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Por

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As its three editors state in the introductory chapter, *Comparative Constitutional Law in Africa* is a collection that aims to bring the ‘under-studied’ African constitutional context to the fore. It is indeed high time that constitutional scholars - and, for what matters here, comparative constitutional scholars - focused on how constitutionalism manifests itself across the content. According to the editors, this approach explicitly runs counter to the ‘uneven attention’ paid to Africa in comparative constitutional studies and dispels the lingering ‘myth of a borrowing continent’. The aim, it goes without saying, is to highlight ‘the various local ideas about government pioneered by African thinkers and leaders’ (pp. 1-2).

As a comparative lawyer, I could not agree more with the editors’ predicament. We all acknowledge that ‘the study of African constitutionalism is increasingly part of the global repertoire of comparative’ constitutional law. Not only is its study in Africa ‘desirable’, but it is also ‘methodologically defensible’ (p. 2). Yet, the pluralistic social, political, and legal mosaic which is Africa still represents a challenge - and a hindrance - to the understanding and knowledge of how constitutionalism has been digested and accommodated within this extremely diverse continent. I am not denying that global constitutional scholars show a genuine interest in African legal-constitutional systems. My point is this: such an interest is usually affected by a methodological bias. Constitutional legal scholarship in the West still exhibits a colonial attitude towards non-Western conceptions of the law. Usually concealed under a benign approach towards democratic transitions taking place in non-Western jurisdictions, there is an unconscious ethnocentric bias that still presupposes the superiority of Euro-Atlantic legal paradigms.

The bias is apparent when scholars examine, say, the patterns of democratic (and constitutional) transitions. In Africa, the editors correctly contend, 'constitutionalism is witnessing a gradual sedimentation across the continent' (p. 3). The Western approach to constitutional transitions denotes stages and procedures that mark the processes of constitution-making. For those comparativists who aim to extricate the African continent from the colonial perspective, though, this approach is not particularly rewarding. In fact, it reflects the Eurocentric idea of democratic transition shaped with reference to its first wave that took place in America and Europe between 1820 and 1920. Again, it expresses the direction given to political-constitutional change. Consequently, constitutional transitions are assumed to be always 'democratic'. For what concerns us here, this entails Africa adopt constitutional texts consistent with (and functional to) this project. The separation of powers, the independence of the judiciary, and the protection of rights become constitutionally indefectible contents, that is, real benchmarks for the scrutiny of the text adopted at the end of the transition.

Although dictated for the African continent, these benchmarks are thoroughly forged after the constitutional traditions of the West. Like Western societies, they assume that their African counterparts might attain Western democratic standards provided that they evolve through various stages of development that are universal, eventually leading to the same stage of superiority envisaged by Euro-Atlantic comparative constitutional traditions. What lies beneath such a predicament is, however, the implicit assumption that the Western (now global) conception of constitutional law is a universal legal paradigm 'superior' to the African constitutional ones.

In methodological terms, I understand that, again, it is neither worthy nor scientifically rewarding. If we assess the 'progress' or 'degradation' of African constitutional experiments against the benchmarks narrowly tailored on the West, the outcome will probably be depressing. From the Western perspective, these benchmarks are inconsistently applied, and the way constitutionalism is applied there does not thoroughly reflect its development in the Global North. In Africa, transitions are often places where context and postcolonial discourses meet constituent power, that is, they are places where it is possible to anticipate the processes of formation and application of operational rules generated by the interaction, fracture, and misalignment of the active formants of the legal system. More than the formal adoption of constitutional texts, they imply a fuzzy logic, which places them in a liminal position in legal studies, where constitutional law intersects society and generates new traditions. The process is made up of gradations and legal syncretism with the aim of reinventing traditions and emancipating the continent from the legacies of Eurocentrism. As a postcolonial discourse, transitions generate traditions that are the product of the contamination between European and African law. It

is no longer relevant who transmitted Western institutions and concepts, but, rather, what matters here is the African point of view adopted for their re-elaboration and narration. It is a point of view that, therefore, assumes a centre of irradiation entirely within the African dimension.

To this extent, *Comparative Constitutional Law in Africa* grasps the points. The collection supplies readers with a timely analysis of Africa through the lenses of comparative legal methodology. It is, as its editors uphold, a contribution to a better understanding of the 'complexities' of the continent. When it comes to constitutional law, Africa 'has witnessed both change and continuity'. Constitutions abound, but authoritarian regimes still represent the rule rather than the exception; elections are normally held, and 'more alternations of power occur through the ballot box than even before'; at the same time, 'a more innocuous way of continuing dictatorship has taken the form of ostensibly valid constitutional amendments allowing incumbent presidents to extend their regime' (p. 3). The judiciary has become a strong bastion when it comes to adjudicating elections, but a bulk of several different and conflicting processes of democratisation paint a mixed picture. Taking into account all the complexities that make up the continent, 'the markers of progress are not a call for complacency'; both the editors and the chapter authors are indeed strongly supportive of 'the overall trajectory towards the triumph of constitutional democracy on the continent' (p. 4).

The collection navigates the evolution of African constitutionalism with the aim of placing 'Africa as part of the growing discourse of comparative constitutional law', also 'enabling a more circular sharing of constitutional ideas' (p. 13). To this end, the 13 chapters of the book are grouped into four parts: Part I is dedicated to "constitutional design, amendments, and interpretation"; Part II examines the "constitutional structure: democratization and taming the executive"; Part III covers the field of "constitutional rights and freedoms"; finally, Part IV - which covers the theme "constitutions and supranational law" - comprises one chapter dedicated to the process of "Africanization of constitutional law".

As their authors expressly acknowledge, the chapters making up Part I (*Constitutional Design, Amendment, And Interpretation*) cover a host of topics that occur worldwide. In Chapter 2 (*Public participation, representative elites and technocrats in constitution-making processes: Nigeria, Uganda, South Africa and Kenya*), Abrak Saati tracks its application in three jurisdictions (Nigeria, Uganda, and South Africa), thus illustrating the variety of forms, meanings, and functions participation takes in discrete constitutional contexts. These vary from 'false participation' in Nigeria to 'limited participation' in Uganda, with the relevant South African exception, which 'has to a large extent developed into an archetype for how such processes should be designed' (p. 24). If I

understand Saati correctly, the 'Western' pattern of participation is the benchmark (or the universal stance) to be thoroughly applied. In my opinion, however, the three case studies represent three distinct ways of reinventing the same participatory archetype to match the desired purposes of the elites leading the constitutional transitions. This predicament is upheld when Saati assesses the making of the 2010 Kenyan constitution. There, indeed, several elements were combined together: technocracy (i.e. the Committee of Experts), representative democracy (i.e. the Parliament Select Committee on the Review of the Constitution), and direct democracy were 'an intriguing combination' of rather diverse features capable of delivering the new Constitution (p. 37).

A second topic of worldwide occurrence is examined in Chapter 3 (*Constitutional amendment and term limit evasion in Africa*). Written by Tom Ginsburg, Adem Abebe, and Rosalind Dixon, it revolves around the dialectic between political power and constitutional rules as a way of 'structuring and constraining political strategies' (p. 40). The chapter assesses the perusal of constitutional amendments to remove term limits, i.e. a practice to which African incumbent presidents resort in order to hold office indefinitely. Despite the tendency of quantifying constitutional-change frequency and art. 10(2) of the African Union's Charter on Democracy, Election and Governance, the authors of the chapter have mixed feelings as regards an effective application of the unconstitutional constitutional amendments doctrine in Africa. Africa exhibits a panoply of attempts to amend constitutions thus infringing term limits and the principle of democratic change of government. The reinvention of limited government in Africa, the 'widespread presence of tiering and eternity clauses' in constitutional texts, and the role of the judiciary in assessing amendments or preventing 'power grabs' (pp. 54-54) represent the ingredients for reinventing the Western-derived tradition of constitutionalism in terms that fit into the traditions of the African contexts.

In Chapter 4, Markus Böckenförde delivers a rich and comprehensive sketch of *Constitutional review in Africa*. This title is particularly fitting; instead of using the 'constitutional litigation' banner, he peruses a definition which is able to encompass also the processes stemming from the African reinvention of constitutional review. It is what he labels the 'endogenous factor, which encompasses the extent to which the institutional design deviates from such a "blueprint" and precisely how it does so', and which 'is determined by the configuration of political elites' during the constitution-making process (p. 58). The major innovation is to be found in the Ethiopian Constitution, which goes well beyond the traditional divides between constitutional courts/supreme courts, decentralised/centralised scrutiny, and political/judicial review. To this extent, Böckenförde examines three cases: Benin's powerful Constitutional Council; Kenya's Supreme Court (with its judicial activism in the field of human rights and electoral

disputes); and Ethiopia's 'unique, but dormant' House of Federation as the final interpreter of the constitution (p. 82) with its Council of Constitutional Inquiry acting as its 'antechamber' (p. 85). Its dormant character does not depend on a failed process of African reinvention, but 'rather [on] the power matrix of an authoritarian system under one-party dominance' (p. 86).

Chapter 5 is dedicated to *Political party constitutionalisation in Africa: trends and prospects for deepening constitutionalism*. In this Chapter, Charles Fombad examines the rationale for party constitutionalisation by navigating the history of African constitutionalism. From his analysis, it emerges that neither the 'proliferation of political parties' nor the 'expansion of the political space' (p. 130) has complied with the benchmarks of effective multipartyism (formal recognition of multipartyism; rights and duties of political parties; state and party separation; free and fair political participation; internal democracy; bans and regulatory restrictions; party funding; compliance with democratic values and principles: p. 116). Although these benchmarks are set for the African context, they evidently reflect an idea of democracy which has been elaborated elsewhere, namely in the Global North. If we want democracy to flourish on the continent, we should reassess them by accepting the specificities of this extremely vibrant and diverse continent.

Part II is dedicated to the assessment of *Constitutional Structure: Democratization and Taming the Executive*. In Chapter 6 (*Democratic constitutional transitions in sub-Saharan Africa*), Duncan M. Okubasu examines the winds of democratic change that have been blowing over African constitutionalism from the democratic third wave onwards. These winds have stimulated the transition of several states from authoritarian rule to a democratic regime, and therefore have favoured the adoption of new constitutions in many emerging African democracies. As Okubasu correctly argues, the 'institution of formal constitutional change played a less prominent role than hope' (p. 137), probably because it 'was seen as a necessary means through which authoritarian practices could be substantively undone' (p. 142). The fragile third wave was indeed dismantled formalistically, by enacting counter constitutional reforms (such as the repeal of term limits) that enabled incumbents to entrench authoritarian regimes through legal change. Thus, formal constitutional change was 'a necessary but insufficient condition for transition to democracy and especially consolidation' (p. 152). This was also made possible because such a formalistic approach led to neglecting the traditions inherited from the colonial and post-colonial periods - and therefore to reinventing (and "Africanising") them.

Chapter 7 by Assefa Fiseha assesses the constitutional structure which is federalism (*Federalism, devolution and territorially based cleavages in Africa*). The chapter presents

the entanglements between African socio-ethno-linguistic diversity and constitutional arrangements: integration, power sharing, and federal accommodation (pp. 190-203) are used in several jurisdictions to put bridles on 'mobilized ethno-national minorities' that 'continue to threaten the nation state' (p. 159). The prototypical African federacies of Nigeria, Ethiopia, and South Africa (to which the author adds Kenya with its decentralised arrangements) are all ethnically fragmented. Fiseha sketches their key features by taking into consideration the African context because, as he correctly states, 'the nature of the cleavage matters and impacts institutional design' (p. 204).

In Chapter 8 Hugh Corder approaches African constitutionalism through the lenses of administrative review (*Regulating the exercise of public power through law: a first glance at comparative administrative law/justice in Africa*). The argument is compelling: as administrative review has the 'potential ... to secure a degree of accountable government' and an 'acceptable degree of fairness and accountability in the exercise of public power' (pp. 217 and 218), it is decisively helpful when it comes to assessing the grade of pervasiveness of constitutional democracy in African jurisdictions. This assessment is carefully conducted by considering how administrative review is implemented in several jurisdictions (Malawi, South Africa, and Kenya). What Corder argues is that this is an area where African countries have reinvented the colonial heritage, elevating 'the traditional means of regulating public power (through judicial review in the superior courts) into a constitutionally protected right to administrative justice' - and good governance, I would also add.

It does not come as a surprise, then, that the following Chapter is dedicated to *Constitutional responses to corruption in Africa*. Corruption is indeed interwoven with good governance. As Selemani Kinyunyu remembers, corruption has contributed to both the trends of constitutional degradation and the resurgence of populist leaders. This is the reason why Kinyunyu assesses the topic from a supranational - as well as a broader African - perspective. The 2003 AU Convention on Preventing and Combatting Corruption is a case in point, which goes hand in hand with several other features, such as the 'elaboration of clear constitutional standards', the 'establishment of institutional mechanisms to combat corruption', the elevation of 'anti-corruption agencies and mechanisms to constitutional bodies', the 'inclusion of corruption and economic crime prevention in constitutional processes related to transitional justice measures', not to mention the way 'transparency and constitutional norms have been tested in the courts' at both national and supranational level (pp. 250-255 and 257). It does not come as a surprise, then, these trends have favoured the cross-pollination - if not the emergence - of an African standard when it comes to tackling corruption 'given the scale of the problem and the corrosive effect' it has on constitutionalism (p. 265).

As its title suggest, Part III probes a further feature of constitutionalism, i.e. *Constitutional Rights and Freedoms*. Chapter 10 by Mugambi Laibuta examines the fundamental right which is freedom of expression (*Constitutions, freedom of expression, internet shutdowns, social media and defamation laws in Africa*). It is indeed the cornerstone of constitutional democracy, inasmuch as it enables citizens to speak truth to power and to boost pluralism. The chapter focuses on how states have often taken steps to control it, particularly when it comes to using the internet and social media to convey one's thoughts. The author examines six countries through judicial rulings (Kenya, Tanzania), internet shutdowns (Togo, Zimbabwe, and Sudan), and defamation laws (Burkina Faso). Shutdowns, in particular, have been justified 'by indicating that they were necessary to stem fake news, as a precaution, for public safety, for national security, sabotage, to secure school exams' (p. 274). The panoply of exceptions demonstrate how it is possible to use the limitations set forth by constitutions, supranational law (such as Art. 9 of the African Charter on Human and Peoples' Rights), documents (Laibuta refers to the three-part test elaborated the UN Special Rapporteur on Freedom of Opinion and Expression Frank La Rue in 2011), and judicial rulings of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice. The fact that these supranational standards are weak, however, does not prevent the use of litigation as an effective means when it comes to challenging legislation and administrative action limiting freedom of expression.

Likewise, in Chapter 11, Magnus Killander examines how the context has been developing the *Constitutional protection of socio-economic rights in Africa*. Besides delivering an overview of constitutional provisions of socio-economic rights, the chapter points to the thorny issue of their justiciability. The analysis depicts an extremely complex scenario, with a variety of approaches: from non-justiciability in Nigeria to their creative judicial protection in Zambia; from the idea that lodging a complaint before court does not mean 'entitling everyone to demand that the minimum core be provided to them' (Constitutional Court of South Africa, *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* of 2002) to the assumption that 'taking such cases to court would often be a waste of resources' (p. 301). After reviewing several cases related to socio-economic rights in the area of health issues, Killander concludes that the recognition (and implementation) of socio-economic rights in Africa has increased. Yet, the Africanisation of socio-economic protection is yet to come; and 'all tiers of government and civil society must work together to address this sorry state of affairs'.

Chapters 12 and 13 examine two types of rights that are particularly relevant when it comes to Africa. The first of these is *Constitutional regulation of religion in Africa*. Johan D. van der Vyver grasps the point when he affirms that, in the field of religion, rituals

might be observed 'as a matter of religion or merely as an African custom'. Evidently, this has several implications. On the one hand, Muslim countries enshrine their commitment to Islam into their Constitution, whereas in non-Muslim ones there is a tendency to a more secularised approach. On the other, the role of religion is relevant since 'courts of law are more inclined not to interfere in matters of religion than they would be in upholding unbecoming customs' (p. 314 in relation to the slaughtering of animals for ritual purposes). Despite this, there is the tendency to assign a collective right to self-determination to religious communities, which the author labels 'sphere sovereignty', i.e. an 'immunity from outside interference and an entitlement to self-governance' (p. 322).

This sort of immunity is also present as regards Africa's traditional structures, which are usually constitutionalised. In Chapter 13 (*Traditional kingdoms and modern constitutions: parochialism, patriarchy, and despotism vs. indigenous safeguards against absolutism*), indeed, Jan Erk charts the topic under scrutiny by combining a comparative historical overview with an in-depth examination of the Asante, Buganda, and Lozi Kingdoms. In all these cases, there were processes of reinvention when moving from the colonial to the constitutional recognition of traditional structures. Erk is right in highlighting the pluralistic mosaic which is the legacy of traditional law; his equation with politico-legal pluralism also hits the mark (p. 354). Furthermore, the existence of traditional structures is a powerful antidote to 'absolutism of all kinds' in 'a compound polity of multiple *demoi*'. (p. 358).

Finally, Part IV (*Constitutions and Supranational Law*) comprises only Chapter 14 on the *Africanization of constitutional law*. Micha Wiebusch peruses the expression to ascertain whether the AU is able to influence constitutional building processes at the national level. By 'Africanization' of constitutional law he understands the 'collective effort to imagine and organise a legal-political project based on a continentally defined identity made up of 'Continental Constitutional Agenda' to uphold constitutionalism in AU's member states. We stand before a further process of reinvention, which Wiebusch also terms 'continental constitutional imaginaries', which should run counter to the idea that constitutionalism is only 'adherence to formal legal rules' (p. 387). I totally subscribe to this predicament. No wonder, indeed, that I have thoroughly applied the term 'reinvention' throughout this review. If I understand Erk correctly, 'constitutionalism can also be a tool for autocrats to extend their power and use law to protect their interest contrary to the more general interest of the populace. Degradation of constitutional content is also a process of constitutional reinvention. Albeit consistent with (and functional to) democratic design, it can be used as formal constitutional change to mask deliberately regressive processes.



This is a risk that Africa is probably facing - a risk of which the editors (and the contributors too) are warning us. The collection is therefore a timely contribution to the intellectual and never-ending project of applying comparative constitutional-law methodologies well beyond the West. It is also an attempt to deploy a new legal analysis that runs counter to the 'ideological' representation of a continent which is usually considered incapable of fully grasping the potential of constitutional law when it comes to 'reinventing' its own traditions through Western-driven processes of democratic transitions.

What strikes Western comparative constitutional scholars is that Africa does not solely imitate the West; the continent is a laboratory where democratic transitions take place through processes of constitutional reinvention and innovation along autonomous lines developed by (and for) the continent. What is at stake, therefore, is the autonomy and maturity of African societies when choosing *which* benchmarks are best suited to assessing the Africanisation of their constitutional law, thus reorganising the body politic, reinventing traditions, and undertaking democratic transitions without feeling subordinate to the legal West anymore.