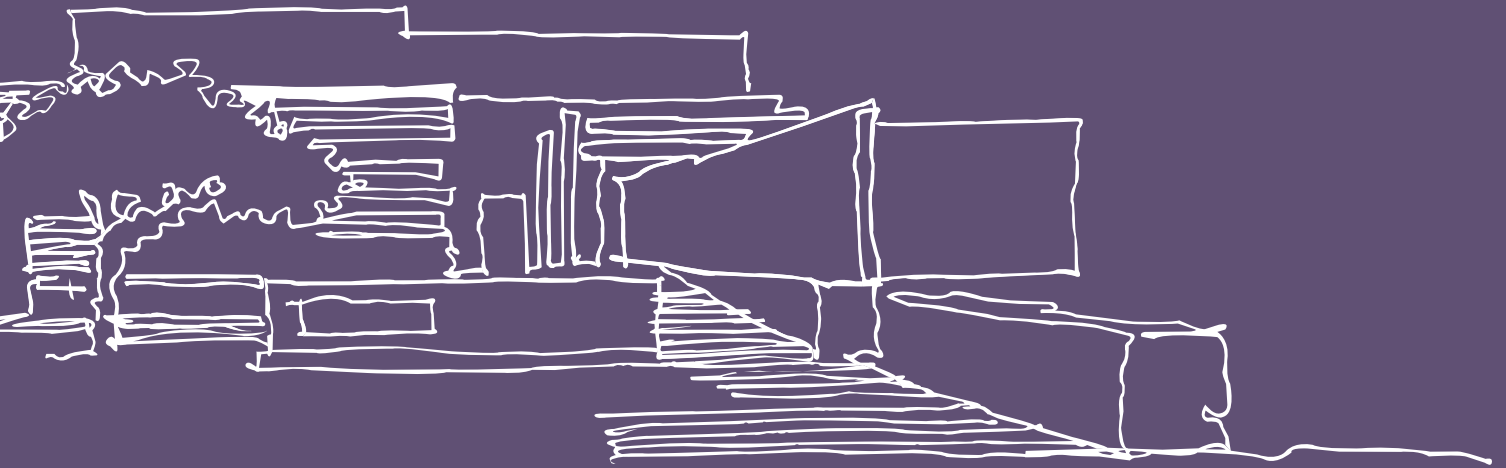


FIFTH STELLENBOSCH ANNUAL SEMINAR
ON CONSTITUTIONALISM IN AFRICA (SASCA 2017)
**CORRUPTION AND CONSTITUTIONALISM IN AFRICA:
REVISITING CONTROL MEASURES AND CONTAINMENT STRATEGIES**
19-22 SEPTEMBER 2017
PROGRAMME

A CREATIVE SPACE FOR THE MIND



Konrad
Adenauer
Stiftung



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

Institute for International and Comparative Law in Africa (ICLA)

South African Research Chair
in **Multilevel Government,
Law and Policy**

University of the Western Cape

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STELLENBOSCH INSTITUTE FOR ADVANCED STUDY
STELLENBOSSE INSTITUUT VIR GEVORDERDE NAVORSING

INTRODUCTION

The Fifth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2017) will take place in Stellenbosch (South Africa) from Tuesday 19 September to Friday 22 September 2017.

ORGANISERS

SASCA 2017 is jointly organised by

- The Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria;
- 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.

THEME

The theme for the SASCA 2017 seminar is ***Corruption and constitutionalism in Africa: Revisiting control measures and containment strategies.***

CONTENTS

Corruption is probably one of the biggest threats to peace and stability in Africa today. It casts an ominous dark shadow over the future political, economic, and social progress of the continent given the deleterious effects it is having on the faltering efforts to establish a culture of constitutionalism, democracy, respect for the rule of law and good governance. In fact, it has been estimated that Africa loses US\$148 billion each year to corruption. The debilitating effects of corruption are sparing no African country.

The discussion of the impact of corruption on constitutionalism, good governance and rule of law in Africa during the seminar will approach the issue from three main dimensions. First, whether the constitutional and legislative frameworks for combating corruption is sufficiently robust to deal with the matter. The second dimension will look at the institutions, both formal and informal that have been established for dealing with corruption. What are they, what are their roles and why have they not been very effective? The third dimension will look at the processes used and the measures provided to prevent, detect, punish, control and eradicate corruption. Why are these not working? What needs to be done to strengthen public accountability, limit avenues for corruption and bolster constitutionalism and good governance?

PROCEDURES

The call for papers opened in January 2017, targeting African legal scholars, judges and legal practitioners from Africa as well as international scholars who have researched and published on the various expressions of constitutionalism in Africa.

In the first round of the two-stage selection process, abstracts were called for on the various aspects of the seminar theme. The first round ended with invitations to submit draft papers, issued to a selection of the authors of abstracts. The second round of the process ended with the extension of final invitations to participate in the seminar, issued to the authors of approved draft papers.

EXPECTED OUTCOMES

Apart from sharing insights on corruption and constitutionalism, evaluating strategies to combat corruption and developing networks of legal scholarship and practice, all the papers presented during the seminar will be peer-reviewed for publication in the fourth volume of the new series, *Stellenbosch Handbooks in African Constitutional Law*, to be published by Oxford University Press.



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PROGRAMME

18 SEPTEMBER 2017		
18.00–20.00	Informal dinner at STIAS	
DAY 1, 19 SEPTEMBER 2017		
	Session 1: Introductory session	
10.30–11.00	Registration and refreshments	
11.00–11.30	Welcome: Prof Hendrik Geyer (STIAS), Prof Nico Steytler (SARChI, University of Western Cape), Mr Peter Wendo (KAS)	Moderator: Prof Charles Fombad (University of Pretoria)
	Group Photo Session	
11.30–13.00	Session 2: The challenges of corruption to constitutionalism	Chair: Prof Nico Steytler (University of the Western Cape)
	1.	Hon. Pravin Gordhan MP
	2. The crisis of corruption and constitutionalism in Africa	Prof Charles Fombad
13.00–14.00	Lunch	
14.00–15.30	Session 3: State Capture, corruption and constitutionalism	Moderator: Prof Nico Steytler (University of the Western Cape)
	3. State capture, constitutionalism and democratization in Africa	Prof Adebayo Olukoshi (International, IDEA)
	4. Economic transitional justice. Turning a new anti-corruption leaf in Africa?	Prof Xavier Philippe (University of Aix-Marseille, France)
	5. Constitutions: Controlling Politically Exposed Persons (PEPs) or Controlled by PEPs?	Prof John Hatchard (Buckingham Law School, UK)
15.30–16.00	Refreshments	
16.00–17.00	Session 4: Some frameworks for preventing corruption	Moderator: Prof Charles Fombad (University of Pretoria)
	6. 'Financial constitutions' to prevent corruption	Prof Nico Steytler (University of the Western Cape)
	7. Chinese Multinational Corporation's Obligations in the Global Anticorruption: Levelling the playing field in Africa	Prof Qingxiu Bu (University of Sussex, UK)
	Discussion	
18.30–20.30	Formal welcome dinner at STIAS	
DAY 2, 20 SEPTEMBER 2017		
9.00–10.30	Session 5: Electoral Corruption	Moderator: Prof Kwame Frimpong (University of Professional Studies, Accra (UPSA), Ghana)
	8. Electoral corruption and the adjudication of disputed presidential elections in Africa	Dr O'Brien Kaaba (School of Law, University of Zambia)
	9. The politics of corruption and elections in Kenya: analysis of the 2013 and 2017 general election	Dr Conrad M. Bosire (Katiba Institute, Kenya)
	Discussion	
10.30–11.00	Refreshments	

11.00–12.30		Session 6: Country case studies: South Africa – deepening corruption	Moderator: Prof Kwame Frimpong (University of Professional Studies, Accra (UPSA), Ghana)
	10.	Social Grant Payments and Regulatory Responses to Corruption in South Africa	Prof Jonathan Klaaren (University of the Witwatersrand)
	11.	Combating corruption at the coalface in the courts: Jurisprudential gems mined in Braamfontein	Adv. Paul Hoffman SC (Institute for Accountability in Southern Africa)
	12.	South African constitutionalism and corruption	Prof Francois Venter (North-West University)
		Discussion	
12.30–13.30		Lunch	
13.30–15.00		Session 7: Country case studies continued	Moderator: Mr Peter Wendo (Konrad Adenauer Stiftung)
	13.	A comparative analysis of corruption and constitutionalism in Muslim MENA states: Algeria, Morocco, and Egypt	Dr Sherif Elgebeily (Centre for the Study of International Peace and Security, UK)
	14.	Constitutional Design and Anti-Corruption Reform in Nigeria: Problems and Prospects	Prof Rotimi Suberu (Bennington College, US)
	15.	Corruption in Ethiopia: A merely technical problem or a major constitutional crisis?	Prof Zemelak Ayele (University of Addis Ababa, Ethiopia)
		Discussion	
15.00–15.30		Refreshments	
15.30–17.00		Session 8: Country case studies continued	Moderator: Prof André Thomashausen (University of South Africa)
	16.	Fighting public sector corruption in Ghana under the shadow of greed and plunder – A case of rhetoric or practice	Prof Kwame Frimpong (University of Professional Studies, Accra (UPSA), Ghana)
	17.	A pretentious commitment? Constitutional promises and anti-corruption work in Malawi	Prof Mwiza Jo Nkhata (University of Malawi, Malawi)
	18.	Corruption in Zimbabwe: Fighting a losing battle?	Dr Tinashe Chigwata (University of the Western Cape)
		Discussion	
18:30		Dinner at STIAS	

DAY 3, 21 SEPTEMBER 2017			
9.00–10.30		Session 9: Country case studies continued	Moderator: Prof Yonatan Fessha (University of the Western Cape)
	19.	The court of audit and the control of public finances in the Lusophone African countries	Prof André Thomashausen (University of South Africa)
	20.	Impact of endemic corruption on constitutionalism and peacebuilding in Somalia	Mr Ibrahim Harun (University of Cape Town)
	21.	Botswana's constitutional democracy and its response to corruption	Prof David Sebudubudu and Dr Ramadi Dinokopila (University of Botswana)
		Discussion	
10.30–11.00		Refreshments	

11.00–12.30		Session 10: Anti-corruption measures and actors	Moderator: Prof Phoebe Bolton (University of Stellenbosch)
	22.	Using the bill of rights to check the state excesses in the fight against corruption: A review of jurisprudence from Kenya and South Africa	Dr Ken Obura (University of Nairobi, Kenya)
	23.	Moving beyond the state: Citizen led anti-corruption mechanisms in sub-Saharan Africa	Prof Sope Williams-Elegbe (University of Stellenbosch)
		Discussions	
12.30–13.30		Lunch	
13.30–17.30		Afternoon excursion to Solms Delta	
18.00–21.30		Dinner at Le Pommier	

DAY 4, 22 SEPTEMBER 2017			
9.00–11.00		Session 11: Strategies out of corruption	Moderator: Prof Nico Steytler (University of the Western Cape)
			<i>Panel</i> Hon. Derek Hanekom MP (former Minister of Tourism) Prof Mohammad Kuna (Independent National Electoral Commission (INEC), Nigeria) Dr David Lewis (Corruption Watch) Mr Chinedu Nwagu (TrustAfrica, Nigeria Anti-corruption and Criminal Justice Fund) Mr Clifford Moonga (Anti-Corruption Commission, Zambia)
11.30–12.00		Closing session	Prof Charles Fombad (University of Pretoria)
		Planning for 2018	Prof Charles Fombad (University of Pretoria)
		Closing remarks	Mr Peter Wendo (KAS)
		Closing remarks	Prof Johann Groenewald (STIAS)
		Vote of thanks	Prof Charles Fombad (University of Pretoria)
		Refreshments and departure	

SUMMARY OF PRESENTATIONS, SASCA 2017

1 Hon. Pravin Gordhan

2 Prof Charles Fombad: The crisis of corruption and constitutionalism in Africa

The relentless persistence of endemic corruption in Africa and the failure since independence to seriously control it poses one of the greatest threats to peace and security on the continent. In fact the evidence of the unrelenting spread of corruption in spite of the optimism that followed the 1990 wave of constitutional renewal and re-awakening on the continent clearly shows that it has become a deep seated institutional problem that has not been addressed in any effective or sustainable manner. Most of the anti-corruption strategies have not only been inadequate and ineffective but have turned out to be mere palliatives and symbolic gestures. The paper will start by providing a brief overview of the nature of the challenge posed by corruption in Africa and its negative impact on the on-going attempts to entrench an ethos of constitutional governance. The question that will be examined is why corruption has persisted and what have been the consequences of this. This is followed by an examination of some of the past attempts to bring corruption under control and why they failed. An analysis of some of the main surveys on corruption, accountability, good governance on one hand, and constitutionalism on the other, is undertaken. The purpose is to investigate the link there is between the former and the latter and what these surveys tell us about the trends on the continent. The fourth part of the paper will consider some of the radical changes that are needed to develop more effective and sustainable anti-corruption measures in Africa. In concluding, it is argued that only a comprehensive set of constitutionally entrenched principles and institutions designed to make corruption a high risk/low return endeavour can provide the firm bedrock needed to launch a credible, effective and sustainable anti-corruption strategy that could bring Africa's troubling endemic corruption under control.

3 Prof Adebayo Olukoshi: State capture and constitutionalism and democratization in Africa (?)

4 Prof John Hatchard: Constitutions: Controlling PEPs or Controlled by PEPs?

The fundamental values of a nation are enshrined in its national constitution and given that 'corruption and maladministration are inconsistent with' those values, it plays the key role in upholding good governance (or in Commonwealth parlance, 'just and honest government'). This is particularly the case when seeking to combat corruption-related activities and the laundering of the proceeds of corruption by senior political figures, commonly referred to as politically exposed persons (PEPs). Yet this raises a unique problem in that PEPs are often in a position to 'control the constitutional controls'. This remains an issue for many African states. Thus, PEPs can use constitutional provisions to protect themselves and their supporters (e.g. through the use of immunity clauses and the exercise of the presidential power of pardon) as well as seeking to undermine the operation of good governance mechanisms (e.g. undermining the oversight of government spending). Given this reality, the challenge is to ensure that constitutional safeguards are effective and capable of 'persuading' even the most powerful of PEPs to 'commit' to good governance. This paper explores some of the strategies for making constitutions 'work effectively' in practice and argues that in seeking to do so, civil society, including the media, as well as anti-corruption/ethics commissions have key good governance roles to play.

5 Prof Nico Steytler: 'Financial constitutions' to prevent corruption

The principal aim of a constitution is to regulate and limit state power. The principal source of state power is money. Therefore, constitutions are therefore also concerned with the regulation and limitation on the raising and expending of public money. The basic principles of constitutionalism is therefore also applicable to the management of public funds. First, the raising and expenditure of funds are subject to democratic decision-making; secondly, the expenditure of funds is subject to limitations, including the separation of powers; thirdly, the raising and expenditure of funds are subject to the rule of law; and finally, the expenditure of funds should be for a public (developmental) purpose. These basic principles have evolved into a particular constitutional architecture which, if followed, could prevent the routinization of corruption. These principles will be examined in respect of Africa's major economies: Nigeria, South Africa, and Kenya. Since they are also decentralised states, a further layer of controls for the vertical distribution of funds is added. Given the endemic nature of corruption in the three countries the questions are thus: (a) is this financial architecture sufficient to prevent corruption routinely? Or (b) that none of the underlying premises hold water, or inadequately so? It will be shown that although there may be some gaps in the financial architecture (for example, on procurement), the main difficulty lies in the systemic weakness of the institutions.

6 Prof Xavier Philippe: Economic transnational justice. Turning a new anti-corruption leaf in Africa?

The Tunisian Revolution during the Arab Spring gave rise to a commitment to democracy and fight against the odds of the previous regime. Amongst them was corruption for which the former President Ben Ali and his relatives were tried. Tunisia adopted a transitional justice mechanism in December 2013 and a new Constitution in January 2014. Both texts put a specific emphasis on fighting corruption. However, despite these principles and mechanisms, the executive power drafted a bill named '*Statute of economic and financial reconciliation*' that grants amnesty on persons who could have taken personal benefit from the State assets or money. This bill follows the opposite objective from those espoused by the Constitution and transitional justice mechanism. Vehemently criticised by NGO's and the population, it has been largely amended but not to the point of being simply dropped. This case study raises the issue of dealing with corruption crimes of the past in a new democratic era and the inherent discrepancies involved in fighting corruption.

7 Prof Qingxiu Bu: Chinese Multinational Corporation's Obligations in the Global Anticorruption: Levelling the playing field in Africa

Bribery and corruption are major problems in both China and Africa, while the former is the biggest investor in Africa, building major infrastructure projects in the continent. With the two realities interacted, the Beijing Model inspires that a regime without adequate rule of law and democracy has still substantially developed its economy. Such a counter-conventional trajectory raises many inquiries: would Section 164 of the PRC Criminal Law serve a deferent role in combating bribery against China's multinational corporations (MNCs) in Africa? In terms of levelling the playing field between Western MNCs and their Chinese counterparts, do China's *guanxi* and West's networking differentiate each other in any meaningful sense? Would Western MNCs be disadvantaged by such tough anti-bribery laws, such as Bribery Act 2010 and Foreign Corrupt Practices Act (FCPA)? The paper focuses on the relationship between China and Africa in the context of corruption. Viewed from an interdisciplinary perspective, Chinese MNCs have a competitive advantage over their Western rivals in the short term, but not sustainably. With pros and cons taken into consideration, it is arguably held that

the China's effort in tackling bribery and corruption plays a positive role in Africa, which facilitates Africa's anticorruption incrementally. A sustainable development will depend upon whether the long-standing endeavour against corruption and bribery can be implemented from the African continent internally, after all, the neither China nor the West serves as primary driving forces in rooting out the global challenge!

8 Dr O'Brien Kaaba: Electoral corruption and the adjudication of disputed presidential elections in Africa

Corruption is widespread in Africa and invariably affects the electoral process. In the electoral process it usually manifests through bribing electoral officials and rival candidates, vote buying, multiple voting, ballot stuffing, pre-marking ballots, tampering with election results and inducing unqualified persons to vote. Winning the Presidency ensures one and those connected to him or her almost unlimited access to public resources and, for the incumbent candidate or party, losing the election usually means losing all these privileges. As a result, presidential elections in Africa tend to be bitter zero sum games. Candidates usually try to win the elections at any cost. Incumbent candidates or candidates supported by incumbent parties often have a head start as they have access to public resources their opponents in the opposition do not have. The situation incentivizes electoral malpractices, including electoral corruption. When results of presidential elections are disputed aggrieved parties have sometimes petitioned the courts for redress. Despite all the electoral corruption and other malpractices that have often characterized elections in Africa, there is no judiciary in any African country that has annulled a presidential election. This paper looks at the problem of corruption in the context of the electoral process and how courts hear and determine disputed presidential elections in Africa, in which allegations of corruption are often made. It is divided in seven sections or parts.

9 Dr Conrad Bosire: The politics of corruption and elections in Kenya: analysis of the 2013 and 2017 general election

With the presidential vote and political support roughly divided into half in the last couple of elections, Kenya's presidential election, and all elective seats in general, are some of the most highly contested in the continent. The high and real political stakes in the presidential election make the every election an intense and nerve-wrecking exercise in the country. Furthermore, all elective seats are usually characterised by a high turnover of elected representatives. As a result, all candidates, including the incumbent President, are not always certain, incumbency notwithstanding, of a re-election. This situation encourages corrupt behaviour among contestants, in a bid to capture their seats. The Constitution of Kenya 2010 envisaged comprehensive reforms to the political and electoral processes geared towards promoting transparency, accountability, and integrity in elections and accompanying political processes. The paper will analyse the framework (constitutional and legal) that underpins elections and transparency in Kenya, and the effectiveness of implementation. Kenya just concluded the second general election under the 2010 Constitution; the two events will form the basis of analysis of the paper.

10 Prof Jonathan Klaaren: Social Grant Payments and Regulatory Responses to Corruption in South Africa

This paper investigates an ongoing intense episode of redistributive politics in a particular sector that may be used both to reveal the limited extent of the capacity of the South African state to combat corruption and to test some more general propositions about legal institutions and constitutionalism and their ability to minimize corruption and promote competition. The first part of the paper will describe and investigate corruption and the responses to it in the South African sector of social grant payments at three levels. One is corruption at the beneficiary

level. The existence of such corruption has been a justification for the use of biometric techniques. Another is corruption through the misuse of personal data by CPS and affiliates. A third level is corruption in the awarding of the contract to CPS in 2011 through the last-minute manipulation of the tender requirements and corruption in what might be termed the attempted engineered continuation of the illegal contract in 2016/2017. In each of these three levels, the aim will be to identify the form, shape, and prevalence of corruption as well as the judicial and state responses to that level of corruption.

11 Adv. Paul Hofmann SC: Combating corruption at the coalface in the courts: Jurisprudential gems mined in Braamfontein

The South African Constitutional Court has been at the forefront of developing the jurisprudence for the eventual eradication of corruption. It has sat through a trilogy of cases initiated by a Gauteng businessman, Hugh "Bob" Glenister, who has steadfastly endeavoured, through the use of "lawfare", to secure efficient, effective and adequately independent machinery of state to combat the corrupt. The Glenister cases have spawned imaginative judicial interventions based on the notion that failure to take appropriate measures to combat corruption is regarded as a violation of human rights in South Africa. This notion has been developed by the Constitutional Court because it regards the justiciable obligations of the state under the Bill of Rights, which is Chapter Two of the Constitution, as matters affected by corruption. In the light of this and focusing particularly on the *Glenister cases*, this paper investigates how the South African courts have developed the anti-corruption jurisprudence. It concludes that the *Glenister cases* have indeed been a test of judicial imagination and collectively are an important contribution to the worldwide struggle against the scourge of corruption.

12 Prof Francois Venter: South African constitutionalism and corruption

This paper examines the relationship between constitutionalism and corruption in South Africa. It analyzes the attitude of the South African courts in the fight against corruption through their decisions. From this analysis, the paper brings out some of the requirements for stemming corruption which can serve as guideline for not only the courts, but other institutions that are responsible for anti-corruption crusade. The paper furthermore takes stock of how South Africa has fared in this regard and discusses what the future may hold for the country in terms of stemming corruption.

13 Dr Sherif Elgebeily: A comparative analysis of corruption and constitutionalism in Muslim MENA states: Algeria, Morocco, and Egypt

This paper embarks upon a comparative review of the intersection between the three constitutional frameworks and corruption – Algeria, Morocco, and Egypt, exploring comprehensivity of constitutional protections and safeguards of anti-corruption and highlighting the challenges in their implementation. The paper also examines the influence of Islamic law and cultural heritage upon anti-corruption measures. It begins by identifying the nature of corruption in Algeria, Morocco, and Egypt, exploring to what extent it has been recognised as a problem. Then, the paper goes on to identify and critique the constitutional provisions and non-constitutional influences that deal with corruption, introducing the element of Islamic thought and domestic religious institutions. The paper furthermore questions how effective these measures have been in tackling corruption and identifying what is needed to bring them fully into force, before providing conclusions and recommendations.

14 Prof Rotimi Suberu: Constitutional Design and Anti-Corruption Reform in Nigeria: Problems and Prospects

While the interactive and complementary effects on corruption of political culture, political economy, political agency, and political institutions is acknowledged, this contribution argues that deficiencies in Nigeria's constitutional architecture generally, and in the institutional design of anti-corruption and oversight agencies more specifically, have contributed prominently to the failure of anti-corruption reform in the country. The paper focuses on five key constitutional and institutional deficiencies as follows: the institutional perpetuation of imperial political chief executives at federal and sub-federal levels, weak political insulation for anti-corruption agencies, the decentralization of political corruption through a patronage-based federalism, feckless or hollow open government laws, and non-participatory and non-integrative constitution-building processes. Accordingly, the paper suggests that critical constitutional and institutional reforms in these domains are required to mitigate the endemic and pervasive nature of corruption in Nigeria.

15 Dr Zemelak Ayele: Corruption in Ethiopia: A merely technical problem or a major constitutional crisis?

This paper argues that corruption in Ethiopia is not a merely administrative problem but a major constitutional crisis. The prevalence of corruption in the country is, at least in part, a result of the ineffectiveness of institutions with a direct and indirect mandate of preventing, investigating and/or prosecuting corruption. This is in turn because the anti-corruption institutions lack constitutional protection and, therefore, institutional independence that their mandates require. Moreover, the absence of a competitive multiparty democracy in the country has given the ruling party an unimpeded control on all state institutions and affairs, thereby, creating a conducive environment for corruption. Furthermore, various restrictive pieces of legislation have rendered the media and civil society organisations inept in terms of playing a meaningful role in anti-corruption efforts. All these together have led to an unprecedented prevalence of corruption in the country. Therefore, a reform that does not address these issues and seeks to deal with corruption merely at technical level is not likely to be successful in terms of resolving the problem. The paper begins by describing the state of corruption in the country with a view to showing how serious a national predicament it has become. This will be followed by a discussion on constitutional principles and constitutionally and legislatively established institutions that have the mandate to fight corruption. Policy reforms and legislative measures which were introduced with similar objectives will then be discussed. Finally, the paper attempts to explain why these anticorruption efforts were less than effective.

16 Prof Kwame Frimpong & Mr Kwaku Agyeman-Budu: Fighting public sector corruption in Ghana under the shadow of greed and plunder- A case of rhetoric or practice

In light of the widespread nature of corruption and the apparent inability of the international community to combat this evil economic scourge, it is obvious that current efforts do not appear to be effective. It is therefore imperative to search for new alternatives to confront this enemy. What needs to be borne in mind is the fact that corruption generally thrives when there are no appropriate mechanisms to detect, prosecute and punish offenders, or the appropriate mechanisms are ineffective. Studies have shown that when public sector institutions are strengthened the normal tendency to be involved in corrupt activities is substantially minimized. Using Ghana as a case study, this paper, *inter alia*, seeks to argue for the development and strengthening of democratic institutions to provide the best mechanism to expose corrupt tendencies in society and thereby make it difficult for it to thrive, and effectively punish offenders in Ghana.

The paper is therefore structured in three parts. The first part examines the history of corruption in Ghana. The second part explores the rhetorical fight against corruption in Ghana and finally, focuses on the path that can be taken towards rooting out corruption.

17 Prof Nwiza Jo Nkhata: A pretentious commitment? Constitutional promises and anti-corruption work in Malawi

This paper is an evaluation of anti-corruption work in Malawi from 1996, when the country's first legislation dealing specifically with corruption became operational. The adoption of a specific law to deal with corruption also marked the establishment of a dedicated government agency to deal with corrupt practices. However, to provide a context to the dynamics surrounding corruption in the country, the paper begins by charting a brief historical perspective to corruption in Malawi. This historical perspective goes further back than 1996 simply for the purpose of providing a holistic picture of the situation. The paper's main focus is an evaluation of the work of the Anti-Corruption Bureau (ACB), especially its successes and failures over the years, as against the stipulations in the Constitution of the Republic of Malawi (the Constitution). Specifically within the Constitution, the evaluation of the work of the ACB is conducted by, primarily, referring to the fundamental principles of the Constitution and the principles of national policy. A key argument in this paper is that the Constitution's fundamental principles and principles of national policy must always be the guiding beacons for the work of the ACB and also the basic standard(s) against which the ACB's work should be measured. The paper also contends that the Constitution's fundamental principles generate imperatives which require that Malawi should be corrupt free thereby imbuing all anti-corruption work with a constitutional imprimatur. The paper concludes by making some suggestions on the way forward in terms of fighting corruption in Malawi.

18 Dr Tinasho Chigwata: Corruption in Zimbabwe: Fighting a losing battle?

Corruption has reached pandemic levels in Zimbabwe despite the presence of an anti-corruption legal and institution framework with constitutional backing. The 2013 Constitution of Zimbabwe has not only failed to bring corruption under control, but corruption continues to constrain the realisation of other constitutional objectives. The burden and the effects of corruption on the lives of ordinary citizens are growing more unbearable. Not everyone can access public services whenever they require them. The law is no longer fully exercising its function of protecting weak members of society. Economic growth has stalled, partially due to an unattractive investment climate with corruption at the centre of it. The effects of corruption on democracy and development, and ultimately on constitutionalism are, therefore, astronomical and devastating. Accepting defeat against corruption is not an option given the lives of a majority of Zimbabweans which are at risk due to this evil. Yet, the battle against corruption promises to be a daunting task which if not addressed as a matter of urgency will cause irreparable damage to Zimbabwean society. The magnitude of this problem, its impact on constitutionalism, the effectiveness of mechanisms designed to fight it, and ways of improving that fight, require interrogation which this paper seeks to provide.

19 Prof André Thomashausen: The court of audit and the control of public finances in the Lusophone African countries

Art 14 of the French Declaration of the Rights of Man and of the Citizen, passed by France's National Constituent Assembly in August 1789, guarantees the principle of accountability which has since led to the institution in many countries of judicial organs tasked with controlling public finances and auditing public spending. In France the "Cour des Comptes" was created in 1807, and the Portuguese "Tribunal de

Contas” followed in 1849. The “Corte dei Conti” in Italy was created in 1862. The Belgian “Cour des Comptes” commenced to operate in 1883. In Africa, Angola, Mozambique, Cape Verde, São Tomé and Príncipe and Guiné Bissau all continued the Portuguese tradition of a judicial Audit Court. The Courts of Audit in the Lusophone countries in Africa have found it difficult to operate as part of an independent judiciary and are hampered by curtailments of their competencies and powers. At the same time, their status as part of the judiciary has isolated them from the parliamentary powers of controlling the executive. The effectiveness of the Courts of Audit thus depends almost entirely on their powers of intervention and especially preventive intervention with regard to public spending and budgeting. The powers and procedures of the Courts of Audit will be examined and evaluated for each of the 5 lusophone countries. Particular legislation to strength the combatting of public finances maladministration, and corruption generally, will also be examined and critically evaluated.

In concluding, the effectiveness of the “judicial” approach to public accounts will be compared with the “parliamentary” foundation of audit functions in South Africa.

20 Mr Ibrahim Harun: Impact of endemic corruption on constitutionalism and peacebuilding in Somalia

Corruption in Somalia is of growing concern both to the Somali people and to the international community and is, therefore, consistently singled out as a serious problem. In international rankings measuring corruption, Somalia has remained stubbornly at the bottom of the pile over the past several years. In 2005, Somalia was ranked 144th on Transparency International’s Corruption Perception Index. By 2009, Somalia had slipped into 180th place. In 2016, Somalia was ranked 176th, earning the unenviable title of the country perceived as most corrupt. Corruption in Somalia has now become a major challenge and has been entrenched in all areas of life, threatening the fragile peace, stability and security, undermining the institutions and values of democracy, destroying ethics, values and justice, and jeopardising the growth of constitutionalism that is gradually taking shape. Consequently, corruption is decelerating the state-building process and development gains and impedes the progress achieved in terms of the rule of law, access to basic services and free market economy. Both the Somali government and the international community have made fighting corruption a stated priority, especially in the current context of transition. The paper argues that anticorruption measures should be viewed as an important conflict-prevention tool, thus providing an agenda for the promotion of peace and security in Somalia.

21 Prof David Sebudubudu and Dr. Ramadi Dinokopila: Botswana’s constitutional democracy and its response to corruption

The purpose of this paper is to demystify Botswana’s hailed anti-corruption’s response/strategy. In that context, the paper considers Botswana’s constitutional democracy’s response to the problem of corruption. It further unpacks the effectiveness and limitations of this response. Drawing from previous studies on the issue of corruption in Botswana, the paper further argues that the commitment to entrench a culture of constitutionalism, good governance and respect for the rule of law is critical to curbing corruption in any country. It argues that while Botswana is doing well, perhaps relative to many African countries, recent trends in the incidence of corruption suggests that Botswana is slowly failing to effectively address issues of corruption. The lapse in the country’s concerted efforts to address issues of maladministration and corruption became apparent since President Ian Khama took office in 2008. This is, it is further argued, due to the limitations that have been placed on the country’s response to corruption. Such limitations undermine and are a threat to the country’s constitutional democracy which is ranked as one of the strongest in Africa.

22 Dr Ken Obura: Using the bill of rights to check the state excesses in the fight against corruption: A review of jurisprudence from Kenya and South Africa

The constitutionality of the fight against corruption has been the subject of litigation in a number of jurisdictions. These challenges reflect the constant unease that characterises relations between law enforcement and the bill of rights. In the context of anti-corruption, these challenges have been witnessed in a number of areas including: the use of non-conviction forfeiture mechanisms; autonomy and operational independence of anti-corruption agencies; creation of special anti-corruption courts; definition of corruption; and investigative powers and techniques, such as electronic and other forms of surveillance and undercover operation, adopted by anti-corruption agencies. But how have the courts dealt with these challenges and are there lessons that can be drawn on how to design a constitutional compliant anti-corruption framework? This paper attempts to answer these questions through an analysis of identified cases where the constitutionality of the anti-corruption effort has been challenged.

23 Prof Sopo Williams-Elegbe: Moving beyond the state: Citizen led anti-corruption mechanisms in sub-Saharan Africa

Anti-corruption mechanisms have had a chequered history in Africa. Since the ‘corruption eruption’ of the 1990s, Africa has been the intense focus of the development community’s anti-corruption studies, action and rhetoric; with the aim to improve governance and developmental outcomes in Africa. Despite the implementation of several measures to address corruption in areas of the public sector such as public finance, public administration and public procurement, there appears to have been little change in the perception of corruption in many countries in sub-Saharan Africa based on global corruption indices such as the Corruption Perception Index and the Bribe Payers Index. This paper examines the underlying causes of the failures to adequately reduce government corruption in Africa, exploring the problems inherent in the manner in which corruption is characterised and addressed, the collective nature of corruption in countries with systemic corruption, and the limitations of current anti-corruption measures. The paper further explores the recent move towards citizen action against corruption to determine whether citizen action provides more promise in fighting corruption than government sponsored regulatory and non-regulatory measures.

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