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0521584647 - Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective - John Hatchard, Muna Ndulo and Peter Slinn

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Introduction

We are conscious that there are many pitfalls in writing a book of this kind. They were pointed out over thirty years ago by the authors of a pioneering work on public law and political change in Kenya.¹ Our project is in a sense even more ambitious in that we deal not with one state but eleven eastern and southern African states (the ESA states). Even the title caused us much difficulty. It is to be hoped that readers will get beyond a textual analysis of expressions which raise some difficult questions. What is ‘constitutionalism’? What is ‘good governance’? What are the boundaries of ‘eastern and southern Africa’? What is the relevance of the Commonwealth?

De Smith’s view of the concept of constitutionalism is firmly set in a western liberal democratic mould:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content – Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.²

This definition has been characterised as ‘minimalist’ by one of Africa’s most distinguished academic lawyers, noting that western constitutionalism was often argued to be representative of a foreign element

¹ Preface to Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya*, Oxford, Oxford University Press, 1970: ‘There are so many reasons for not writing a book on the public law of an African state, not least that much of the subject matter . . . tends to be somewhat ephemeral.’ It is particularly fitting that we close this study with a reference to the Report of the Constitution of Kenya Review Commission, chaired by Professor Ghai, p. 324.

² S. A. de Smith, *The New Commonwealth and its Constitutions*, London, Stevens, 1964, p. 106.

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which had no place in African tradition, history or practice.³ This latter perspective led to a 'developmental' argument in favour of authoritarianism: no fetter should be placed on the exercise of state power in the interests of the development of the masses. At the heart of this book lies the issue of the extent to which the exercise of arbitrary power may be limited by constitutional and other means so as to ensure the good government of the people.

'Good governance' is another much used but ill-defined concept. 'Good governance is more than putting constitutional limits to the power of the government.'⁴ The adjective 'good' perhaps is merely there for emphasis, for while 'government' may be good or bad, 'governance' in the modern language of the development industry implies 'the conscious management of regime structures with a view to enhancing the legitimacy of the public realm'.⁵ As it was put in the World Bank's report which marked that institution's damascene conversion to the importance of governance issues in the quest for sustainable development,

Underlying the litany of Africa's development problem is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs . . . [Appropriate economic policies must] go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable and an administration that is accountable to the public.⁶

Africa's quest is thus for a golden triptych of good governance → constitutionalism → sustainable development.

The boundaries of the study are comprised by the anglophone Commonwealth countries of eastern and southern Africa (the ESA states): Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland,

³ Issa G. Shivji, 'State and Constitutionalism: a New Democratic Perspective', in Issa G. Shivji (ed.) *State and Constitutionalism*, Harare, Zimbabwe, Sapes 1991, pp. 28–9.

⁴ Ali A. Mazrui, 'Constitutional Change and Cultural Engineering: Africa's Search for New Directions', in J. Oloka-Onyango (ed.) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, Kampala, Fountain Publishers, 2001, p. 22.

⁵ Goran Hyden and Michael Bratton *Governance and Politics in Africa*, Boulder, CO, Lynne Rienner Publishers, 1993 p. 7, quoted in a helpful synthesis by H. W. O. Okoth-Ogendo, 'Governance and Sustainable Development in Africa', in K. Ginther, E. Denters and P. de Waart (eds.) *Sustainable Development and Good Governance*, Dordrecht, Kluwer, 1995, p. 107.

⁶ World Bank, *Sub-Saharan Africa: from Crisis to Sustainable Growth*, Washington, DC, World Bank 1989, pp. 60 and xii. See also Peter Slinn, 'Constitutional orders and sustainable development: the Southern African experience and prospects', in Ginther, Denters and de Waart *Sustainable Development*, p. 165.

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Tanzania, Uganda, Zambia and Zimbabwe.⁷ Our collective expertise lies in these countries and we have all taught comparative constitutional law in diverse places. Whilst it is appropriate to draw some useful comparisons, the intention is not to undertake a comparative analysis of the texts of the constitutions of the ESA states, but rather to draw lessons, both positive and negative, from the experience of these countries in the development of constitutionalism in the region. In doing so, we address critically the legal issues involved in seeking to make constitutions 'work': for example, the protection of the constitutional order from being undermined by 'unconstitutional means' through the undue influence or involvement in government of the military or by 'constitutional means' through executive abuse of power.

The Commonwealth in our view is a vital component of the constitutionalism agenda for the ESA states. Representing an international organisation which is comprised of fifty-four countries from all parts of the globe, both developed and developing, but which lacks the threat of super-power dominance, Commonwealth Heads of Government Meetings (CHOGM) have adopted and frequently endorsed a statement of fundamental political values. The Commonwealth Principles including 'the inalienable right [of citizens] to participate by means of free and democratic political processes in framing the society in which they live', were first adopted at the Singapore CHOGM in 1971.⁸ The Harare Commonwealth Declaration of 1991 explicitly linked the advancement of the Commonwealth's fundamental political values with promoting sustainable development.⁹ CHOGM in Australia in 2002 reaffirmed a shared commitment to 'democracy, the rule of law, good governance, freedom of expression and the protection of human rights'.¹⁰ Moreover, the Commonwealth Ministerial Action Group on the Harare

⁷ Mozambique, although a Commonwealth ESA state, is omitted on the grounds that it is a Lusophone country with a radically different constitutional tradition. We have not dealt in any detail with the complex story of South Africa's transition, about which a vast literature already exists, although the post apartheid constitutional order demands frequent attention. Zimbabwe is included, although after this book went to press, Zimbabwe withdrew from the Commonwealth. This was in response to the decision of Commonwealth Heads of Government in December 2003 at their Meeting in Abuja, to extend Zimbabwe's suspension from the Councils of the Commonwealth imposed in March 2002. See chapter 1 at p. 11. All references to the number of Commonwealth member states in this book should take into account this situation.

⁸ The Declaration of Commonwealth Principles, Singapore, 22 January 1971.

⁹ Harare Commonwealth Declaration, 20 October 1991.

¹⁰ Coolum Declaration of Commonwealth Heads of Government, 5 March 2002. Significantly, a reference to freedom of expression appeared for the first time in this series of Declarations.

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Declaration (CMAG) was established in 1995 to deal with serious or persistent violations of the principles contained in that Declaration.¹¹

While no study of Africa can ignore the historical context, the emphasis here is on the contemporary constitutional scene.¹² ‘Contemporary’ may be defined for this purpose as the era ushered in by the wind of constitutional change which blew through Africa in the early 1990s. This wind proved too strong for the *de jure* one-party state regimes which had been a particular feature of the SEA states and even proved strong enough to topple the very *apartheid* system from the parliamentary ramparts of which Harold Macmillan had identified that earlier wind of change blowing through the continent some forty years before.¹³

We are conscious of our limitations as constitutional lawyers. We do not seek to offer an analysis of the political economy of the region. However we hope that this book will be of interest not only to fellow constitutional lawyers but to all those interested in confronting Africa’s twenty-first century challenges. We hope to make a useful contribution to the analysis of the successes and failures of African development in the region in so far as these may be attributable to matters within our focus – to the problem of tailoring appropriate constitutional clothes to fit the body politic in a way which promotes the good governance which is now accepted as a prerequisite for sustainable development.

¹¹ Millbrook Commonwealth Action Programme on the Harare Declaration issued by Heads of Government at Millbrook, New Zealand, 1995, Commonwealth Secretariat.

¹² The importance of the historical background is illustrated by the discussion of the colonial legacy and one-party states, see chapter 2.

¹³ Peter Slinn, ‘A fresh start for Africa? New African Constitutional Perspectives for the 1990s’ [1991] 35 *Journal of African Law* 1.

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1

The democratic state in Africa: setting the scene

Setting the scene: Africa's record

It is appropriate to begin with some general reflections upon Africa's successes and failures in the field of governance since independence and upon the future of democracy on the continent in the new millennium. Africa, with a land area three times the size of the United States and a population in excess of 600 million people, is both the least developed and, in terms of natural resources, the most endowed continent in the world.¹ With its vast mineral, oil, water, land and human resources, the continent has the ability to attain sustainable development, that is to say 'increasingly productive employment opportunities and a steadily improving quality of life for all its citizens'.² Yet millions of Africans live in acute poverty, have no access to safe drinking water and are illiterate.³ The ambiguity in Africa's position is revealed with particular clarity in relation to food production. In pre-colonial times, the continent was self-sufficient in this

¹ World Bank, 'Accelerated Development in Sub-Saharan Africa: an Agenda for Action', Washington DC, World Bank, 1981; Organisation of African Unity (OAU), *The Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa*, adopted by the Second Extraordinary Assembly of the OAU Heads of State and Government Devoted to Economic Matters, Lagos, Nigeria, 28–9 April, 1980.

² World Bank, *Sub-Saharan Africa: from Crisis to Sustainable Growth*, Washington, DC, World Bank, 1989; Julius Nyerere, 'Africa Exists in the Economic South,' *Development and Social Economic Progress* 41(3)(1988), 7–8; United Nations Economic Commission for Africa (UNECA), *Africa Alternative Framework to Structural Adjustment Programs for Socio-Economic Recovery and Transformation* (E/ECA/CM.15/6/Rev.3).

³ This is emphasised by the Human Development Index contained in the United Nations Human Development Report 2001 which measures the achievement of 163 countries world wide in terms of life expectancy, educational attainment and adjusted real income. It reveals that forty of the fifty-four worst performing countries are found in sub-Saharan Africa and these include all the ESA states, with the exception of South Africa. For a discussion of Africa's economic situation, see generally, Adebayo Adedeji, 'The Leadership Challenge for Improving the Economic and Social Situation of Africa', paper presented at the Africa Leadership Forum, 24 October – 1 November, 1988, Ota, Nigeria; and A. Y. Yansane (ed.) *Prospects for Recovery and Sustainable Development in Africa*, Westport, CT Greenwood Press, 1996.

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area. Now, however, many African countries are dependent upon external food supplies. On the face of it, the inability of the African continent to feed itself is paradoxical, since one of its chief assets is its huge agricultural potential. Further it has all the conditions for becoming one of the world's major food baskets.⁴

Unfortunately, Africa lacks the domestic capital necessary to translate its enormous wealth into realisable benefits for its people and it has failed to attract sizable foreign investment to fill the gap. While, for example, African countries have put in place a myriad of investment codes in an effort to attract foreign capital, they receive only some 5 per cent of all direct foreign investment flowing to developing countries.⁵ Furthermore, about half of this investment goes into oil and mineral production and most of it to a few countries such as South Africa, Nigeria, Angola and Botswana; this in spite of the fact that investments made in Africa consistently generate high rates of return.⁶

At the root of the problem is the world-wide perception of Africa as an unstable, poorly governed, conflict- and poverty-ridden continent that cannot guarantee the safety of foreign investments.⁷ Several researchers have tested the impact of political stability, or conversely, political risk, on foreign direct investment flows. They found that a major factor cited by investors to explain their decision not to invest in a particular country was political instability.⁸ Certainly Africa's political instability has

⁴ Karl Lavrencic, 'Food for Africa', *New African* 137, 90, February 1979.

⁵ United Nations Conference on Trade and Development, *Foreign Investment in Africa*, UNCTAD/DTCI/19, Current Studies, Series A, No. 28, 1995, p. 3.

⁶ For example, the average annual return on book value of US direct investment in Africa is nearly 28 per cent compared with 8.5 per cent for US direct investment worldwide. See *United States Direct Investment in Africa*, Southern African Development Community – USA, Trade and Investment publication, Washington DC, 1998, p. 4.

⁷ Since 1970, more than thirty-two wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone fourteen of the fifty-three countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons. See United Nations, *Secretary-General's Report to the United Nations Security Council*, New York, United Nations, September 1998. See also Ted Robert Gurr and Barbara Harff, *Ethnic Conflict in World Politics*, Westview Press, Boulder, CO, 1994, at 13. However, Africa also suffers from the fact that the image of the continent is poor even in areas such as corruption where the actual situation is perhaps better than that prevailing in some other regions.

⁸ Yair Aharon, *Foreign Investment Decision Process*, Cambridge, MA, Harvard University Press, 1966; E. I. Nwogugu, *Legal Aspects of Foreign Investment in Developing Countries*, Manchester, Manchester University Press, 1965.

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exacted a huge cost on its development efforts. In its 1989 report on Sub-Saharan Africa the World Bank concluded that ‘. . . underlying the litany of Africa’s development problems is a crisis of governance’. The report continued:

By governance is meant the exercise of political power to manage a nation’s affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and voluntary associations are co-opted or disbanded. This environment cannot readily support a dynamic economy.⁹

The answer to the development quagmire therefore lies in establishing just and honest government. The starting point is examining the obstacles to achieving and sustaining this goal.

To a large extent the problems are rooted in the past. The continent has suffered a painful history that includes some of the worst human tragedies: slavery, colonialism and apartheid. As a direct result, when African countries won independence they faced formidable constraints to development. These included an acute shortage of skilled human resources, political fragility and insecurity rooted in ill-suited institutions. This legacy will continue to hamper development for decades to come. Yet Africa should be able to draw lessons, strength and determination from them. The serious problems should generate a predisposition to engage in a fundamental re-examination and re-direction rather than despair. Any avoidance of an unpromising future requires the transcending not only of the unfavourable indicators for the decades immediately ahead, but also the unhelpful inheritance from the past.

If issues of governance are resolved, Africa can become one of the fastest growing regions in the world. Just and honest government can result in the adoption of policies that will resolve the constraints that hinder sustained economic development. It is now acknowledged that after years of decline, some African economies are beginning to experience significant growth¹⁰ and that parts of the continent are slowly becoming an attractive ‘emerging

⁹ World Bank Report, Sub-Saharan Africa *From Crisis to Sustainable Development*, 1989, Washington, DC.

¹⁰ World Bank, *Annual Report, 1997*, World Bank, Washington, DC, 1997. See also World Bank, *World Development Report 1999/2000: Entering the Twenty-First Century*, World Bank, Washington, DC.

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market' and investment opportunity.¹¹ But this fragile progress can easily be reversed and therefore needs consolidation. There is much to be done to translate the recent improvements into sustainable progress that will have a positive impact on the lives of everyone.

Not since independence have both the hopes and the challenges been simultaneously so great. Yet in reality whilst some African countries may be doing quite well, most Africans are not.¹² Africa remains host to the largest population of refugees and displaced persons on any continent. Too many people are trapped in conditions of grinding poverty, face violence and abuse daily and suffer under corrupt regimes. They are condemned to live their lives in squatter settlements or rural slums with inadequate sanitation, schooling and health facilities and to endure a police force and criminal justice system that seemingly does little to address their needs. All this contributes to conflict, instability and misery.¹³ States must also pay particular attention to the experiences of poverty and address and respond to the legal problems that adversely affect the lives of the poor, e.g. corruption, governmental lawlessness and institutional failure.

Criticism might be levelled here that this broad approach runs the danger of over-generalising the problems and the solutions applicable to individual countries. In fact one can make a strong case that African countries, though a mix, share common problems in relation to governance and development. They all face high levels of illiteracy, disease and poor infrastructure, are virtually all multi-ethnic in composition and most of their people live in grinding poverty. In other words, they are all struggling with the challenges of economic development and nation building.

¹¹ As Douglas Anglin has observed: 'Africa, long the poor cousin of a resurgent Asia is beginning to emerge from under its shadow. The continent's long-heralded renaissance is at last capturing the imagination of the world and in the process contributing to a new and more positive image as well as providing fresh momentum for constructive change' (D. Anglin, 'Conflict in Sub-Saharan Africa', Bellville, Centre for Southern African Studies, 1997).

¹² See, 'Africa Growth and Opportunity Act: a Cursory Appraisal', Africa Faith and Justice Network, September 1997. See also, 'Letter from Several African-Americans to Members of the US Senate urging modifications of the US-Africa Bill', 13 May, 1998. In it the authors point out the devastating social impact on Africans of the structural adjustment programmes being pursued by the World Bank and the IMF.

¹³ In fact as Anglin ('Conflict', at p. 6) has observed, Africa has arguably slipped into one of the most violent phases of its post independence history 'with political struggles spilling across borders as states interfere militarily in their neighbours' affairs in ways once uncommon'. He cites the conflicts in Congo (now the Democratic Republic of the Congo), Rwanda, Burundi and Lesotho where neighbouring states have intervened in internal conflicts.

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Many of Africa's problems are the result of an inability to create 'capable states'.¹⁴ A capable state, in this context, is one characterised by transparency, accountability, the ability to enforce law and order fairly throughout the country, respect for human rights, the effective sharing of resources between the rural and urban populations, a limited role in the market economy, the creation of a predictable, open and enlightened policy-making environment and the working in partnership with the private sector, the media and organs of civil society.¹⁵ In addition, the acceptance of competitive politics and the maintenance of a bureaucracy imbued with a professional ethos and committed to acting in furtherance of the public good is required.¹⁶ These characteristics enable a state to effectively perform its role of developing the country and bringing about a better life for its people.

For these to occur, the rule of law must prevail. Political pluralism cannot prosper until effective legal institutions are established. In order to function effectively, a legal system must include not only relevant and up-to-date laws, but also an efficient institutional infrastructure for the design and administration of the law. The national constitution is the most important legal instrument here. Thus, part of the answer to the present predicament lies in the development of constitutions that can stand the test of time and that deliberately structure national institutions engaged in the management of the country in such a way as to ensure the creation of a capable state.

The central role that good, efficient and capable governance plays in the economic and social development of a country is now widely recognised.¹⁷ This was emphasised in 1991 by the Commonwealth,¹⁸ a voluntary association of fifty-four sovereign independent states that includes

¹⁴ Apolo Nsibambi, 'The Interface among the Capable State, the Private Sector and Civil Society in Acquiring Food Security', Keynote paper at the Conference on Building for the Capable State in Africa, Institute for African Studies, Cornell University, 24–8 October, 1997.

¹⁵ Patricia Armstrong, 'Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making', 88 *American Society of International Law Proceedings*, 271.

¹⁶ See Nsibambi, 'Interface', at p. 14.

¹⁷ See, UNISA 'Deliberations of African Governance Forum, organised in the context of the United Nations System-wide Special Initiative on Africa' (UNISA), 11–12 July, 1997, New York. See also World Bank, *Development Report, 1997*, World Bank, Washington, DC, 1997.

¹⁸ These comprise all those with direct or indirect colonial ties with Britain along with the 'special' case of Mozambique. For full details of the work of the Commonwealth see J. Hatchard (ed.), *Directory of Commonwealth Law Schools 2003–2004*, Cavendish Publishing, London, 2002, pp. 49–82.

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the eleven ESA states. In the 1991 Harare Commonwealth Declaration,¹⁹ which established its guiding principles, Commonwealth Heads of Government pledged:

[T]he Commonwealth *and our countries* to work with renewed vigour, concentrating especially on the following areas:

- * the protection and promotion of the fundamental political values of the Commonwealth
 - democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
 - fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief . . .
- * extending the benefits of development within a framework of respect for human rights; . . .’ (our emphasis).²⁰

That just and honest government takes time to develop and that at the meeting the concept was treated with little respect by many heads of government is well illustrated by noting the names of some Heads of African Delegations who ‘pledged’ their countries to uphold the Declaration. They included Dr Hastings Banda, the Life President of Malawi, as well as the leaders of four other *de jure* one-party states.²¹ Military governments were also well represented by the presence of (using their official titles) HE Major-General Elias Phisoana Ramaema, Chairman of the Military Council of Lesotho, HE General Ibrahim Babangida, President of Nigeria and Hon. Paul Obeng, Member of the Provisional National Defence Council (Prime Minister) of Ghana.

Whilst practice and theory were clearly far apart in 1991, the Declaration’s importance is that it has provided and continues to provide a benchmark upon which to judge the ESA states performance on principles to which that they themselves have voluntarily agreed. Evidence of the Declaration’s increasing significance lies in the fact that any country

¹⁹ For the context and significance of the Declaration see Alison Duxbury ‘Rejuvenating the Commonwealth: the Human Rights Remedy’ (1997) 46 ICLQ 344.

²⁰ The UN General Assembly has also recognised that democracy and transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realisation of social and people-centred sustainable development and that governments in all countries should provide and protect all human rights and fundamental freedoms, including the right to development, bearing in mind the interdependent and mutually reinforcing relationship between democracy, development and respect for human rights: Resolution 50/225 of 19 April 1996.

²¹ Plus the ‘no-party’ state of Uganda.