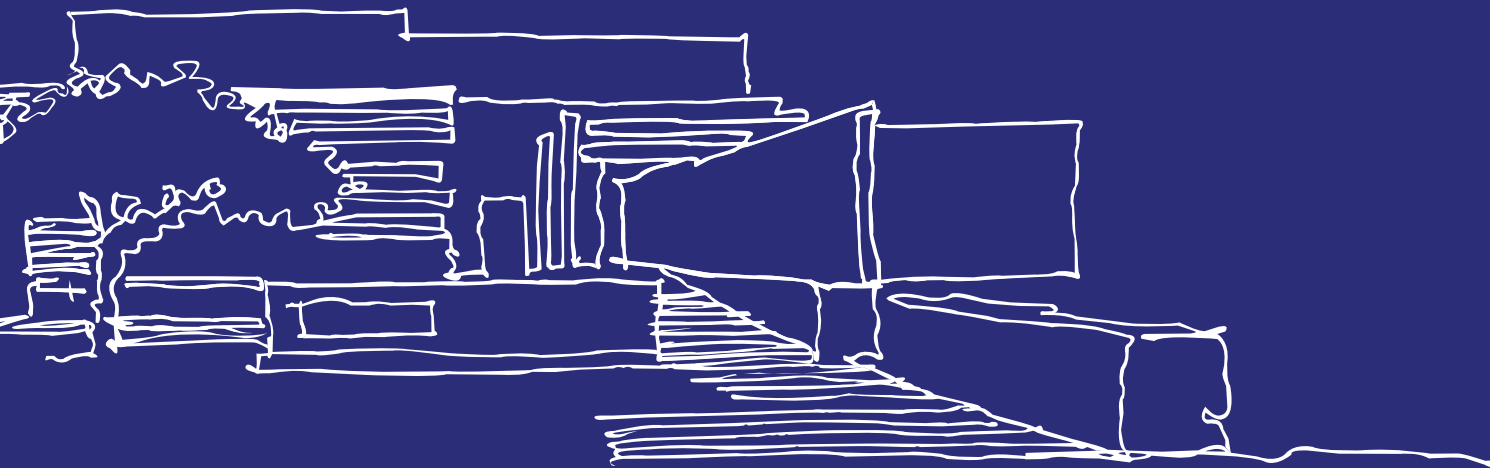


FOURTH STELLENBOSCH ANNUAL SEMINAR
ON CONSTITUTIONALISM IN AFRICA (SASCA)
DECENTRALISATION AND CONSTITUTIONALISM IN AFRICA
7-9 SEPTEMBER 2016
PROGRAMME

A CREATIVE SPACE FOR THE MIND



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law



INTRODUCTORY NOTE

OBJECTIVES

The Fourth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2016), jointly organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria and the Stellenbosch Institute for Advanced Study (STIAS) in partnership with the South African Research Chair in Multilevel Government, Law and Policy (SARChI) at the Dullah Omar Institute, University of the Western Cape and the Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa, based in Kenya, will be held in Stellenbosch (South Africa) from Wednesday 7 September to Friday 9 September 2016. The theme for this year's seminar is 'Decentralisation and Constitutionalism in Africa'

The objective of the seminar is to examine the dynamic relationship between decentralisation and constitutionalism in Africa. The end of the Cold War led to the return of multi-party democracy in many African countries within the paradigm of constitutionalism. In some decentralisation formed part of the democratisation process. In others, it came after protracted conflict as part of a peace deal. The objectives to be attained as well as a myriad of historical, social and cultural factors have also shaped the processes. As a result, the nature of the decentralisation processes in the different African countries has varied considerably along a continuum which has, at one end, a strongly centralised system with local authorities exercising limited powers, and, at the other, highly decentralised federations.

The central question to be examined during the seminar is the dialectic between decentralisation and constitutionalism: can they be mutually reinforcing processes? Has constitutionalism enhanced the achievement of the objects of decentralisation, and, in turn, has effective decentralisation advanced constitutionalism? If not yet in practice, can a mutual reinforcing beneficial relationship emerge? Are different patterns apparent in the different legal traditions operating on the continent viz; Anglophone, Francophone, Lusophone, and Arabophone Africa?

These and other questions interrogating the inextricable link between decentralisation and constitutionalism will form the focus of this seminar.

Although the wide diversity and complexity of the different models, forms, degrees and levels of decentralisation practices across African countries make a comparative study a challenging task, it nevertheless provides an excellent opportunity for cross-national learning. It enables us to get a better understanding of recent developments in the design, content and forms of decentralisation in the context of constitutional reform on the continent and learn lessons from what is working or not working and what needs to be improved and why.

FORMAT OF PROGRAMME AND EXPECTED RESULTS AND OUTCOMES

The programme will run from Wednesday 7 September to Friday 9 September. There will be nine sessions. The morning sessions will start from 08h30 and end at 12h30. The afternoon sessions will start at 14h00 and end at 17h30. The first session will start on Wednesday morning and end with an informal braai later that evening at 18h30. There will be a short excursion on Thursday from 15h00 to 18h30.

Each session will involve short presentations followed by discussions. Each presenter will try to identify specific issues which in his/her opinion need to be discussed. The concluding session on Friday 9 September will be devoted to discussing the challenges faced and the lessons for the future.

Since one of the most important objectives of the SASCA series is to fill the knowledge gap in the literature on comparative African constitutional law, the papers presented during this seminar will be peer-reviewed for publication in volume 3 of the new Oxford University Press series, *Stellenbosch Handbooks on African Constitutional Law*.

FOURTH STELLENBOSCH SEMINAR ON CONSTITUTIONALISM IN AFRICA (SASCA 2016)

DECENTRALISATION AND CONSTITUTIONALISM IN AFRICA

7-9 SEPTEMBER 2016

WORKSHOP PROGRAMME

DAY 1	WEDNESDAY 7 SEPTEMBER 2016	
	Session 1: Introductory session	
8.30-9.00	Registration	
9.00-9.15	Welcome: Konrad Adenauer Stiftung, ICLA, SARChI, STIAS	Moderator: Prof Kwame Frimpong
	1. Decentralisation and constitutionalism in Africa	Prof Nico Steytler
	2. Perspectives on constitutionalism and decentralisation in Africa	Prof Yash Pal Ghai
	3. Regional and continental frameworks for decentralisation	Prof Charles Fombad
	Discussion	
10.30-11.00	Refreshments and group photograph	
11.00-12.30	Session 2: Established federal and hybrid systems in Africa	Chair: Prof Kwame Frimpong
	4. Constitutional Infidelity, Decentralisation, and the Restructuring of Nigerian Federalism	Prof Rotimi Suberu
	5. Federalism without constitutionalism: The case of Ethiopia	Prof Yonatan Fessha
	Discussion	
12.30-13.30	Lunch	
13.30-15.00	Session 3: Established federal and hybrid systems in Africa	Moderator: Prof François Venter
	6. Unrealised aspirations of devolved governance in Kenya: Is greater fidelity to constitutionalism the solution?	Dr Tom Kabau
	7. The constitutional promise of South Africa's system of multilevel government	Justice Kate O'Regan
	Discussion	
15.00-15.30	Refreshments	
15.30-17.00	Session 4: Emerging federations and hybrid systems	Moderator: Dr Jill Cotterell
	8. Decentralise and Rule: The Tortuous Journey of Decentralisation in the Democratic Republic of the Congo	Dr Dunia Zongwe
	9. South Sudan's elusive quest for peace through federalism and constitutionalism	Dr Zemelak Ayele
	10. Federalism as institutional device for peace in Somalia: Challenges and prospects	Mr Ibrahim Harum
	Discussion	
18.30-20.30	Informal braai	

DAY 2	THURSDAY 8 SEPTEMBER 2016	
9.00-10.30	Session 5: Comparative studies on the constitutionalisation (or not) of local government	Moderator: Prof Charles Fombad
	11. Constitutionalisation of Local Government in South Africa, Uganda, Lesotho and Zimbabwe	Prof Jaap de Visser
	12. Local Multiparty Democracy and the Right to Govern: The Quest for Constitutionalism in Namibia, Botswana, and Zambia	Mr Alois Madhekeni
	13. Progress and Pitfalls in Constitutional Reform: Decentralisation in the wake of the Arab Spring In Egypt and Tunisia	Dr Sheriff Elgebeily
	Discussion	
10.30-11.00	Refreshments	

11.00-12.30	Session 6: Local government case studies	Moderator: Mr Reuben Baatjies
	14. An overview of local government in Lusophone Africa	Prof Fernando Bastos
	15. The Concept and Implementation of 'Gradual Decentralisation' in Mozambique	Prof Andre Thomashausen
	16. Sub-national Constitutional Autonomy, Local Government and Constitutionalism in Ethiopia	Dr Christophe van der Beken
	Discussion	
12.30-13.30	Lunch	
13.30-15.00	Session 7: Local government case studies continued	Moderator: Prof François Venter
	17. Decentralisation for Participatory Governance in Ghana Under The 1992 Constitution: The Objectives and Reality	Prof Kofi Quashigah
	18. Devolution and Constitutionalism in Zimbabwe	Dr Tinashe Chigwata
	Discussion	
15.00	Excursion – Wine tasting	
18.30-20.30	Dinner	

DAY 3	FRIDAY 9 SEPTEMBER 2016	
9.00-10.30	Session 8: Traditional leadership and constitutionalism issues	Moderator: Prof Kofi Quashigah
	19. Constitutionalisation of Traditional Authorities and the Decentralisation of Governance: Anglophone and Francophone Africa compared	Prof Jan Erk
	20. Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance	Prof Christa Rautenbach
	21. The <i>Tinkhundla</i> Decentralisation System: A Blend of Constitutional and Traditional State Governance that Works?	Dr Musa Shongwe
	Discussion	
10.30-11.00	Refreshments	
11.00-13.00	Session 9: Wrap up session	
11.00-12.15	Panel of moderators: Reflections	Prof Nico Steytler
	Prof Kwame Frimpong Justice Kate O'Regan Mr Reuben Baatjies	
12.15-12.30	Partnerships in Decentralisation: Konrad Adenauer Stiftung Rule of Law Programme in Sub-Saharan Africa	Dr Arne Wulff
12.30-13.00	Planning 2017 and Publication Schedule	Prof Charles Fombad
13.00-13.15	Closing remarks	Prof Johann Groenewald STIAS
	Word of Thanks	Prof Charles Fombad & Prof Nico Steytler
13.15-14.00	Lunch	
14.00	Departure	

SUMMARY OF PRESENTATIONS, SASCA 2016

1 Prof Nico Steytler: Decentralisation and constitutionalism in Africa

A very crucial issue in Africa today is how to curtail the powers of the Leviathan – the untrammelled ruler – through constitutionalism and to some extent, decentralisation. Post-Cold War African presidents exercise unbridled powers which has significant effects on their countries leading to underdevelopment, increase in conflicts and marginalisation of minorities. With time, the vision of decentralisation and constitutionalism came to Africa as a means to peace, democracy, good governance and development. Nevertheless, this vision is only partially realised in most parts

of the continent. It is in this regard that this conference seeks to examine the relationship between decentralisation and constitutionalism. This paper therefore contributes to this very crucial and timely debate in Africa on the nexus between the concepts of decentralisation and constitutionalism. The paper also analyses the challenges of decentralisation in the face of superficial constitutionalism and whether decentralisation can be a catalyst for constitutionalism in Africa. It argues that there is a mutually beneficial relationship between decentralisation and constitutionalism especially in the African context.

2 Prof Yash Pal Ghai: Perspectives on constitutionalism and decentralisation in Africa

Recent developments in constitutionalism and decentralisation in Africa have made scholars revise their understanding of both concepts. The concepts are now understood in a broader context. Lately, there is now a conscious effort by scholars to define constitutionalism in the African context because of the fact that African states share some similarities in their pre-colonial, colonial and post-colonial modes of organisation and experiences. Indeed, one of the main objectives of the Stellenbosch Project is to define 'African constitutionalism'. In this regard, the first part of this paper examines the works of eminent African scholars on constitutionalism to show the extent to which there is agreement and disagreement among them on the meaning and significance of constitutionalism. The second part of the paper focuses on an analysis of the scope and significance of decentralisation and its links with constitutionalism. While scholars generally agree that decentralisation in Africa is largely to accommodate the ethnic diversity of its population by granting them considerable powers of self-government thus preventing internal conflicts, the important question is how this fits into the discourse on constitutionalism. This is largely what this paper sets out to analyse.

3 Prof Charles Fombad: Regional and continental frameworks for decentralisation

In spite of the considerable literature discussing the decentralisation processes in Africa, there is hardly any discussion of the actual or potential role of the main supranational organisations on the continent, namely the African Union (AU) and the Regional Economic Communities (RECs). Yet, their role is or could be crucial. The reason might be that their approach to issues of democracy and decentralisation within member states has historically been cautious and reactive rather than proactive. This paper focuses on, and critically assesses the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (the African Charter) that was recently adopted by the AU in June 2016. Will this Charter serve as an effective standard and a guide that will enhance the prospects for the adoption of more effective decentralisation systems in Africa? Is it an acceptable model for all to adopt? In highlighting some of the weaknesses of the African Charter that need to be corrected for it to make any meaningful impact, the paper concludes by arguing that such a continent-wide instrument on decentralisation by taking not only governance, but also democracy to the grassroots provides the best opportunity to give a voice to the voiceless and promote constitutionalism, accountability, transparency and equity in society.

4 Prof Rotimi Suberu: Constitutional Infidelity, Decentralisation, and the Restructuring of Nigerian Federalism

Before now, Nigeria operated a form of 'centralised variant of federalism' with powers largely concentrated at the centre. Since the transition from military to civilian rule in 1999 however, the country has witnessed significant innovations and experimentations with federalism. Decentralisation in Nigeria has, thus, been largely influenced by a lot of factors such as the country's multifaceted, post-military constitutional politics, incremental constitutional amendments and acts of constitutional defiance or infidelity. Constitutional infidelity largely occurs when political elites and others circumvent the constitution while it is still in force. Indeed, this has significant impact on federalism in Africa. This paper examines the sources, practices, consequences and challenges of constitutional infidelity in Nigeria's federalism under its 1999 Constitution. It analyses how constitutional infidelity can contribute rather than undermine the innovative federalist institutional development. In the first part of the contribution, the concept of constitutional infidelity is explored from a comparative perspective with particular focus on the African experience. The paper then analyses the design of the Nigeria's federalism under the Constitution and how its military/authoritarian-centred provisions have led to a politics of formal and information constitutional change. The crux of the paper is contained in the third part where instances of federalism-related constitutional infidelity is analysed. The last part reflects on the broader implications of constitutional infidelity for the development of federalism in Nigeria.

5 Prof Yonatan Fessha: Federalism without constitutionalism: The case of Ethiopia

It has now been more than twenty years since Ethiopia has opted federalism as its preferred form of government. Primarily designed to address ethnic claims, the Ethiopian federalism is generally regarded as dual federalism that provides for autonomous subnational governments. This paper shows that the description of Ethiopia as a federation could, however, be misleading. Both formal and informal points of interaction contradict the seemingly compartmentalised functions of the two levels of government. The dominance of the political landscape by a single party and, hence, the absence of political pluralism, has brought important consequences for the federal-state relations. What we have witnessed is the anomalous evolution of the federal system, which has been, to a greater extent, functioning as a centralised system. This paper reveals that political powers that belong with the state electorate are now seized by national politicians.

6 Dr Tom Kabau: Unrealised aspirations of devolved governance in Kenya: Is greater fidelity to constitutionalism the solution?

The adoption of the devolved governance structure in Kenya by the 2010 Constitution shows a more conscious effort towards limiting the powers at the centre and institutionalising governance practices like constitutionalism and decentralisation in Africa. An evaluation of Kenya's experience shows that for decentralisation to be substantially realised, there is a need for governance to be implemented within a framework of constitutional fidelity. This means federalism must go hand-in-hand with constitutionalism. However, the nature and scope of the interdependence between federalism and constitutionalism are relative and fluid rather than static. The adoption of the 2010 Constitution in Kenya signifies a radical change from centralised to decentralised government through devolution. Nevertheless, despite efforts at true federalism through devolution, practices like meaningful public participation, accountability and equity in resource allocation are far from being realised. This paper therefore addresses the question regarding whether some of the challenges in realisation of good governance in Kenya through devolution could have resulted in inconsistent fidelity to constitutionalism by national and state governments. It argues that despite devolution enhancing the prospects of constitutionalism in Kenya, some of the aspirations of a decentralised governance remain unrealised because of lack of fidelity to constitutionalism by the national and county governments. The paper further assesses the possible role of various state organs in closing the gap between devolution and constitutionalism and thus promoting good governance.

7 Justice Kate O'Regan: The constitutional promise of South Africa's system of multilevel government

8 Dr Dunia Zongwe: Decentralise and Rule: The Tortuous Journey of Decentralisation in the Democratic Republic of the Congo

Decentralisation in the Democratic Republic of Congo (DRC) is without a doubt, one of the most ambitious and challenging projects of the 2006 Congolese Constitution. This paper therefore critically examines the complicated process of decentralisation in DRC. The central question the paper seeks to answer is why is the process of decentralisation so protracted in the DRC? Other important issues this paper explores are the reasons for institutionalisation of decentration in the Constitution, the main obstacles to decentralisation, the role of the court in implementing decentralisation and how the decentralisation links with constitutionalism in the DRC. In concluding, it is argued that the gains of decentralisation are far from being realised in the DRC as decentralisation has not resulted in limited government, rule of law and constitutionalism. Nevertheless, there is some level of implementation of decentralisation in the DRC.

9 Dr Zemelak Ayele: South Sudan's elusive quest for peace through federalism and constitutionalism

Federalism has an inextricable link with constitutionalism and it presupposes a constitution establishing a federal system of government which is also committed to constitutionalism. This means for a federal system to function properly, there has to be a constitution. Within the context of South Sudan, this paper argues that the sad state of the nation currently is largely as a result of the unrealised quest of the people of South Sudan in search of a constitution establishing a federal system and a government committed to federalism. This paper traces the origin of the federalism in the history of South Sudan and examines the relationship between the lack of constitutionalism and the non-realisation of a federal system. The interim arrangement that was put in place after signing the Compact Peace Agreement (CAP) is discussed. The paper concludes by mapping the political and constitutional developments taking place in the country since it gained independence in 2011.

10 Mr Ibrahim Harum: Federalism as institutional device for peace in Somalia: Challenges and prospects

The importance of federalism as an instrument of conflict management cannot be overemphasised. This is because of its ability to manage differences, accommodate minorities and hold nations- states together. Federalism also gives federating unit some degree of autonomous powers. However, if federal units are not given full autonomy, this may contribute to conflict situations. After long years of crises and conflicts, the Federal Government of Somalia was established in 2012 with the endorsement of the Provisional Federal Constitution which unequivocally states that Somalia is governed by a federal system. This system has been lauded by the international community as necessary for the total restoration of peace in Somalia. However, the ideological commitment necessary to make federalism work is seriously lacking. This is because of the scepticism demonstrated by Somalian leaders about it which has in turn affected the impression of the people about federalism. Therefore, the federal government is still struggling to establish federal systems. This paper answers the question on the extent to which the adopted federal system is likely to bring peace in Somalia.

11 Prof Jaap de Visser: Constitutionalisation of Local Government in South Africa, Uganda, Lesotho and Zimbabwe

This paper evaluates the extent of constitutionalisation of decentralisation of power in four Anglophone countries, namely South Africa, Uganda, Lesotho and Zimbabwe. The four countries are chosen because of the common Anglophone legal tradition which enables the extrapolation of trends that may offer lessons in other Anglophone contexts. Similarly, each of the four countries has followed different paths in developing their local government sectors, especially with regard to the role of the constitution, age of the local government. The paper therefore carries out a brief overview of the context of constitutional arrangements for local government in each of the four countries before examining these arrangements with regard to issues like autonomy, intergovernmental supervision and cooperation. Some reflection on whether efforts to constitutionalise local government can be ascribed to advances made in the area of democratisation and development is carried out.

12 Mr Alois Madhekeni: Local Multiparty Democracy and the Right to Govern: The Quest for Constitutionalism in Namibia, Botswana, and Zambia.

This paper examines the link between decentralisation and constitutionalism in Namibia, Botswana and Zambia. The three countries are all committed to constitutionalism and they practice it at the national level. Their constitutions enshrine a bill of rights, separation of powers, an independent judiciary and democratic elections and they all conduct free multiparty elections. They have a sound record of constitutionalism at the national level of government but can the same be said about their local level of government? This paper therefore questions if decentralisation reflects and advances constitutionalism in its two forms of deepened democracy and limited central government power. It is argued in the three cases under review that decentralisation advances constitutionalism through the deepening of multiparty democracy.

This is reflected through the conduct of regular credible multiparty local government elections. It is however argued that decentralisation has not been able to advance constitutionalism through limiting central government. This is because the elected local governments are weak and have a very limited scope for the right to govern. It is concluded that decentralisation promotes constitutionalism only if it is genuinely practiced but genuine decentralisation devolves power from central government and disperses it to local government.

13 Dr Sheriff Elgebeily: Progress and Pitfalls in Constitutional Reform: Decentralisation in the wake of the Arab Spring In Egypt and Tunisia

The Arab Spring brought much promise for the people of North Africa and the Middle East; however, in all cases bar Tunisia, it appears to have been an exercise in futility as neighbouring countries are embroiled in civil war or have regressed to totalitarian regimes. Decentralisation offers an alternative means to wholesale regime change, and in theory allows citizens to become more involved in the political process. Tunisia and Egypt both have new constitutions – established in 2014 – which guarantee a wide range of decentralisation. However, while Egypt has been taking steps towards centralisation, Tunisia appears to be on the cusp of implementing a sustainable model. This paper seeks to juxtapose the path of Egypt and Tunisia in light of their similarities. It aims to identify the political and cultural catalysts that have caused such varied results within the framework of the decentralisation process as contextualised in the constitutions. Using Tunisia's model, it will highlight the realities of theoretical decentralisation under the Egyptian constitution, identify how this translates into its practical application, and propose that the lack of real decentralisation is caused by the current military regime that tends in its governance towards a centralisation of power analogous to a military command structure.

14 Prof Fernando Bastos: An overview of local government in Lusophone Africa

15 Prof André Thomashausen: The Concept and Implementation of 'Gradual Decentralisation' in Mozambique

This paper reviews the transition of Mozambique from a centralist one party State to a constitutional state that acknowledges and formally upholds the supremacy of the rule of law of the Constitution, including local government guarantees in two parallel systems of local governance, and with overlapping degrees of local autonomy. The Mozambican concept of 'gradualism' in respect of decentralisation acknowledges the benefits of decentralised government, but aspires to build local government institutions in a step by step and cautious approach. However, the resistance against true transfer of authority and resources to decentralised and local government institutions continues to be great and has since 2014 become the main stumbling block to development and the maintenance of a national consensus regarding internal peace. The current 'silent civil war' in Mozambique is first and foremost about the quest for greater autonomy and resources for 6 out of a total of 11 provinces.

16 Dr Christophe van der Beken: Sub-national Constitutional Autonomy, Local Government and Constitutionalism in Ethiopia

The Ethiopian federal constitution has authorised Ethiopia's regions to draft, adopt and amend a constitution. All nine regions have also used this power and enacted their constitution. The sub-national or regional constitutional autonomy is determined by the federal constitution since the latter is supreme. This means that the federal constitution constitutes the framework within which regions have to exercise their constitutional autonomy. Yet, an overview of the federal constitution reveals that in many areas it contains only limited provisions, consequently leaving significant autonomy to the regions. One of these areas is sub-regional or local government. Emulating the example of classic federations, the Ethiopian constitution endows the regions with almost full discretion to determine the scope and powers of their local governments. This allows for the design of local government administrations emanating from and adapted to the distinct region. Although the regions are at liberty to decide whether to entrench local government

in their constitutions or not, all regional constitutions contain references to local government and all of them, except for one, determine the different levels, institutional structure as well as the powers and responsibilities of local governments. By comparing all regional constitutions, the article aims to investigate to what extent the regions have used their constitutional autonomy to design local government arrangements prompted by and adapted to region-specific features. The paper also investigates to what extent the constitutional frameworks and practices are conducive to the achievement of constitutionalism.

17 Prof Kofi Quashigah: Decentralisation for Participatory Governance in Ghana Under The 1992 Constitution: The Objectives and Reality

The 1992 Constitution of Ghana supports devolution through the local government system. This flows from the understanding that decentralisation would make governance more relevant to the local people and make them responsible for at least some of their own developmental challenges. The system was conceived within an atmosphere of intense disaffection with party political elections and a focus on popular power. The perception that a multi-party system which permits struggles for political office along political party lines has the tendency to derogate from national cohesion led to the constitutional exclusion of political parties getting involved in the conduct of elections into the District Assemblies. Unwittingly however the constitution thereby creates a local government system that affords the central government enough opportunity to strengthen its hands in control of the local government units. This has been made possible particularly through the power of appointment of the Chief Executive and a number of the Assembly Members. The structure of the decentralised system under the 1992 Constitution of Ghana creates an inherent inconsistency. The constitution review exercise of 2010 provided an opportunity for proposals for reform. The Government's response to even the not too radical proposals of the Constitution Review Commission has, however, not been completely accommodating. This paper examines the viability of the proposed and other possible reforms.

18 Dr Tinash Chigwata: Devolution and Constitutionalism in Zimbabwe

Zimbabwe has been experiencing political and economic struggles for more than two decades. These have been attributed partially to the centralised system of government which the Zimbabwe African National Unity Patriotic Front (ZANU-PF) led government inherited at independence and further entrenched. The newly adopted 2013 Constitution of Zimbabwe has the potential to tackle some of the challenges which the country has experienced since independence. The Constitution envisages the establishment of a non-centralised system of government with provincial and local tiers of government exercising devolved powers. Over three years after its adoption, devolution and the fully-fledged multilevel system of government is yet to be implemented. The actions or lack thereof of the ZANU-PF led government suggests that devolution will unlikely be implemented anytime soon. The non-implementation of devolution is not only a political question but also raises questions relating to constitutionalism in Zimbabwe which this paper seeks to answer. The paper argues that devolution will unlikely be successful in a country which lacks a strong constitutionalism culture.

19 Prof Jan Erk: Constitutionalisation of Traditional Authorities and the Decentralisation of Governance: Anglophone and Francophone Africa compared

This paper examines the recent resurgence of traditional authorities in Sub-Saharan Africa. Particular focus is placed on the new life the large-scale territorial decentralisation reforms of the 1990s have blown into the traditional authorities. But twenty years following their introduction, the de facto results of decentralisation reforms vary significantly across African countries – despite the similarities in de jure design. There is one pattern however which seems to separate Anglophone and Francophone Africa: With regard to the recognition and constitutionalisation of traditional authorities, Francophone and Anglophone Africa display marked differences. The British colonial practice of 'indirect rule' had historically lead to the recognition

and co-optation of the exiting traditional authorities at the time of British arrival; France on the other hand had imposed direct rule in the territories in its possession. Most post-colonial regimes in Africa did not undo the institutions and legal systems that had been put in place during colonial times. As a result, there is more political continuity in former British colonies over pre-colonial, colonial, and post-colonial times. The paper therefore examines the way various sub-Saharan countries have recognised and constitutionalised traditional authorities based on the analytical framework partly described above.

20 Prof Christa Rautenbach: Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance

In pre-colonial South Africa, traditional leadership was an institution vested with the powers and authority to rule based on native law and customs. They were autonomous and separate leadership structures with hierarchical and consultative relations with their followers based on the belief that from time immemorial, leadership was informed and maintained by the ancestors. However, the general view is that traditional leadership does not fall within the scope of modern government, even though it shares some of the features of modern governments. This paper seeks to determine how traditional authorities fit into the decentralised governance structure of South Africa. The role of traditional leaders is also analysed in the three spheres of government – the national, provincial and local. Furthermore, this contribution examines the extent, if any, to which traditional authorities contribute to constitutionalism.

21 Dr Musa Shongwe: The *Tinkhundla* Decentralisation System: A Blend of Constitutional and Traditional State Governance that Works?

The *Tinkhundla* decentralisation system is a unique system of state governance operating under an absolute monarchy in Swaziland. It was established as an alternative to multiparty government with was hitherto in place at independence. The *Tinkhundla* system seeks to create a home-based legal and political order in which traditional authorities play significant roles in state governance. It is a blend of traditional law with constitutional and modern principles of governance. Since the decentralisation system coexists alongside a statutory based local government system under the *Tinkhundla* system, the system has come under heavy criticism from civil society in Swaziland. Their main grouse with the system is that it is deeply rooted in Swazi customary law which is largely uncodified and therefore uncertain. The uncertainty of the normative framework means that the powers of traditional authorities within the state government are prone to being abused. Under the new Swazi Constitution, the *Tinkhundla* system has further been recognised as the medium of decentralisation. This paper critically analyses the *Tinkhundla* decentralisation system as well as the implication of legal dualism. It argues that the *Tinkhundla* system effectively decentralises administrative and political functions to the people but not real power. Thus, the system has the ultimate effect of centralisation of the state powers on the monarchy rather than actual decentralisation.

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