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COMPARATIVE CONSTITUTIONALISM AND DEMOCRATISATION: HAS AFRICA ANYTHING TO LEARN FROM EUROPE?

У статті розглядається поняття конституціоналізму в порівняльній (з точки зору європейського врядування) перспективі та досліджуються деякі його практичні аспекти, важливі для розуміння процесів демократизації в Африці. Взявши за основу досягнення у сфері конституціоналізму в Європейському Союзі (ЄС), в статті ставиться питання про те, чи можуть проекти інституційної реформи привести до посилення демократії та встановлення демократичної культури серед громадян. В той час, коли на практиці не всі європейські країни спромоглися в однаковій мірі забезпечити принцип рівності серед своїх громадян, їх досвід регіональної інтеграції пропонує декілька цінних уроків у контексті посилення демократії в Африці. Порівняльний аналіз політики в різних секторах показує, що специфічні моделі врядування мають відповідні переваги та недоліки, які мають бути враховані при прийнятті політичних рішень, але також, що вони можуть трансформувати організаційні принципи політичних систем за умови функціональності системи конституційного судочинства. У статті доводиться, що конституціоналізація та конституціоналізм представляють дві різні речі, і що регіональна інтеграція є ключовим елементом у процесі досягнення сталого соціального та економічного прогресу в Африці.

Ключові слова: *конституціоналізм, конституціоналізація, демократизація, врядування, регіональна інтеграція, реформа, Африка, Європа.*

В статье рассматривается понятие конституционализма в сравнительной (с точки зрения европейского государственного управления) перспективе и исследуются некоторые его практические аспекты, важные для понимания процессов демократизации в Африке. Взяв за освнову достижения в сфере конституционализма в Европейском Союзе (ЕС), в статье поднимается вопрос о том, могут ли проекты инстуциональной реформы привести к усилению демократии и установлению демократической культуры среди граждан. В то время, как на практике не все европейские страны смогли в одинаковой степени обеспечить принцип равенства среди своих граждан, их опыт региональной интеграции предлагает несколько ценных уроков в контексте укрепления демократии в Африке. Сравнительный анализ политики в различных секторах показывает, что специфические модели государственного управления имеют соответствующие преимущества и недостатки, которые должны быть учтены при принятии политических решений, но также, что они могут трансформировать организационные принципы политических систем при условии функционирования системы конституционного судопроизводства. В статье доказывается, что конституционализация и конституционализм представляют собой две разные вещи, и что региональная интеграция является ключевым элементом в процессе достижения стабильного социального и экономического прогресса в Африке.

Ключевые слова: *конституционализм, конституционализация, демократизация, государственное управление, региональная интеграция, реформа, Африка, Европа.*

This article explores the meaning of constitutionalism from a comparative European governance perspective and explores practical issues that are relevant for the understanding of democratic processes in Africa. Drawing on certain constitutional developments in the European Union (EU), it poses the question whether institutional reform projects can result in more democracy and the firm establishment of a democratic culture among citizens.

While in practice not all European countries may have managed to guarantee the value of equality among their citizens in the same way and to the same degree, their experience with regional integration offers some valuable prescriptive lessons in the context of democracy promotion on the African continent. The comparative analysis of policy sectors reveals that specific governance arrangements create path dependent advantages and disadvantages for policy makers and are able to transform the organizational principles of political systems with the help of a functioning constitutional court system. The article concludes by arguing that constitutionalisation and constitutionalism are two different things, but that regional integration is also a key to materializing sustainable social and economic progress in Africa.

Key words: *constitutionalism, constitutionalisation, democratisation, governance, regional integration, reform, Africa, Europe.*

Introduction: European versus African constitutionalism?

Constitutional choices are important because they connect various forms of authority granted by a sovereign people to a set of state institutions. Especially in Western Europe and North America the resulting political structures have achieved such a high recognition that they were considered worthwhile to be exported to other regions and territories around the world. Inevitably, this enterprise was bound to run into difficulties, if it would not give due consideration and, hence, organizational respect to contextual factors emerging from specific cultural backgrounds and path-dependent historical experiences.

In this article, comparisons between key features of European and African constitutionalism will at first evolve around the claim that not all forms of government manage to guarantee the value of equality among their citizens in the same way and to the same degree. Following from this, is the observation that both continents have a record of long-standing problems with the recognition of 'subnational' and ethnic identities and their respective participation in working arrangement for the common exercise of state sovereignty. More recently, severe and ongoing conflicts in Africa have renewed interest in drawing certain parallels with the European post-war development of constructing successfully supranational institutions beyond the nation state and to implement common policy goals through fairly elaborated schemes of political, social and economic integration.

As regards the latter, a significant debate is also taking place as to the democratic credentials of the European Union (EU) given certain limits, for example, in terms of the representative status of its Parliament. In fact, one does not have to go as far as Larry Siedentop, who traces the social role of the individual back to an essential European state tradition, to realize that the acceptance and internalization of legal principles by citizens largely depends on a notion of fairness according to which the 'rules of the game' do not privilege any actor or a particular set of actors in a consistent manner and over an extended period of time [1]. Again, in the European context this potential danger is theoretically and empirically matched by the distinction between input and output legitimacy of EU policies (see below) and an innovative 'dual system' of Community law, which makes the sharing (or pooling) of sovereignty among member states possible. By contrast, in the prominent case of South Africa, a segregated legal system and the practices of the apartheid regime seriously undermined any legitimacy base and eventually made the exercise of sovereignty internally as well as externally impossible.

To make a general case for constitutionalism from the angle of individualism, however, might be misleading in the African scenario for several reasons. While it is true that post-colonial states continue to quarrel with tribalism and its resistance to any identity formation along a specified state territory, the cause for this is not solely related to a form of failed nationalism where the inherited structures of society do not grant 'equal status' to all members of a community. Instead, African constitutionalism would have to try and define individual rights in relation to group rights and, more specifically, in relation to the established rights of families or clans. Such a variable definition, potentially, would do more justice to contextual factors found in a particular developmental stage of a legal system and leave more room for an unbiased identification of societal needs by government agencies and executive bodies [2, p. 63].

Emphasizing form over substance in African constitutionalism would assume that with the gradual introduction of written constitutions after independence their normative element already carried the day by positively determining the actions of state institutions by laying down a set of rules concerning their organization, competences and procedures. To follow Karl Loewenstein's famous distinction, what otherwise would be considered an ideal situation is here already a reality [3]. The political community is comfortably wearing a 'constitutional suit' that fits its contemporary requirements. Yet fact is that the country-specific organization of government in this part of the world does most of the time reveal a significant degree of continuity (or path-dependency) from the colonial period and, therefore, generates a level of distrust into institutional politics that is in its reach and magnitude still unknown in Western Europe. Moreover, already the pre-colonial period on the African continent provided little incentive to build beliefs into grand legal systems or into the enforcement and compliance with the secondary legislation derived from them. Rather,

jurisprudence was seen in the light of cultural and ethical norms employed by the regional elites to control their societies. This was not necessarily conceived as a bad thing, since society itself favored the reliance on narrow foundations of group solidarity and independent processes of consensus formation for the handling of public affairs [4].

Arguably, therefore, we might be faced in the African context with merely 'nominal constitutions', i.e. the dominant political practices do not actually reflect constitutional prescriptions. Again, for Loewenstein, this was a consequence of existing social and economic preconditions frequently found in societies without an independent middle class or with non-Western political cultures and traditions. Though inherently a Euro-centristic viewpoint, the expectation nevertheless was that at some point in the future formal, overarching legal documents – the letter of the law – could guide the dynamics of the political process rather than simply adjusting to its own particularistic demands. In other words, at least in the long run a constitutional settlement would have the ability to transform state-society relations and spark learning processes among the participating elites.

Seen from this perspective, the search for rules of appropriateness would have to go hand in hand with the search for economic solutions to the continent's long-standing problems in development. On the one hand, many African countries reflect unstable production cycles, dependency on industrialized countries and an exposure to international economic forces that clearly is beyond the immediate reach of constitutional designs. For this the exploitation of labour and natural resources by third powers lasted far too long and created too much damage to easily imitate the European growth pattern. On the other hand, the acute demographic problems and largely unrestricted labour migration urge some fundamental agreement on how constitutional prerogatives can facilitate a basic needs strategy as the most adequate policy response. To be sure, this asks not for repeating the mistakes of post-colonialism, when key African leaders sacrificed constitutional principles of democratic governance and minority protection for the sake of faster development [5, p. 321-322]. Instead, it puts emphasis on the ultimate grounding of economic development in institutional mechanism not only tight to the principles of parliamentary democracy, but to a richer reservoir of participatory and communicative practices.

Frequently, part of the blame had to be put on the highly personalised style of African politicians interpreting their role in the system with the help of archaic images of power and positioning themselves 'above' any formal rules of succession. Typically, presidents or prime ministers would oppose legislative decisions by exercising veto rights or draw on manipulated referenda as a means to have their way. Alternatively, parliamentary dissolutions could be followed by highly restricted electoral contests with almost certain outcomes for those already in office. In other words, constitutions were reduced to their 'semantic' meaning and all but a formalisation of prevailing power constellations, at best adding some residual legitimacy to those who already were in control of the governmental machine [3]. In the case of some former British colonies, such as Ghana, Malawi and Nigeria, this actually meant a distancing from parliamentary traditions and a stronger orientation towards presidential systems of government [6].

Similarly, of course, the criticism of 'mere semantics' could be readily applied to the timid attempts of regional integration on the African continent. If there were no Constitutive Act of the African Union (AU) or a Treaty establishing economic co-operation among West African states (ECOWAS), would it truly make a difference? The test of such historical counterfactuals is beyond the aims of this article, though its basic line of argument is tentatively skewed towards an answer in the affirmative. To allow for useful comparisons between the European and African experience in the sections to follow, I will at first concentrate on central features of British, French and German constitutional politics before discussing aspects of their 'Europeanization' on a continental scale. The latter comes with a comparative focus on the prospective role democratic processes may play in the emergence of a particular form of multi-level constitutionalism and sectoral policy-making. After exploring the credentials of an increasing institutionalisation of judicial review processes, the article will conclude with some notes as to why a comparative, non-doctrinal, approach to constitutionalism may help to steer societies on both continents away from anarchy.

2. Constitutional practice and constitutional change

In line with the learning ambition of constitutions one can ask whether constitutional practices over time will help to build a democratic culture in a society and establish a clear development path towards further democratization. All the European country examples, chosen below, point to the time factor when making such an assessment. It, therefore, makes sense to be aware of the different conditions prevailing at the point of departure, i.e. the adoption of a new constitutional framework. Furthermore, we should not lose sight of certain similarities that can be readily observed. The ideal scenario of people's participation in a 'bottom-up and inclusive process' has rarely been achieved and serves to contrast the realities in African as well as European states [7].

Indeed, in France and Germany constitution-making could be described as a 'top-down, elite driven enterprise' with democratic legitimacy largely constructed *ex post* around a referendum, a high turnout in parliamentary elections or ratification processes in subnational parliaments immediately after a constitutional settlement. Moreover, the constitutional rules adopted were in no small part perceived as following either the mindset of a 'savior figure' (de Gaulle in the French case) or the explicit blueprint preferred by a major superpower (the United States in the German case). Thus, what remains of African frustration with their 'own' rule-making processes should probably have more to do with the complete neglect of cultural

traditions, inherited values and generic ideas in the substance of their basic legal codes than with the imposed nature of particular forms and mechanisms of legal reasoning as such.

By looking into some particular achievements of three European countries it should become clear that, despite certain birthmarks, constitutionalism understood in a broad sense (comprising policy formation within a given value system and cultural heritage) effectively constrained majority rule and made 'democracy work'. The existence of an idealized starting point where undistorted, or fair, rule-making would occur appears not to be a fundamental prerequisite. Thus, we follow, in opposition to Carl Schmitt, the argument of Michael Greven and offer some preliminary assessments as to the standard performance of constitutionally embedded regimes and their ability to transform 'extreme situations' into more reutilized forms of day-to-day policy-making [8, 47-48].

Admittedly, the United Kingdom is a somehow unusual starting point. Without a written document 'set in stone' or, at least, a freely distributed booklet for the adult population, the exclusive reliance on Acts of Parliament and lead judgments by the High Courts may come as a surprise. While elsewhere stability and credibility of political systems are closely intertwined with a founding law, here preferences have fallen for a flexible and adaptable framework that adjusts depending on current constellations and circumstances [9, p. 23]. For some, however, this possibility of change has gone too far. They identify 'radical constitutional reform' in the guise of the devolution of powers to subnational entities. According to this point of view, there is no guarantee that the constantly evolving form of British government will not end up in separatism and, at any rate, is bound to significantly transform a previously unitary state. This continues to pose serious normative issues since powers were given back to Wales, Scotland and Northern Ireland in an asymmetrical fashion putting the citizens living in 'English regions' at a disadvantage [10, p. 234-235]. In fact, this disadvantage could be perceived as sacrificing egalitarian individual rights in one of the most established Western democracies.

It seems that constitutional reformers in the United Kingdom were willing to take such risks, if it would bring them closer to a lasting solution for the sectarian conflicts in Northern Ireland. By passing quasi-constitutional legislation the British government tried to neutralize competing nationalisms and anchor them in common institutional arrangements. Similar to most African scenarios a lasting partition or secession of opposing ethnic groupings was not considered a viable option. Instead, the widely-publicized 'Good Friday Agreement', championed constitutional politics to the extent that it went beyond mere power-sharing within the region and explicitly recognized an all-Ireland component as well as a nonfederal element for the British Isles as a whole. Most importantly, it reflected a strong leaning towards convocational models within which competing ethnic blocs agreed not to abuse their majority rights [11, p. 181-183]. Interestingly, the major concern of such models is the achievement of political compromises by accommodating different communities and societal groups. As this is done through joint decision-making by representative elites within the same territory, we find a constitutional practice that is strongly oriented towards the exercise of group rights [12, p. 365-382]. Accordingly, similar consensus oriented practices could spread on the African continent opening up further space for political improvement especially in the political systems of Gambia, Kenya, Nigeria and South Africa where consociational elements are already present and regional integration attempts are under way [13].

By contrast, the French constitutional settlement of the Fifth Republic came to symbolize a different attitude towards the solution of political conflicts. Closely related to the historical events surrounding its first presidency, the dominant belief held that this political position should be endowed with the authority to steer the country through the vicissitudes and crises of the day. Accordingly, as the constitution says, the person holding the office would not only 'arbitrate' between the different organs of government, but eventually ensure the 'continuity of the state'.

The larger pretext for this, as Ives Mény points out, was already set by the French revolution and its misunderstanding of the separation of powers as an instrument to strengthen representative bodies at the expense of executive and judicial actors [14, p. 256]. Hence, successive French republics were unable to establish a proper institutional balance that could effectively control the exercise of majority rights. For the same reason, it took 'a century and a half' until the constitutional prerogatives became so widely accepted that their interpretation would not just be another 'weapon' in the fight against the political opponents of the time [15, p. 152]. In no small measure this is due to a maturing legal system – and a parallel judicialisation of politics – enabling a gradual emancipation of the judiciary from partisan pressures and clearing the path towards better accountability of government decisions.

To be sure, the bringing of political disputes to the French Constitutional Council, as a relatively late created legislative review body, or the initiation of cumbersome procedures for revision or amendment (with fairly uncertain outcomes) have not solved the inherent ambiguities of the French constitution. What is remarkable about the political system, nevertheless, is the way in which major defects (such as the unclear division of executive power between President and Prime Minister) have been used imaginatively to adapt to the ever changing demands of policy-making especially during periods of cohabitation. Again, constitutional practices develop in ways which have not been foreseeable by the drafters and, in fact, might even contradict the firmly held convictions of earlier days.

In the comparative context it has to be noted that by now the former French colonies in Africa have developed their very own permutations of 'semi-presidentialism'. In organising the relationship between

different branches of government they tend to lean either to a 'premier-presidential' or 'president-parliamentary' system with varying degrees of accountability by the governing cabinet to parliament and the elected president. Even when these systems come as close to the 'French model' as in Burkino Faso, Madagaskar, Mali, Niger or Senegal, they pose each time a different question about the evaluation of their relative performance in terms of democratization processes and the responsibilities allocated to individual actors in case something goes wrong [6, p. 8-12].

A third approach to constitutionalism finds its articulation in the German federal system. Probably, more than anywhere else, there was the strong expectation that politics in the real world would by and large converge with the formal provisions found in a 'provisional Basic Law'. Indeed, Manfred Schmidt has been able to highlight a far reaching congruence between formal institutional arrangements and the implementation record found on the output side of ideologically diverse government activities [16, p. 9]. Yet, as he does not fail to point out, the resulting high level of predictability and credibility of public action does also have its downside. It comes at the cost of what, more recently, has been described as the 'German disease': the clinging on to dated regulations and quasi-judicial decision-making processes despite a fast changing socio-economic environment.

Occasionally such systemic disadvantages might be exaggerated for political reasons. The widely respected commitment to a 'social market economy', for example, has not tight the legislator to any particular form of the welfare state, but to general principles of social justice by which the actions of the state meet 'the basic conditions for a humane existence of each of its citizens' [16]. Accordingly, post-unification Germany did only run into trouble when for the sake of unity its version of federalism had to be interpreted more stringently as achieving 'equal living conditions' throughout its regained territory. Understandably, therefore, any constitutional design perspective potentially adding similar 'state objectives' to the constitutional framework was soon to be given up. Although many more worthwhile causes were easily found by a 'constitutional commission', their realization would have demanded a degree of state activism hardly sustainable in times of economic uncertainty. Pragmatic reasons, thus, prevented further constitutional changes and led to a serious hesitation to inundate courts with cases where eager citizens would actually be prepared to sue for 'newly guaranteed' rights [17, p. 187-188].

As a consequence, it appears all the more problematic to suggest the anchoring of 'social market' ideals in African constitutional designs. While no other continent suffers more from basic inequity and injustice it is not clear how there the 'output orientation' of the German system could be upheld by legal provisions alone. None of the recent state failures in the Democratic Republic of Congo, Rwanda, Sierra Leone, Sudan and Somalia could have been prevented by more progressive constitutional settlements. Yet, arguing from a structural perspective, several African observers have highlighted the linkage between globalization processes, rising levels of income inequality and inadequate governance mechanisms leading to rising levels of poverty and undermining basic needs strategies [18]. To a larger degree than the British and French experience would suggest, political change along the German constitutional model in Africa would require an integrated approach with international institutions, a certain reorientation of their policy priorities and a more consensual articulation of their preferences for sustainable economic development.

What follows from this highly selective look into the constitutional history of three major European counties is an appreciation of specific opportunities and constraints created by their internal frameworks to control the exercise of political power. All three, learning from particular historical experiences, leave room for manoeuvre to deal with the unexpected, the contingent and unpredictable in political life, yet they do so in their own specific way. We arrive at this finding without having taken a detailed look into the rules and procedures of constitutional change present in each of their legal declarations. Nor have we investigated the many political motivations standing behind desired policy changes through a change in the rules of the game. Strictly speaking, this is not necessary to support the general view according to which constitutions themselves are a form of 'frozen politics' and, typically, contain a fundamental critique of the historical situation that existed before their inception.

The existing and emerging constitutional orders in Africa reflect a number of parallels with this pattern. At the same time, they differ most fundamentally in the general ambitions and aspirations associated with new constitutional designs and the related political practices. In Western Europe, at least, major parts of the population expect from the political class to safeguard, protect and defend what has been achieved in terms of prosperity and stability, whereas in Africa the preferred slogan will be catching up with and copying of, if not 'leapfrogging', what has been built elsewhere around peaceful legal settlements. Paradoxically, the key to both kinds of social desires might rest irrespective of their diverging historical and cultural rooting in an accelerated drive towards further regional integration.

3. Multi-level constitutionalism

The attempt to draw useful comparisons between African political constellations after independence and European post-war developments appears as an outright provocation. After all, the former advanced the view to get rid of 'European' laws and institutions regardless of the 'exporting countries' and to construct, for the first time, their own arrangements seen as appropriate for solutions to the major challenges facing their respective societies. Among those, the need to accommodate ethnic diversity and to ensure an equitable as well as efficient allocation of scarce resources stood out. Most certainly, the tasks ahead for the political leadership were of a tall order. Not only should both be achieved simultaneously, it should also be done – as it were – by maintaining the

moral high ground of democratic state reconstruction. With the help of 'consultative processes' a new 'system of governance' was to be created reflecting and promoting genuine 'African values, aspirations, traditions, customs and views of the world' [19, p. 1-5].

While this kind of language is reminiscent of the current theoretical and conceptual debates around 'European governance', it is an indicator for the existence of some substantive parallels which should make the EU case of regional integration an important one [20]. In addition to the transnational economic forces mentioned already above, the significant follow-on problems of large cross-border movements in terms of citizenship status, refugee rights and human rights underline the urgency in the search for solutions 'beyond' inherited state structures [4, p. 367]. For some time, African scholars have argued that the content of individual rights as well as the practice of democracy is bound to vary according to historical phase and social context [4, 359]. Of course, what they had in mind was more to 'contrast' than to compare the two continents. Indeed, European integration itself a negotiated, working solution to member-state interdependence for more than half a century has sparked a veritable controversy about its underlying basic ideas. Here, as elsewhere, the question hinges upon the existence of common 'values' or 'principles' able to create an overarching sense of community and to legitimate the further transfer of sovereignty to supranational institutions. While many agree in the case of Africa on the immediate economic benefits of regional integration schemes, few see the close interconnection with broader objectives of social welfare, sustainable development and bargaining power in international institutions potentially under threat in an increasingly globalizing world. Consequently, there is much more hesitation to move on from an essentially 'intergovernmental' mode of policy-making towards 'supranational' mechanisms of joint decision-making [5, p. 1-27].

In the EU quasi-constitutional developments starting with the Single European Act, continuing with the Maastricht, Amsterdam and Nice Treaties and, finally, culminating in the drafting of a 'European Constitution' have likewise met doubts within the academic community as to whether they truly reflect 'genuine European reference values' such as peace, human rights, democracy, economic prosperity and social justice. In fact, numerous contributors have acknowledged the widening of a 'democratic deficit' in the multi-level polity of the EU revealed by a de-politicisation of its decision-making, a reliance on technocratic structures and a general trend towards elitism. They hesitate to recommend a move of the European project to a next stage of 'constitutionalisation' since it has already a narrower legitimacy base than traditional nation-states and has to cope with considerable uncertainty as to the actual preferences held by the 'peoples' living on its territory [21, 78].

Some of the arguments and counter-arguments, however, are worth repeating here, especially since their presentation can be magnified through the lens of different disciplines. The sociologist Jürgen Habermas, for example, suggests as a way out of the mismatch between *demos* and *ethnos* in an integrated Europe to give the notion of 'constitutional patriotism' a European-wide meaning. This conception, originally developed to describe the changing basis of a newly formed German identity after fascism, depicts constitutional provisions and principles of liberal democracy as more important for the development of society than historically grounded and culturally based self-assessments. Accordingly, it should become possible to construct larger communities around 'universal values' and a 'constitutional legacy' embracing a political culture where intensive deliberation, negotiation and dialogue is firmly embedded in formal and informal institutional arrangements across several levels of territorial organization.

Arguing from the angle of constitutional federalism, the lawyer Joseph Weiler qualifies this view. For him, there is a constitutional order already in place [22]. The previous phases of supranational treaty-making have irrevocably connected the numerous national constitutions of the member states with a corresponding and complementary EU frame. What counts more than the theoretical debate about the possibility of democracy in a 'post-national constellation' is the high degree of 'constitutional tolerance' articulated in the continuous interactions between national and EU institutions constantly accepting a set of mutual obligations in a pluralist fashion. The constitutional architecture in its current form has the distinctive capacity to defend national identities and protect fundamental human rights against excesses coming from Brussels as well as from the member states themselves. Although the established hierarchy of norms has suffered from the lack of a proper validation by an all-European *demos*, there is no concomitant ambition (or *telos*) to create one. In short, the journey's destination is an 'ever closer Union of the *peoples* of Europe' and not a distinct European 'peoplehood' [23, p. 17].

Taking a public policy perspective, Fritz Scharpf, likewise, defends the current constitutional *status quo* in the EU by drawing on a distinction between input and output legitimacy in order to clarify certain differences between 'government by the people' and 'government for the people' [24, p. 6-28]. Given the latest enlargement rounds the input dimension is for the foreseeable future seriously limited as a collective identity, overarching policy debates and a dense institutional infrastructure is unlikely to emerge. In other words, any further constitutional settlement will have to recognize these normative constraints and, thus, concentrate on a fairly selective range of truly common policy choices. This is not necessarily bad news, since to some extent such output-oriented arguments can be used to legitimize governance at the European level whenever these policies meet consensus requirements and are conducive to the realization of a clearly delineated public interest.

Developing his arguments within the field of International Relations, Andrew Moravcsik proposes to accept the EU's constitution-like arrangements as a 'world of the second-best' [25, p. 187]. In this view,

constitutional development and design in Europe, as elsewhere, is not commensurate with a kind of liberal perfectionism that links notions of fairness, equal participation and due process to policy outputs that can satisfy the demands of a theoretical construct like the median voter or a neatly deduced ideal of normative governance. More to the point, the EU has to operate within a particular historical and social context that inevitably reduces its recurrent institutional changes to a form of piecemeal constitutional engineering. Any strong claims about a 'democratic deficit' are misleading given its comparatively standard mix of majoritarian and non-majoritarian decision-making closely resembling the situation found in the domestic polities of the member states.

As in the preceding section, this is by all means a selective presentation of *topoi* found in the discourse on European constitutionalism. Their common point of departure is an appreciation of processes beyond a purely doctrinal, legalistic, understanding of integration and its demand for a democratic foundation. They add further credibility to the EU's own claim to have no intention to export a specific integration model to other parts of the world, for example, in the guise of its regional co-operation policy. For this purpose, the ongoing efforts to support sub-regional groupings in Africa would still have to be considered as too limited. So far they have mainly included regular political dialogue with the African Union (AU), the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS) as well as the supply of economic aid to the West African Monetary Union and the Central African Customs and Economic Union [26, p. 73-74]. Moreover, these have sometimes been overshadowed by merely bilateral negotiations as a substitute for more encompassing interregional agreements [27, p. 262]. In turn, African intergovernmental organizations have frequently resorted to European blueprints, though without conducting a real power transfers to what should become functional equivalents to the Brussels institutions. In particular, they failed to adjust respective priorities to the regional context or neglected the serious resource limitations of their member states [28, p. 49-64].

For the purpose of this article, then, the question should be asked – why bother in the African context? First, an answer suggests itself because of certain basic similarities: Africa lacks a larger sense of community because of linguistic and cultural diversity. The identification of second 'working language(s)' would be all that is needed to create a communicative context for the next phase of political integration. In addition, and similar to Europe, Africa is exposed and particularly vulnerable to forces of economic globalization. The foundation of common markets and overarching regulatory frameworks would be a way to react and filter those forces according to country specific risks and opportunities, strengths and weaknesses.

Second, an answer suggests itself because of certain basic differences: Africa has no prior experience with strong nation-states or fully developed state bureaucracies. From a comparative angle, this could be a blessing in disguise. New regional integration schemes would not have to outperform existing national policies straight away, but could in some respect start from scratch. In addition, and in contrast to Europe, there has been and continues to be a stronger impact of geopolitical considerations, power politics and internal as well as external military threats. This by itself, if properly channeled, could offer ample opportunities and incentives for political leaders to form durable alliances or co-operation schemes to achieve more lasting degrees of independence and peace [29].

Moreover, a comparative approach drawing on the different constitutional conceptions introduced above helps to move African ideas of regional integration away from a particular form of economic reductionism with an exclusive emphasis on trade liberalisation and monetary policy co-ordination. Given the nature of the problems on the African continent, the emerging debates around different integration schemes need to cover the 'full range' of public sector activities and avoid an overly restrictive focus on a single policy dimension. [5, p. 1-27] Indeed, to the extent that international institutions are representatives of a new form of 'constitutionalism' with judicial language almost exclusively underpinning global capitalism and free markets, it is essential for the prosperity of sub-regional entities and their member states to be pluralistic in their constitutional choices of development goals [20, p. 50]. Whether they are supposed to foster community sense, improve political legitimacy or facilitate incremental change, they should do so on an equal basis with economic concerns, for example, in issue areas such as regional security and human rights.

In normative terms, the European constitutional debate does highlight another purpose of institutional integration of importance to African countries. As various enlargement rounds with respective treaty changes have shown, prospective EU membership has been seen as an important ingredient to domestic reform and democratization processes. No doubt, due to the large number of authoritarian governments based on single party rule there is a huge potential to increase the legitimacy of political systems on the African continent. Different to the overall positive – but crude – picture of significant economic growth rates in the 21 century (or output legitimacy), the domestic democratic record is much more wanting. In particular, electoral processes as an essential element of 'input legitimacy' have not lived up to the expectations raised by new constitutional arrangements setting the rules for periodic changes in power constellations.

Instead, what we find in Africa appears to be 'power alternation' of a different kind. The systems there seem to be trapped in a threefold behavioral pattern which forces them to go through a repetitive cycle of political change. The typical start is a new attempt at democratization, followed by a phase of stagnation or policy reversal and, finally, a coup or other form of illegitimate replacement of an elected government. The country examples for the first phase could be

Cameroon and Kenya, for the second Ethiopia and Uganda (or Zambia and Liberia); and for the last phase Burundi and the Gambia [30, p. 5-9]. It is, however, the conjecture of this article that an appropriate constitutionalisation of regional integration schemes can make a useful contribution to a more open-ended and stable democratization process facilitating lasting changes in the political culture of the participating countries.

The debate on European constitutionalism touched upon above, attracting further commentary from academic as well as political circles, offers some inspiration as to what kind of principled beliefs could give guidance to legal reasoning and learning processes conducive for the emergence of such schemes in Africa. As pointed out before, what matters more than 'big debates' is their practical relevance and useful contribution to the effective day-to-day running of a political system. For this very reason, the EU itself might not always be sufficiently tuned towards the implementation of general (soft) federal principles coming under the heading of loyalty, comity and voluntary co-operation [31, p. 28-29]. Instead, there appears to be a plethora of mechanism organizing the interaction between national, supranational and international actors (or levels) in various hierarchical and non-hierarchical structures. On a more positive comparative note, though, this feature of modern governance arrangements offers rich opportunities to embed democratic administrative traditions inherited from smaller African communities into newly emerging structures. By no means does their organization of society into clans and families imply non-participatory decision-making. The council of elders, for example, operated in some cultures as the representative body for all village clans discussing the majority viewpoints as previously articulated in individual clan meetings [18].

It might therefore be an important insight spanning across continents that the efficient bureaucratic management of interdependence can only counter institutionalized ignorance and guile with a good measure of trust and reciprocity on the part of individuals working through redesigned channels of delegated state authority. In the comparative context it should also be obvious that this is much easier achieved against the background of relatively 'simple' arrangements of checks and balances along a more traditional separation of powers model than in fairly sophisticated constitutional designs with potentially overburdening complexity [13, p. 258]. Accordingly, to the extent that the EU in its constitutional development and practice has been *sui generis*, the African continent is likely to follow a similar pattern [32, p. 440].

4. Comparing Policy Sectors

In the area of security policy, for example, there are already some promising steps found in this direction with the formation of the African Union (AU). As Liisa Laakso reports, it has outgrown the institutional prerogatives and performance of earlier forms of collaboration [33]. Referring to the 'Constitutive Act of the African Union', one can find articles explicitly demanding 'the right of Member States to request intervention from the Union in order to restore peace and security' or 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' [33]. Consequently, the AU has created institutional arenas, mechanisms and *agoras* to formulate and arrive at respective decisions; its Peace and Security Council being a case in point. Though there continues to be an appreciation of the principle of 'non interference by any Member State in the internal affairs of another', the protocol initiating its establishment passes rights to an intergovernmental forum that approves 'the modalities for intervention by the Union in a Member State, following a decision by the Assembly' [34]. What is more, the feasibility of this arrangement has already been tested in a number of African countries. In addition, due to the involvement and monitoring role of the 'Commission of the AU', expectations have been raised that it might be able to take on a truly 'supranational' role in the security field. In fact, piecemeal integration steps of this kind should be easier to achieve within the 'uncharted' territory of Africa than in the organizational context of the EU. There, as the saga of a common defense policy shows, most military capabilities are jealously guarded by the member states.

Of course, to list these achievements as an intrinsic part of African multi-level constitutionalism requires some imagination. The same, by the way, is true for the ECOWAS framework and the 'Tribunal', first established in a treaty dating back to 1975. At the time, the 'founding fathers' thought of it as a 'dispute settlement mechanism' in order to ensure that West African member states would adhere to 'the observance of law and justice' in the interpretation of their common agreement. Interestingly, in a frame mainly devised to foster economic co-operation, so far it proved impossible to establish a working institution and to convince the participating governments about a mutually beneficial transfer of sovereignty. Therefore, one might want to follow Ominiyi Adewoye right away, who considers the revival of this mediating body as vital to 'enforce human rights and check abuses of power on the part of governments' [5, p. 321-322].

Again, the comparison with the EU's constitutional practice and debate is instructive. For some time, EU Treaties in their various and detailed provisions did not explicitly safeguard human rights. Instead, the European Court of Justice (ECJ) through its jurisprudence gradually maintained their inclusion in 'general principles' of European law. To this end, its judges used regularly constructions found in the pre-existing texts of international law and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [35, p. 185]. With hindsight, a similar process seems under way in Africa. The updated ECOWAS Treaty of 1993, for example, formally recognised the African Charter on Human and People's Rights as adopted by the of Heads of State and Government of the Organisation for African Unity (OAU).

However, the story does not end here. As part of the current debate around a 'European Constitution' some controversy developed as to whether the 'new design' should contain a charter of fundamental rights along the established ECHR model or along a more comprehensive catalogue of basic rights including social rights. Regardless of the precise settlement agreed upon in the final draft version, the key problem how effective implementation can be ensured across a community of 25 member states remained untouched. Similar to the African context, it is possible to speculate, if there is an awareness to advocate purely symbolic politics, or if there is the sincere (and costly) intention to build the legal capacities to sanction non-compliance by the signatories, some incompatible clauses in national constitutions not withstanding [36, p. 10].

Be that as it may, the above underlines a general point in support of 'reality checks' to establish the 'normative', 'nominal' or 'semantic' qualities of constitutional orders regardless of their geographic positioning. It was, Chris Padden, former EU Commissioner, who used precisely this expression in his first reaction to the failed ratification process of the new 'EU Constitution' in France and the Netherlands. Since then, coming to terms with reality meant a 'time to think' and the intention to restart the ratification process with a potentially revised and, most likely, re-named constitutional document, then under the six-months EU Council chair of a consensus-oriented German Chancelloress Angela Merkel. Her take on the subject, as that of many other political leaders in Western Europe, has more to do with the action capacity, practical results and measurable outcomes to be delivered by further integration steps than with theoretically advanced and highly sophisticated debates of democratic theory. Similar to the insights presented by African scholars in their examination of regional attempts at economic integration, political power, strategic calculations and leadership capacities are equally important to create the conditions under which states eventually agree to lasting transfers of sovereignty. For this reason, on the other hand, a closer look suggests itself into what eventually has been accepted by all member states. Again, this is a selective look into an area of economic governance with long-standing, conflicting viewpoints; although by now many observers tend to agree that joint decision-making is the 'only game in town' leading to the 'best' policies political elites have to offer in response to increasing market internationalization and globalization.

In the comparative context, it is again worth recalling differences as well as similarities between the two continents [37, p. 239-257]. Overall Africa shows a much lower level of exchanges in trade and finance across borders and the basic macroeconomic indicators on budget deficits, inflation rates and balance of payments reveal a large degree of continuing divergence among individual countries. Therefore, similarities should be much easier to identify in terms of institutional progression. With the signing of the Abuja Treaty in 1991 Africa has revived its interest in a continent-wide approach to integration, most clearly expressed in the establishment of the African Economic Community (AEC). The past decade, though, did show that there are many stumbling blocks on the road towards the ultimate goal of an African Monetary Union (AMU) and its crucial benchmark the introduction of a common African currency.

As it stands, there is all reason to call for more appropriate guidelines and realistic road-maps bringing the puzzling range of formally created regional bodies together in a more concerted effort [38, p. 19]. In the area of monetary policy, for example, only the former French colonies in West and Central Africa have continued to manage a common currency now tied to the Euro via a convertibility guarantee supplied by the French treasury. Their reliance on what are essentially pre-independence monetary arrangements has made the alternative, trade related, attempt at regional integration of ECOWAS not easier. Indeed, what is needed would be a kind of 'constitutionalization' spelling out the complementary benefits deriving from a contractual solution bringing all West African states together under a common roof and, thus, establishing a 'role model' for the continent as a whole.

Article I-3, paragraph 3, of the latest European constitutional document (EUC) opens up a useful comparative angle. There, we find the Union determined to work towards the 'sustainable development' of all its member states on the basis of 'balanced economic growth and price stability' and a highly 'competitive social market economy'. It furthermore aspires to the overall aims of 'full employment and social progress' as well as a high degree of 'environmental protection'. Thus, by and large, previous agreements especially as regards the competitive nature of Economic and Monetary Union (EMU) are reconfirmed. In large parts, the EUC continues to oblige the member states to follow neo-liberal principles anchored around price stability and low inflationary pressures through the exercise of restraint in their state finance and wage policies. With the inclusion of a full employment goal and the recognition of a social and environmental dimension, though, other policy goals have been added, potentially opening inroads to forms of state intervention.

The further changes proposed in institutional terms appear even more important. Here the EUC has the intention to substantially strengthen the sub-group of the community that already introduced a common currency. The members of 'Euroland' are expected to go beyond the general frame of policy co-ordination introduced by the current treaty structure. The vision is that the members of this 'club within a club' will have the authority to decide for themselves whether they have adhered to the economic guidelines and common policy prescriptions of the previously agreed stability pact. Naturally, therefore, an already powerful group of finance ministers will be further elevated in terms of status and competences. Accordingly, there appears little denial of a certain preference for economic 'government' facilitated by the introduction of the 'Euro' rather than for a 'medieval' form of fragmented, economic, 'governance' covering the whole of the EU.

The latter is the more likely scenario for the African Economic Community (AEC) as it has not specified a clear time line by which a common central bank and currency should be set up or by when different stages of monetary policy harmonization should be completed. Instead, chapter VII, Article 44, paragraph 1, of the AEC founding treaty states a clear preference for the objective of improved intra–community trade in goods and services within its regulations on monetary and financial policy. Of course, at this stage, it is impossible to spell out in detailed legal terms what sequencing of steps would be most advantageous for the Anglophone and francophone countries in West Africa for the organization of their economic interdependence; let alone the effects this would have for the continent as a whole. No doubt, as we know from the introduction of EMU in Europe, there are good arguments floating around to make the case for either a continuation of the *status quo*, the admission of competing currencies in different monetary zones or the early creation of a new form of legal tender. Yet, to push this comparative perspective further, pragmatism would most likely mean to underline the role of 'anti-inflationary' policies as the lowest common denominator for further economic integration in Africa [39, p. 29-48].

The resulting tensions between macroeconomic and monetary policy not withstanding, scholars justifying the role of 'non-majoritarian' institutions in EU politics have equally done so with reference to the price stability goal of the European Central Bank (ECB). If there is a manifestation of a 'common European interest', so the line of reasoning went, it is the respect granted by all relevant actors to this 'basic norm' or 'fundamental principle' guarded by an independent body [40, p. 722]. Indeed, the prominent standing of the monetary institution in the overall architecture could be deduced from 'the European citizen's fundamental right to the protection of private property' [40, p. 722]. It is, therefore, all the more striking that some economists have now diagnosed in the EUC a certain shift of balance away from the monetary policy priority to the advantage of general economic policies [41, p. 13]. They arrive at this prediction, first of all, because the ECB will be classified as just 'another institution' in the overall hierarchy of the constitution; secondly, because of the Commission's new right of initiative in areas of social policy; and last, but not least, because of the European Council's right to change the requirement of unanimity in 'important economic policy areas' to majority decision-making [42, p. 4]. As has been the case with constitutional practices inside the member states, larger integrated structures need to offer opportunities to come to terms with changing circumstances. The validity of this finding is bound to travel across geographic boundaries.

Certainly, predictions rarely lift the veil of the future. Yet, they alert us to the unresolved ambiguities of constitutionalist debates. There is an inherent danger with macro-perspectives in their tendency to emphasize procedural over substantive issues, institutional designs over political participation and legal safeguards over policy outcomes. It should be clear that progressive moves towards 'constitutionalization' require fairly high levels of 'politicization' or, at least, a qualitative shift in the exercise of participatory rights in comparison to their *ex ante* status. In case of neglect, large parts of the general public will use region-wide ratification processes to record their discontent with aspects of particular integration projects. Therefore, Africa with its unique history might be the more promising testing ground for the progressive formation of 'sectoral publics' beyond particular state constructs and for referenda reaching beyond single state borders [43, p. 131; 44, p. 97]. Learning from Europe's constitutional debates, however, could only mean to construct any integrationist ambitions carefully – as a matter of domestic politics and domestic priorities in terms of basic needs and social justice [45, p. 48; 46, p. 60-61]. The alternative, to leave it to established elites in foreign policy circles, would fail to build the badly needed trust in institutional arrangements at whatever level and, hence, their ability to influence policy outcomes in the desired direction.

5. Judicial review and politicization

An independent judiciary, of course, is the other major exception to majoritarian notions of democratic control. As in the case of monetary policy, the removal from the immediate reach of accountable, elected office holders is justified for reasons of technical expertise and practicality, but equally because of a broad, supportive consensus among the community of democrats. In contrast to the prevailing mood at independence, some African countries seem to have rescued this idea as a well understood comparative tradition warned them against the meaningless plagiarism of foreign legal codes. Frequently, South Africa and its drafting process of new 'interim' and 'final' constitutions, is given as an outstanding example where a successful blending of foreign, domestic and international sources of law has been achieved for the greater good of society [47, p. 429-485]. Even here, however, path-dependent arguments set in, warning against potentially detrimental long-term effects generated by key actors carrying on with the cultural codes of the past and extending their experiences with the law tradition under apartheid [48, p. 417-441].

While the latter concern might be specific to one country, the general point is to be more concerned about the implementation of elements of constitutionalism in Africa than about the European legacy of those elements *per se*. Not only do constitutions determine the formal powers, checks and balances in a system of government; typically they, too, form the basis and legitimating source for a rich body of secondary legislation. As a consequence, a lot of their intrinsic value derives from the quality of the latter. The larger deficits tend to prevail here, in terms of implementation, enforcement and effectiveness to achieve desired policy outcomes. The public desire, for example, to raise standards of living and to improve general living conditions, to eradicate hunger and to prevent famines, to provide housing and adequate clothing and to deliver educational and health programs in support

of larger communities, inevitably depends on policy-making processes requiring the sensible exercise of discretion by governmental as well as non-governmental actors. This sooner or later poses the question on how to settle conflicts potentially arising from the varying exercise of discretion by prominent actors within a system of turbulent governance, by their competing claims for the pursuit of welfare-enhancing objectives and their adaptation to fast changing political constellations.

Therefore, what we find in the European context is a mostly internalized, widely accepted, mix of checks and balances leveling different individual and institutional ambitions and, in the last instance, upholding the link of accountability to the people in the form of regular and free elections. Yet, and without geographic restriction, popular will and constitutional prescriptions seem to stay in 'punctuated equilibria' for rather brief periods before the former experiences, sometimes blatant, discrepancies between its demands and the behavior of a political class. The instrument invented to deal with this constellation is that of judicial review: the ability of courts to re-examine administrative and executive action with a view to set limits to the exercise of state power and to protect individual citizens from its abuse or arbitrary extension [47].

While this in itself can be considered to be a fundamentally political activity, a respective right granted to review the constitutionality of law-making and legislative action is even harder to defend [49]. In the comparative context this amounts to a double trade-off impossible to solve by either universal legal principles or a '*Grundnorm*' and, instead, necessitating the adaptation to cultural and historical circumstances as recommended in the introduction to this article. On the one hand, there are the two competing risks – well documented in the French '*État de Droit*' and the German '*Rechtsstaat*' – of 'judicializing politics' or 'politicizing justice', potentially undermining the credibility of the political system as a whole. At the end of the day, it does not matter whether this occurs because the 'political climate' ties up parliament with cumbersome legal prerogatives or because it quickly transfers unresolved party conflicts into the realm of a court.

On the other hand, there is the constant challenge to synchronize the working mechanisms of the public law system with the varieties of democratization found on the African continent. In a state like Uganda or Eritrea, for example, the population might already be receptive for ideas commensurate with minority protection and majority restraint; whereas in a country like Kenya or Sudan a court decision, even if presented by the highest and supreme authority, could shatter standard beliefs in what democracy is all about. There, exceptions to majority rule in the form of invalidated legislation would be difficult to digest by the general citizenry and likely to be interpreted as surrender to illegitimate forces.

In such constellations politics and law closely intersect and demand a consensual settlement on, or the gradual construction of, the fundamental values any particular society wants to prioritize within its order. In Europe, there is some evidence that constitutional control institutions have been used to protect, but also to define and redefine citizens' rights [14, p. 257]. Elsewhere, and for the time being, functionally useful and beneficial equivalents might be found in the recognition given to particular group or clan rights. In Africa, to repeat the argument, systemic features of the legal system matter less than the particular cultural tradition within which its rules have been embedded.

At a general level it is possible to distinguish two large groups of countries reflecting in their review processes the legal families of Europe [50]. While it is desirable that the prescriptions of local and regional customary law (or a combination of systems as in Botswana and Rwanda) become the expression of culturally well-adapted review mechanisms, this is by no means the dominant picture. Even in the relative coherent group of African countries working mainly with French legal codes judicial review is limited to legislative acts and not uniformly institutionalized. Cote d'Ivoire, Gabon and Morocco, for example, operate with a special constitutional chamber within their Supreme Court, whereas Mali and Senegal have their own Constitutional Court. The diversity is equally pronounced in countries following the precedents set by Anglo-Saxon common law. In Kenya and Lesotho, for example, review mechanisms are left to the High Courts, whereas Zambia follows the decisions of an ad hoc Constitutional Council and Malawi the rulings of a Supreme Court of Appeal.

To be sure, such differences support the basic claim of institutionalism according to which the composition, substantive remit and procedural power of review bodies will matter in the long run and in observable patterns. As a consequence, those forums that manage to gather high status and legitimacy in the early phases of constitutionalization have also good chances to achieve tangible results in the policy-making process despite the latter's tendency to invite unintended consequences in terms of output and outcomes. As Alec Stone Sweet has shown in several European cases, elected political elites learn to accept and tolerate their own monitoring, if they are able to exert some influence on the composition of a respective panel of legal experts [51, p. 286-314]. Moreover, their own masters, political parties have an interest in 'fixing the rules of the game' and want to turn repetitive power transfers into a 'normal' event. Then, with the public policy concern taking priority, a set of positive, welfare-enhancing, long-term changes can be set in motion building and transcending a country's political culture.

Thus, constitutionalism equipped with a review instrument serves as a kind of early warning system to filter out over-ambitious legislative projects including conflict-prone policies. It can, depending on its precise design, slowly create an ethos of 'piecemeal engineering' and 'self-improvement' by exercising restraint in the exercise of control rights on the government's task to develop adequate laws. It may, furthermore, reserve

its role to a limited form of constitutionalization, regulating a selective range of policy sectors considered to be of utmost importance for a country's progression or developmental goals, for example, in the area of privatization. In this way, normative guidance could be given once equally challenging legislative projects come up in the future. Last, but certainly not least, demanding and granting concessions to opposition forces within these processes would help to consolidate trust and embed reciprocity also in other layers of society.

In the final analysis, some degree of optimism follows in the African context from a sheer lack of alternative mechanism by which political actors can commit themselves to 'good' public policy in the sense of problem-solving as part of a basic needs strategy. Typically, in 'defective democracies' with parts and elements of the classic institutional ensemble damaged or hardly working, review bodies may still maintain the 'highest standing' compared to any of the other 'veto-players' in the political system [52, p. 30-58]. This is a consequence of their immediate connection with an initial constitutionalization phase and their understanding as 'guardians' who are in a position to repair and reproduce or, if need be, to revive its legitimacy in regular intervals.

6. Conclusion: constitutionalism, tribalism and diversity

This article advanced a non-doctrinal, process-oriented approach to constitutionalism. It did so, to make the point that despite all socio-economic differences a comparative dimension to judicial politics in Africa and Europe could be useful. Without the endorsement of a distinction between formal prescription and political practice no progress in terms of institutional learning over time seems to be possible. Therefore, as a first element of comparison, the suggestion was to consider the 'imported' or 'foreign' mechanisms found in the new constitutions as secondary to the more important internal quest for adaptation, adjustment and revision to country and culture-specific circumstances. In short, constitutions should count in day-to-day politics. This is not to argue for an end to more inclusive and participatory processes of constitutional design, but to ask for a realistic assessment of the indirect, mediated and often passive linkage between agreements in principle and actual governance arrangements for the formulation and implementation of public policy. In other words, constitutionalization is not identical with constitutionalism. While there is nothing wrong with the ambition to aim for as close a match as possible, Africa should not be ignorant to the comparative European history that can only counsel patience in this respect. Potentially, maximal demands could jeopardize minimalist, step-by-step and piecemeal, though sustainable, improvements.

Adding to the variety of possible structural solutions is the prospect to upgrade individual state capacities via regional integration schemes. Hence the second element of comparison in this article followed from the future recognition of a combination of democratic principles reflected in the current constitutional debates of the EU. Given the vast size of the African continent, and if social science experiments were possible, one feels tempted to recommend a pre-run of competing integration models to ensure their receptiveness and resonance to particular constellations of member states. Still, our findings in this respect were equally cautious, due to Europe's own uncertain prospects for further polity development. Any major concern with policy-oriented problem-solving seems to require the delegation of power (*kratos*) to non-majoritarian institutions, including those conducting judicial review processes. For the time being, however, there is only limited evidence of trials with this and related mechanism in a number of African countries.

Therefore, Robert Dahl's abstract reasoning has kept some of its attraction within democratic theory and political practice [53, p. 90]. In probing the possibility of a 'constitutional principle of autonomy' he investigated the feasibility of a base rule that would rank the autonomy given to minorities *vis-à-vis* democratically legitimized majorities particularly high. In his thought, the latter would be obliged to grant a minority of citizens even complete independence, if no other way could be found to ensure the 'fundamental rights, freedom and opportunity' of that group. No doubt, Dahl himself was aware of the harsh consequences of such a settlement: it would invite repetitive secessions and create anarchical structures under the guise of legitimate group demands. Eventually, the result would be severe state failure since detailed forms of coercive organization are not any longer a viable option [53, p. 93].

Consequently, constitutionalism does also come with high risks for African societies. In contrast to the Western liberal tradition, the challenge is not to defend individual rights against state or, more recently, supranational intrusion. Instead, the search is on for a recognition and definition of more complex rights granted to groups within society. On the one hand, the aim is to establish a degree of continuity in the sense of their identities and solidarities; on the other, there is the need to indicate a clear break with the past when respective 'memberships' and 'divisions' were abused for an artificial structuration of social life [4, p. 372].

Then, a third and final element of comparison had to deal with modern versions of 'tribalism'. To be sure, centuries ago Europe was the prime location where ethnic groups and tribal associations slowly transformed into nations and gradually acquired the political sovereignty around which a state system could be constructed. Yet, there can be no illusion about the characteristics of this historical process. In the words of Zygmunt Bauman, the 'blending' of tribes into nations was driven, 'by some tribes, which managed to lift themselves to the rank of nations' and 'devouring' others 'less lucky or resourceful' [54, p. 3-4]. Only later on, it has been possible to find a degree of congruence between the 'primordial loyalties' *as well as* the 'reasoned principles' of a large number of individual citizens that is not easily replicated in other regions of the world [53, p. 96].

At the very end of the 20th century, Europe itself became the location for the 'resurgence of tribal

hostility' and since then has tried to play the role of a 'soft power' to the best of its ability. Its advocacy of normative constitutional practices, reliance on consociational arrangements and attempt to combine economic success with social justice has continued to attract the attention of other would-be designers, though sometimes misguided by the 'welfare-magnet' image of the cold-war period. All said, the former Chancellor of the Federal Republic of Germany, Helmut Kohl, was perhaps right in stressing the lack of alternatives to further integration other than falling back into a violent past. The long-term presence of peace turned out to be an excellent promoter of cultural diversity, variety and plurality to which the constitutionalism of the EU became an important ingredient [55, p. 391-392]. Pushing its institutional development to federation-type extremes, however, could mean rising differentiation and fragmentation leading to a contested re-articulation and controversial manifestation of group rights within its societies. As a result, the terrain for comparisons between Africa and Europe is likely to increase.

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