EIGHTH STELLENBOSCH ANNUAL SEMINAR ON CONSTITUTIONALISM IN AFRICA (SASCA 2020)
21-23 September 2020

CALL FOR PAPERS:

Constitutional Identity and Constitutionalism in Africa

Dear Colleagues,

The Organisers of the Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) are pleased to announce the call for papers for the Eighth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2020) which will be held in Stellenbosch (South Africa) from Monday 21 September to Wednesday 23 September 2020. SASCA 2020 will be jointly organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria, the South African Research Chair in Multilevel Government, Law and Development (SARChI) at the Dullah Omar Institute, University of the Western Cape, and the Stellenbosch Institute for Advanced Study (STIAS).

The theme for this seminar is **"Constitutional Identity and Constitutionalism in Africa"**.

A.   **Problem statement**

1.   **Africa has in modern history experienced different waves of constitutional ordering, which includes both the drafting of written constitutions and their implementation, all with the aim of regulating the exercise of state power.**

The first wave of written constitutional ordering was the imposition of colonial rule, replacing or subjecting indigenous forms of governance. The new constitutional order was characterised mainly by untrammelled centralised rule in the service of colonial interests and not of the colonised indigenous peoples. This period rapidly unravelled soon after the end of the Second World War with the rise of African nationalism and the acceptance of the right of peoples to self-determination.

The second wave of constitutional ordering was the independence constitutions of most African countries, commencing in the 1950s and only ending with the departure of the Portuguese in 1974 from their five colonies. Zimbabwe, Namibia and South Africa were exceptions to this

wave; ruled by minority white settlers, majority rule was only obtained at the end of the last decade of the 20th century. The independence constitutions in Africa were largely imposed by the departing colonial powers. Typically, the constitutions reflected not the system which typified colonial rule, but some ideal type of how the new independent countries should be governed: democracy, limited government with a bill of rights, separation of powers, and the rule of law.

The third wave of constitutional ordering came swiftly after independence; the independence constitutions were replaced by constitutional arrangements which closely resembled the centralist colonial orders: the concentration of powers in the executive, with scant regard to a separation of powers, limited government and human rights. With the objectives of nation-building and development the one party state emerged with a 'strong man', military commander, or imperial president at the helm. Separation of powers withered away with weak legislatures and compliant judiciaries. The results were dire; instead of nation building, internal conflict was engendered with ruling elites, supported by both side in the Cold War, clinging to power by relying on repressive, autocratic, and often tyrannical rule. Instead of a developmental state emerging, the patrimonial and corrupt state followed.

The international support that propped up the repressive constitutional orders vanished after the implosion of the Soviet Union in 1989, and the triumphalist West led a 'universalist' surge in democratic liberalisation which swept through the continent during the 1990s. It was marked by fervid writing and rewriting of the post-independence constitutions in attempts to entrench the fundamental principles, institutions and values of modern constitutionalism. In all but two countries (Botswana with its 1966 Constitution and Mauritius with its 1968 Constitution), new or substantially revised constitutions have been adopted. This wave was captured continent-wide in the African Union's Charter on Democracy, Elections and Governance, which came into operation in 2012.

The new constitutional order promised by the third wave of democracy have not been realised. Most of these constitutions were not fully implemented and the prospects for constitutionalism remains unrealised. A number of reasons have been suggested for this: excessive reliance on Western-imposed constitutional concepts; a lack of resonance of the constitutions with indigenous culture and traditional values and structures; and the lack of alignment with the African social context which is different from the historical context in Europe and US where liberal constitutionalism emerged from.

The quest for a new constitutional ordering is emerging. Questions about the identity of African constitutions took centre stage after the "Rhodes Must Fall" (#RhodesMustFall) student protests of 2015, placing the question of constitutional decolonisation firmly on the agenda. It has raised questions about the legitimacy of recent constitutional reforms on the continent, whether these new or revised constitutions really reflect an African identity.

2. **From the above, it is clear that each of the various waves of constitutional ordering had its own characteristics, and within each wave countries showed their own particularities. Each country thus has had both a shared and unique 'constitutional identity'. The international literature on 'constitutional identity' highlights the following:**

First, a constitution is more than a legal document that regulates the exercise of state power. Its particular characteristics of how it deals with state power provide a particular constitutional

identity which allows us also to assess how it deals with the key problem of state power – its abuse at the expense of a country's people.

Second, a constitution's identity is first articulated in the text which, as such, reflects the political, social, and economic forces that brought it into being. As each country's constitution is the product of particular forces at play, each has different or even unique characteristics that give the text a particular texture. Some authors suggest, for example, in the context of European Union uniformity in the field of constitutionalism, that the German constitutional identity lies in the eternity clauses of the Basic Law. Some associate the French and Italian constitutional identities with the unamendable "republican clause" contained in their respective 1958 and 1946 Constitutions. In Africa, the pre-independence and independence constitutions bore the hallmarks of the colonial powers – primarily Portuguese, French, English and Spanish. Such constitutions were but the pinnacle of legal orders based on the respective colonial legal traditions, some of which allow a limited space for indigenous legal orders.

Third, constitutional identities are not set in stone as at the time of the constitution's inception, but may change over time through amendments to the constitution itself or through the embroidery of a judicial interpretation. It is claimed that the judiciary contributed to the constitutional identity of the Indian Constitution by declaring the basic structure doctrine –the country's federal structure as unamendable.

Fourth, the constitution establishes and is embedded in institutions such as legislatures, executives and the courts. The constitution both shapes those institutions and is in turn shaped by them, reflecting a constitutional order which is broader than the text. As the text allows the institutions space for contestation, the identity or character of a constitution may evolve as it gets encrusted with history.

Fifth, a distinction is also drawn between the formal constitutional order and 'a nation's constitution', suggesting that there may be a disconnect between the operation of the state (the political elite) and how such operation is supposed to connect with, and impact on, ordinary people. The constitutional order may thus be remote or distant from the interests of ordinary people.

Sixthly, the constitutional order may change the nature of the society to which it applies; it may shape the national identity where that was a goal set in the constitution itself. In these cases, a particular normative set of goals is set which seeks not only to regulate state action but also societal behaviour.

Finally, a constitution may also simply remain a text and be little more than constitutionalism symbolism. It may structure the state organisations, but no constitutional order emerges that constrains the exercise of state power where that is indeed the constitutional intent. Executives ignore constitutional constraints at will and pay no heed to fulfilling constitutional obligations. The identity of such a constitutional order has thus been described as 'illiberal constitutionalism', or 'authoritarian democracies'.

3. **Our concern is, firstly, the absence of constitutionalism and continued abuse of state power in Africa. Our second concern is, in the face of such absence, the need for the decolonisation of constitution, reflecting an African identity. Can both constitutionalism and decolonisation of constitutions produce a new African constitutional identity?**

Constitutionalism, as articulated in Anglo-American political thought, and universalised through various international law instruments, entails principally the constitutional entrenchment and implementation of multiparty democracy, separation of powers between the three branches of government – the legislature, executive, and judiciary, a bill of rights limiting state action, and the rule of law through an independent judiciary. In Africa the further element has arguably been added: the purposeful application of state power for development.

Constitutionalism was, as noted above, the primary concern of the post-1990s wave of constitutional ordering. It also led to the coming into operation in 2012 of the AU Charter on Democracy, binding signatories to constitutionalism. Yet, constitutionalism has not been the primary identity of African constitutional orders and state abuse continues unabated. At the same time, calls for the decolonisation of African constitutions and their reflection of an African identity, have become urgent.

B.   Research questions

The issues of decolonisation and constitutionalism bring a number of important research questions about constitutional identity to the fore – historically, contemporary, and prospectively. We thus call for papers that address and are guided by any of the following themes:

1.   The relevance of the concept of 'constitutional identity' to African constitutional orders?

To start with, is the concept of constitutional identity a useful optic to look at African constitutions? It is a highly contested concept. Is it more than about the main characteristics of a constitution (unitary or federal, presidential or parliamentary)? Is identity about the relevance and aspiration of the constitution? Nominal or effective, descriptive or transformative? Is it about the way the constitution relates to a country's culture(s) and history? What are the prevailing theories of constitutional identity, their core elements, the universal versus the particular, the relevance of external and internal influences? What are the pertinent factors constructing an indigenous constitutional identity: history, ethnicity, traditions, religion, language and culture?

2.   Colonial constitutional identities and path-dependency

In Africa, what have been the mode and measure of path dependency in forming constitutional identities? To what degree has colonial heritages shaped the way in which constitutional identities surfaced in independence and post-independence constitutional ordering? What have been the principal differences between the Francophone (including Lusophone) and Anglophone approaches to constitutionalism and dealing with diversity? Furthermore, have remnants of such 'colonial' identities continued in post-1990 constitutional identities?

3.   Authentic constitutional identities and the decolonisation of constitutional law

The widening gap between most African constitutions, which in many cases have incorporated key fundamental principles of modern constitutionalism, and actual practice, raises many questions. Does the problem lie in that these constitutions lack an authentic constitutional identity? Is this the reason why entrenching a culture of constitutionalism, respect for the rule of law and good governance remains a challenge? What explains the lack of constitutionalism

in post-1990 constitutional identities? The illegitimacy of the birthing process or their colonial or western genealogy? Or not squaring with the rapacious demands of the dominant neo-patrimonial state?

Do African constitutions need be 'decolonised' to give them an African identity? If so, how in terms of form and content? Are there alternative principles that can replace some of the present principles? Are there any innovative theories, principles or practices that have been designed to address peculiar African challenges, such as ethnic conflict? Are there any distinctive governance principles that have emerged in African practice, for example, communitarianism versus individualism, and consensual decision-making rather than winner-takes-all political competition?

4. Traditional authorities and African constitutional identities

Are African traditional authorities and institutions part of a national constitutional identity-building factor or are they just an emotional cultural relic of the past that is of little relevance today? There is need for a rational assessment of their actual and potential relevance mindful of their complicity in facilitating slave trade, colonial rule and post-colonial dictatorships as well as in stifling the transition to democratic governance in many countries. The critical question is how exactly traditional authorities and institutions can be made to play a role in promoting constitutionalism and good governance and hopefully enrich the constitutions with traditional identity and legitimacy. The problem today is not simply one of the presence or absence of traditional authorities and institutions in designing constitutions that reflect an African identity. It is rather one of identifying what problem they solve and what value they add to the goal of promoting constitutionalism. In other words, do we want traditional African authorities and institutions because they are indigenous and relevant or only because they are indigenous?

5. Constitutionalism and an African constitutional identity

Should constitutionalism form part of an African constitutional identity? Does the project of having constitutional identities being reflective also of constitutionalism, remain important? Have conditions changed much from the pre-1990s that a different approach to government becomes viable? Are all the elements of constitutionalism equally relevant? Does the Chinese governance model of an undemocratic developmental state pose a real alternative for African developmental challenges?

Can the substance of a country's constitutional identity to a large extent reflect how the essentials of constitutionalism combine and interact with the attributes of a constitution that are expressive of the unique history and particular circumstances of the country to come out with something distinctive? Are there any distinctive principles that could contribute to the promotion of constitutionalism that have emerged in African practice, past or present?

How can a distinctive constitutional identity also be the nation's or people's identity, and break the disconnect between the formal and the informal organisation of society? How can such a community identify itself as a constitutionally organised political community with a sense of collective constitutional self and able to associate itself with some core constitutional values and institutions? How does the promotion of constitutionalism, respect for the rule of law, good governance, democracy and respect for human rights on the continent – fit into or shape African constitutional identity? Would participatory constitution-making processes suffice?

6. A pan-African constitutional identity?

How does the pan-African ideal reflect the individual national or collective African constitutional identity? Or, is this a(n) (un)realistic dream deferred? Have any distinct, innovative theories, principles and practices been adopted by the AU and/or Regional Economic Communities to address Africa's challenges? Is the African Charter on Democracy sufficient and effective instrument to impose a constitutional identity across the continent that fortifies constitutionalism? How have these organisations reconciled the national constitutional identity of member states with the imperatives of supra-national constitutional identity? These questions are particularly important with respect to the existing supra-national judicial bodies on the continent.

C.   Information on the submission of abstracts

We hereby invite all scholars and other persons interested in research in this area to submit a proposal on any of the sub-themes indicated above. The proposal should include:

- An abstract of the paper of about 1000 words (clearly indicate the sub-theme you want your abstract to be reviewed under or if is it general, then say "other").
- A c.v. of the author.

The deadline for submitting proposals is **15 February 2020.** Proposals should be sent as e-mail attachments to Dr Michelle Maziwisa, at michelle.maziwisa@gmail.com and Dr. Lukman Abdulrauf, at lukmanrauf@gmail.com. and copy the two organisers, Prof. Charles M. Fombad, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, Charles.fombad@up.ac.za and Prof. Nico Steytler, SARChI Chair in Multilevel Government, Dullah Omar Institute, University of the Western Cape, nsteytler@uwc.ac.za Any questions on this call for papers should be directed to the addresses given above.

On acceptance of an abstract by the organisers, the author will be invited to submit a draft paper by **15 May 2020** on the basis of which a final invitation to the conference will be extended.

All authors whose papers are accepted will be provided with a return economy class air ticket, and board and lodging in Stellenbosch for the duration of the seminar.

All the papers presented during the seminar will be peer reviewed for publication in the sixth volume of the, ***Stellenbosch Handbooks in African Constitutional Law***, which is published by Oxford University Press, Oxford.

Please, kindly distribute this call for papers as widely as possible to all colleagues in your faculty as well as to other interested persons such as legal practitioners and judges.

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