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Book Review

Constitutional Adjudication in Africa
Charles M Fombad (ed)
Oxford, Oxford University Press, 2017. xiv + 369 pp. Hardback £75.00, ISBN 978-0198810216

This is the second volume in the series of *Stellenbosch Handbooks on African Constitutional Law* edited by Professor Fombad. As he writes in his introduction, the essays in this volume "offer a first attempt to undertake a critical and comparative examination of the interplay of the diverse forms of constitutional review models on the continent".[1] Given the enormity and complexity of the task, the volume does amount to a worthy first attempt. There is a coherence, which many edited volumes lack. This may in part be attributed to the effective framing of the volume by Professor Fombad's stimulating opening chapter (part 1), which provides an overview of contemporary models of constitutional review in Africa, and his thought-provoking conclusion (part 6) mapping the way forward.

Part 2 comprises seven studies of "archetypical examples" of different models of African constitutional adjudication. It is notable that the examples are drawn from anglophone, francophone and lusophone traditions, thus crossing the divides that so often inhibit comparative legal scholarship. Of the francophone courts, Adjolohoun describes the Benin model as having the highest reputation among francophone jurisdictions, a remarkable achievement in view of Benin's initial troubled post-independence constitutional history. Since the transition to democracy in the 1990s, the court "has played a tremendous role in the progressive entrenchment of constitutionalism, constitutional democracy and respect for the rule of law".[2] The Benin success story is contrasted in an essay contributed by Fombad himself, analysing the failure of the constitutional adjudicative process in Cameroon, a state that was formed out of an uneasy marriage of francophone and anglophone legal traditions. Given that the president has full control of the constitutional review mechanisms, Fombad concludes that the country is left "blindly limping into an uncertain future dependent on the benevolence or otherwise of whomever is president".[3] André Thomashausen paints a rather more optimistic picture of the role of the Constitutional Court of Angola, given the country's slow emergence from the authoritarian rule that had subsisted since independence. However, there is no independent appointment process. Four of the eleven

1 CM Fombad "Introduction" in CM Fombad (ed) *Constitutional Adjudication in Africa* (2017, Oxford University Press) 1 at 1.
2 SH Adjolohoun "Centralized model of constitutional adjudication: The Constitutional Court of Benin" in id, 51 at 75.
3 CM Fombad "The Cameroonian Constitutional Council: Faithful servant of an unaccountable system" in id, 80 at 96.

judges are appointed by the state president and four by the legislature. However, in a novel departure, one judge is appointed through a "national and open tender and selection process, conducted by the court itself".[4]

The next three chapters of part 2 survey Ghana, Nigeria and South Africa. Kofi Quashigah examines the role of the Supreme Court of Ghana in constitutional adjudication, tracing the gradual strengthening of constitutionalism under Ghana's 1992 Constitution after the long period of political turbulence following the overthrow of the Nkrumah government in 1966. Quashigah points to a number of decisions through which the Supreme Court reinforced the principles of the rule of law through the exercise of its power of judicial review. However he also alludes to a number of instances where judges have been open to allegations of political bias or where the executive has sought to interfere in the affairs of the judiciary. Ameze Guobadia describes the complexities of constitutional adjudication within Nigeria's federal structure. He suggests that there may be a strong argument for a separate division of the Supreme Court to deal exclusively with constitutional matters, given the unwieldy load that the court carries as the final court of appeal in every kind of appeal emanating from the lower courts. As James Fowkes notes, in this matter South Africa has moved in the opposite direction. Since a constitutional amendment in 2012, the Constitutional Court, despite its name, has became an apex court of general jurisdiction. Fowkes welcomes this development, since the bifurcated jurisdiction had led to a "polite" jurisdictional battle between the Constitutional Court and the Supreme Court of Appeal as to what constituted a constitutional issue. The result was a substantial neglect of the constitutional development of parts of the legal system, especially in private law, where neither lawyers nor judges were likely to object to the neglect of constitutional issues in the way a case was framed or decided. Fowkes concludes his chapter with a thoughtful section on the ongoing debate about the Constitutional Court's impact on South African constitutionalism in the context of attacks on the court as a by-product of political battles within the African National Congress (ANC).

In the final chapter of part 2, Adem Abebe characterizes the constitutional adjudication system of Ethiopia as "unique but ineffective". The system is starkly different from others reviewed in this volume, in that it completely excludes the courts from reviewing the constitutionality of laws. Instead, the constitution grants exclusive jurisdiction to the House of Federation, the second legislative house composed of representatives of ethnic groups. Given the likely lack of legal expertise of such a body, the constitution establishes a Council of Constitutional Inquiry, composed predominately of lawyers, to make a preliminary determination on constitutional issues. Abebe explains that this constitutional dispensation was devised under the tutelage of a dominant "left-leaning" party, ideologically opposed to empowering courts composed of unelected judges to thwart the will of the people as expressed in a constitution ratified by the people. This reviewer can but observe that this

4 A Thomashausen "The Constitutional Court of Angola: Judicial restraint in a dominant party state" in id, 97 at 99.

"counter-majoritarian" problem has echoes in many countries, for example in ANC attacks on the Constitutional Court in South Africa, the Trump administration's attitude to court decisions in the United States and the political storm generated by decisions of the United Kingdom courts relating to the modalities of exiting the European Union. So far as Ethiopia is concerned, Abebe finds that, if lack of popular trust in judges encouraged the decision to keep the constitution away from the courts, there is likewise a lack of trust in the highly politicized system of constitutional review that is in place. The sorry record of decided cases leads Abebe to the conclusion that the flaws in the system have meant that the constitutional review has had no impact on constitutionalism and that those seeking to uphold constitutional rights find litigation a futile endeavour.

Part 3 examines the impact of what is inelegantly characterized as "transjudicialism", identified as the impact on constitutional adjudication of international norms and of regional and sub-regional courts and tribunals. Magnus Killander assesses the extent to which international norms have affected national law in terms of the constitutional protection of human rights. He asserts that international law tends to play a more important role in constitutional adjudication in anglophone states than in civil law jurisdictions.[5] However, this may not be true of the Benin Constitution, of which international instruments form an integral part and are superior to the internal law.[6] Killander raises the controversial issue of the democratic legitimacy of international norms in the context of the practical realities of indigenous culture. He concludes with due caution that "the lived reality of most Africans is very different from what is written in the constitution and national legislation".[7]

Bonolo Ramadi Dinokopila argues that the normative pronouncements of regional and sub-regional courts have greatly aided constitutionalism in Africa, an assertion that is supported by the citation of a solid body of case law from a number of (mainly anglophone) jurisdictions. Rather curiously, there is no reference to the "hybrid" Special Court of Sierra Leone. Dinokopila sees some evidence in the jurisprudence of common law courts of "creeping monism", whereby use is made of unincorporated human rights treaties despite the absence of legislation giving domestic legal effect to such treaties, citing the landmark Botswana case of *Attorney-General v Unity Dow*.[8]

Part 4 examines the promotion of constitutionalism through constitutional adjudication. In a second contribution to this volume, Adjolohoun considers the relationship between politics and constitutional adjudication, an exercise involving an "extensive tour" of recent case law. He identifies a trend towards the "judicialization" of politics, identified as judicial involvement in matters normally

5 M Killander "The effects of international law norms on constitutional adjudication in Africa" in id, 209 at 217.

6 BR Dinokopila "The impact of regional and sub-regional courts and tribunals on constitutional adjudication in Africa" in id, 225 at 231.

7 M Killander "The effects of international law norms", above at note 5 at 222.

8 [1992] LRC (Const) 623, Botswana CA.

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reserved to the political branches of government. This phenomenon reflects not so much the strength of the courts but the weakness and fallibility of state political institutions. The role of the courts, he argues, is far from benign: "[c]ourts have brought whole societies to the verge of disorder, causing civil strife and conflicts, reversing the course of history, making and unmaking democracy, rewriting the constitution, endorsing illegality and rising above the people who designed the constitutional order of which courts are mere agents".[9] Not surprisingly, Christa Rautenbach takes a more a rather more generous view of the role of the South African courts in promoting constitutionalism through the use of the now familiar concept of *ubuntu*[10] so as to promote a cohesive and plural South African legal culture.

Part 5 examines decision-making and working practices through the work of the Benin Constitutional Court, the South African Constitutional Court and the Supreme Court of Ghana. The authors are all themselves distinguished judicial figures. Professor Theodore Holo, president of the Constitutional Court of Benin, shows that the handling of petitions by his court illustrates a determination by the court to focus on substantive issues of human rights violations and defence of the constitutional order, without being too much concerned with errors of procedure or form committed by the parties. Richard Goldstone, former justice of the Constitutional Court of South Africa, reviews the history of the court and its crucial role in the development and entrenchment of democracy. At the time of writing in 2016, he was obliged to conclude by recording recent unfortunate instances where government had been slow to implement, or been in contempt of, court decisions. It is to be hoped that the subsequent change in the presidency will restore the practice under President Mandela whereby court decisions against the government were implemented promptly. Kofi Date-Bah, former justice of the Supreme Court of Ghana, in examining the decision-making and working practices of his former court, concludes that the judiciary and the legal profession in general have a duty to keep the court's working practice under constant review to ensure that they are fit for purpose and promote efficiency, given its increasingly important political and social role in Ghanaian society.

Fombad himself provides a perceptive and stimulating final chapter. Despite the uneven progress made towards the entrenchment of constitutionalism since the constitutional reforms of the 1990s, Fombad, could "not, for many reasons, be sanguine about the future prospects of constitutional adjudication, generally, and constitutional justice in Africa".[11] However, he cites attacks by former President

9 SH Adjolohoun "'Made in courts' democracies? Constitutional adjudication and politics in African constitutionalism" in Fombad (ed) *Constitutional Adjudication*, above at note 1, 247 at 286.

10 Rautenbach refers to the spirit of *ubuntu* as being "captured in the belief that the well-being of the individual and that of the community are inextricably linked": C Rautenbach "Exploring the contribution of *ubuntu* in constitutional adjudication: Towards the indigenization of constitutionalism in South Africa" in id, 293 at 294.

11 CM Fombad "Constitutional adjudication and constitutional justice in Africa's uncertain transition: Mapping the way forward" in id, 351 at 352.

Zuma of South Africa on the judiciary, which now, under a new presidential dispensation, has the opportunity to judge his past conduct. Fombad might also draw comfort from the decision of the Kenya Supreme Court in September 2017 to annul the result of the 2017 presidential election on grounds of electoral irregularity.[12] Be that as it may, Fombad makes some valid and useful suggestions in relation to the future functioning of constitutional adjudication, including improving relevant judicial training and measures to ensure the accessibility of the adjudicatory body to all, especially to the poor and vulnerable in society.

This volume provides a rich source of comparative material on constitutional adjudication in its many African guises. There are useful bibliographies at the end of each chapter.

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12 See *Odinga v Independent Electoral Boundary Commission* [2018] 1 LRC 498.

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