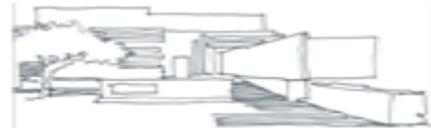


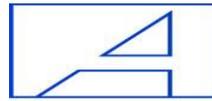
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STELLENBOSCH INSTITUTE FOR ADVANCED STUDY  
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South African Research Chair  
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## CALL FOR ABSTRACTS

### Seventh Stellenbosch Annual Seminars on Constitutionalism in Africa 2019 (SASCA 2019): Constitutionalism and the economy in Africa

**18-20 September 2019**

Dear Colleagues,

The Organisers of the Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) are pleased to announce the call for papers for the Seventh Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2019) which will be held in Stellenbosch (South Africa) from Wednesday 18 September to Friday 20 September 2019. As in the past, SASCA 2019 will be jointly organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria, and the Stellenbosch Institute for Advanced Study (STIAS) in partnership with the South African Research Chair in Multilevel Government, Law and Policy (SARChI) at the Dullah Omar Institute, University of the Western Cape and the Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa.

#### A. Theme

The theme for the 2019 SASCA seminar is; **Constitutionalism and the economy in Africa.**

The seminar, as in previous years, will take place in Stellenbosch, South Africa, from 18-20 September 2019.

#### 1. Introduction

Africa is the continent with the highest level of poverty in the world. Half of the population lives in poverty, not having access to basic amenities of life such as nutrition, water and shelter. The resulting food insecurity is most often the result of conflict and violence, as well as poor governance. For the same reasons millions die or suffer from preventable deceases.

The fight against poverty and all the ills associated with it, is much dependent on a vibrant and growing economy, first, to provide jobs and income, and should that fail, to deliver sufficient revenue with which the state could take anti-poverty measures. Overall, a strong

economy stands central to the well-being of a country and its ability to exercise its sovereignty.

The problem lies not only with a lack of material resources, but also with the distribution and sharing of available resources among the population as a whole. In a recent study the UNDP shows that there has been economic progress in Africa over the last 25 years, propelled by GDP growth of about 5 per cent. However, inequality remains high in sub-Saharan Africa, one of the most unequal regions in the world – with 10 of its countries listed among the 19 most unequal in the world.

The state plays no small role in the levels of both poverty and inequality. In African countries that adopted a command economy, the results have been disastrous. In others with a market economy, the impact of state corruption on poverty is demonstrable.<sup>1</sup> The fusion between the party and the state, which in turn controls or captures the economy, leads to “crony capitalism” and slow and skewed growth. In some countries the state has, in order to boost the economy, alienated land to foreign companies to the detriment of the subsistence tillers of the soil, leading to outcries of ‘land grabbing’. Due to indebtedness, yet other countries such as Zambia, are selling off the family wealth to China. Also, in times of robust economic globalisation the state often appears to watch from the sidelines, with global market forces dictating economic policy.

In every country, the state plays an important role in the economy, be it through ownership, control, regulation, the distribution of its benefits, or a combination of these. Different constitutional arrangements allow for diverse ways of shaping, defining and defending the interests of individuals and groups in the society. From this perspective, the role of the state in African economies has taken three principal modes: a command economy, a free market economy, and a mixture of the previous two.

Popular during the 1960s and 1970s was the command or planned economy. This was partly due to socialist economic dogma adopted by some leaders under the influence of especially the Soviet Union. Unshackled from colonialism and the skewed economy in favour of the colonial masters, newly independent states sought to bring economic and social progress through the state commanding all the levers of economic power. This meant control and ownership of the land and natural resources, as well as other means of production. Nkrumah’s African socialism spread through a number of African countries during the height of the Cold War. The Benin Constitution of 1977, for example, read: “In the People’s Republic of Benin the development path is socialism. Its foundation is Marxism-Leninism, which should be applied in a living and creative way to Beninois realities.”<sup>2</sup> Similar sentiments were to be found in Mozambique and Angola during this period. In essence the state was the rower of the economic boat; the state was the economy by owning key industries and companies. However, rather than plucking the fruits of a Marxist nirvana, the citizens reaped the whirlwind of conflict, corruption, ineptitude, and economic collapse set within the context of a polarised world order.

In the 1980s, when many of these states tasted the bitter fruits of high indebtedness, few had little choice but to bow to the structural adjustment programmes of World Bank and the IMF

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<sup>1</sup> See SASCA volume 4.

<sup>2</sup> Article 4, deleted in 1990.

which entailed privatization of key industries and reducing bloated civil services. When the end of the Cold War marked the demise of the Soviet Union command economy model, the new wave of constitutions not only heralded in multiparty democracy, but also a concomitant free market economy, both pushed by a triumphalist West. The state had to relinquish its role as rower of the economic boat and take charge of only the tiller, steering the economy towards growth. Constitutional principles were incorporated that provide for the protection of private property and safeguarding autonomy of the economy. Popular, too, was the notion of Hernando de Soto that property rights and the rule of law were essential preconditions for economic growth. However, contradictions persisted; liberation movements turned governments had to face and accommodate a Western-dominated world economy, while nourishing socialist doctrines.

While the free market theory dominated, states nevertheless were cautious and few sought to fully extract themselves from economic activity. A mixed form of economy became prevalent: the free market was extolled but states continued with inefficient state-owned enterprises. Moreover, states often strengthened their grip on resources, owning or controlling land transfers and natural resources.

## **2. Research questions**

After nearly three decades of the new wave of constitutional democracy, there is measurable economic growth overall, yet poverty is still rampant and inequality increasing. This raises a number of questions with regard to the nature of the economy, the nature of the state, the relationship between them, as well as the global economic order within in which they have to operate. One element in the mix is constitutions; how is the relationship between the state and the economy structured or managed through a constitution? Put differently, to what extent do constitutions determine the nature of economies?

The first level of inquiry focuses on the constitutions themselves. How do they express different economic models? In the case of a command economy, how does a constitution allocate power to the state with regard to the ownership, control and use of land and other resources? How is the economy being brought under state control?

Since the end of the Cold War, how have these constitutional structures been amended or ameliorated to effect the market economy paradigm? Often in the case of a market economy, constitutions are silent, but nevertheless implicitly pro-market by emphasising the protection of property rights. Yet, issues of land ownership and the control of natural resources are brought under state control. What, then, are the most significant elements required to constitutionally entrench a mixed economy? Where a country has opted for federalism or decentralisation, are subnational governments given any role in economic development?

The second level of inquiry is whether the principles of constitutionalism, where they are embedded in a constitution, have any economic significance. Does the principle of democracy and accountability impact on the mode of the economy, the direction of economic growth, and the broad distribution of its benefits? Is it part of the constitutionalism paradigm that the economy be 'democratised'? What does that mean? Does it include the notion that 'the people' own the land and natural resources as individuals or as a consolidated constitutional entity represented by the government?

Secondly, how does the notion of limited government play out in the economy? Does it mean a market economy that is free from governmental interference? Is it limited to respecting property rights? The debate in South Africa about the expropriation of land without compensation has resulted in the pending amendment of the property clause in the Bill of Rights

Thirdly, how does the rule of law – governance under rules and not by arbitrary discretion, which includes the supremacy of the constitution and its justiciability by an independent judiciary – structure and enhance economic growth? As mentioned above, does the rule of law favour economic development? Is it bound up in ensuring predictable state behaviour?

Fourthly, one of the contributions Africa has made to the development of the notion of constitutionalism is that state power should be directed towards development.<sup>3</sup> The new constitutional enterprise in Africa sees a larger role for the state – a transformative or developmental one – where equal citizenship is the goal through, among other legal measures, enforceable socio-economic rights and substantive equality.<sup>4</sup> The state is not merely a passive regulator of a free market economy, but plays an active role in the effective distribution of wealth to the entire population. Does the notion of the ‘developmental state’ not necessarily contradict the principle of the limited state?

The overall hypothesis to be examined in detail is that the economy and constitutionalism are inextricably linked. Could an economic constitution not only protect economic interests but also ensure that all fundamental principles of constitutionalism as well as the political system itself are also protected?

### 3. Calling for abstracts

Abstracts are thus invited dealing with both the constitutional nature of the relationship between the economy and state, the ensuing practice, and the possible impact of the economy on constitutionalism and vice versa. A number of themes are suggested:

#### 3.1 Globalisation and the economy in constitutions

Globalisation has had its most profound effects on the economies of countries and the trade relations among them. Questions to be addressed under this heading are:

- (a) From a historical perspective, have international economic agendas impacted on constitutional sovereignty producing particular constitutional outcomes: free market economies, structural adjustment programs, poverty alleviation commitments?

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<sup>3</sup> See Yash Ghai. ‘Chimera of Constitutionalism: State, Economy, and Society in Africa’, unpublished paper. University of Pretoria, 2011, available at [http://web.up.ac.za/sitefiles/file/47/15338/Chimera\\_of\\_constitutionalism\\_yg1.pdf](http://web.up.ac.za/sitefiles/file/47/15338/Chimera_of_constitutionalism_yg1.pdf)

<sup>4</sup> Pius Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351; Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

- (b) How is African constitutionalism affected by the fact that the international economic system is profoundly 'non-African', having had no participation in the design of the system? Have economic globalisation trends put pressure on constitutional frameworks and the practice of constitutionalism?
- (c) In the current international economic world order, including the World Trade Organisation (WTO) regime, how do free trade agreements fit into constitutional frameworks of treaty making? Are they made by the executive only? Does parliament have a say? Are subnational units involved? Are they justiciable? Can international treaties be challenged (in court) for harming local business or violating constitutional rights? Does the constitution differentiate between foreign and national enterprises, small and big ones? What does it say about public procurement?
- (d) Does the constitution allow for differentiated taxing regimes which enable export processing zones or free trade zones?
- (e) Does the right to development play a role in the constitutional system? Does the constitution provide for rules regarding international development cooperation?
- (f) Is there perhaps a need for some sort of supra-national order to limit forms of political and economy power that transcends state boundaries? What is the role of the African Union in the regard?

### **3.2 Capturing the economy in the constitution and capturing the constitution in the economy**

In specific country case studies (or in comparative studies), the following questions may be addressed:

- (a) How has the constitutional relationship between the state and the economy evolved over time? From a command economy, to a free market economy, to a mixed economy? What were the driving forces behind such an evolution?
- (b) What model is currently expressed in the constitution? Free market, mixed economy, command economy? What constitutional form does it take? Does the preamble, for example, commit the country towards a particular economic model? What were the reasons for the adoption of a particular model?
- (c) Is the market economy guaranteed indirectly by individual rights, notably property rights (only) or is it found also in more general constitutional principles? Is the market economy the underlying, inarticulate premise of the constitution, and is so, why?
- (d) Are labour rights guaranteed in the constitution and how? What does the constitution say about balancing economic, social and labour rights? What were the political and economic compromises underlying the constitutional text?

- (e) What does a constitution say about social redistribution and how is whatever the constitution says about the issue implemented? What explains the particular form the constitution provisions take and their implementation?
- (f) In the light of the constitutional framework, how have the principles of constitutionalism been implemented, or not? In particular, what has been the role of the judiciary, if any?
- (g) What should constitutions say in the furtherance of constitutionalism in the field of economic development and the sharing of resources?

### **3.3 The constitutional protection of natural resources**

A burning issue in many African countries are the control and use of natural resources, and the accrual to whom of their benefits. There is a tendency to allocate the ownership of natural resources (land, water, oil and gas, minerals, forests, marine resources, etc) to the state. The economic implications thereof warrant investigation. More specifically, how do constitutions deal with natural resources and, equally important, what were the economic, political, international factors that may have influenced the way the matter has been dealt with:

- (a) Owning, controlling and regulating land and its use, including the alienation of land to foreign companies;
- (b) Owning, controlling and regulating natural resources, such as water, forests, and sea;
- (c) Owning, controlling and regulating minerals, oil and gas; and
- (d) Constitutionally protected accountability mechanisms to ensure the appropriate exercise of the powers over natural resources.

### **3.4 The economic constitution and multilevel governments**

Where a country has opted for federalism or decentralisation, are subnational governments given any role in economic planning and development? Framing economic policy as well as its implementation should no longer be seen in simply majoritarian terms or as a top-down implementation of directives from the centre to the periphery. Constitutional arrangements cannot ignore the configuration of interests and role of diverse stakeholders in overlapping jurisdictions and multilevels of economic governance.

- (a) Does the constitution provide for a uniform economic system or do subnational units and local governments have their own economically relevant competencies?
- (b) Is there a constitutional system in place to incentivize subnational units to develop their regional/local economy? Is there a diversity of economic systems in the country?

- (c) Does the constitution prohibit, encourage, or frame competition among levels and components of government for investment? Do regions have an interest in taking economic initiatives of their own or does the constitutional system (e.g. equalization) rather discourage them? Is there a risk of a race to the bottom (of labour, ecological standards) and what does the constitution do to prevent it?

Any answer to these questions begs the further one: what were (and are) the political, social and economic factors underpinning multilevel economies where they are constitutionally provided for and do exist.

## B. Papers

We are inviting abstracts of paper under any of these sub-themes. Papers could focus on a particular country, or deal with an issue from a comparative perspective. Authors are particularly encouraged to undertake comparative studies across the different legal and constitutional traditions in Africa (Anglophone, Francophone, Arabophone, Hispanophone and Lusophone).

All the papers must indicate the manner in which the overriding theme of the intersection of the economy and constitutionalism is addressed.

## C. Information on the submission of abstracts

We hereby invite all scholars and other persons interested in research in this area to submit a proposal on any of the sub-themes indicated above or closely related sub-theme. The proposal should include:

- An abstract of the paper of about 1000 words with a clear indication of the sub-theme under which the author wants the abstract to be considered under. In cases of a closely related sub-theme, then state the specific one.
- A brief c.v. of the author in which he/she **highlights the papers he/she has published on this topic.**

The deadline for submitting proposals is **15 January 2019**. Proposals should be sent as e-mail attachments to Dr. Lukman Abdulrauf at [lukmanrauf@gmail.com](mailto:lukmanrauf@gmail.com) and Dr. Michelle Maziwia at [michelle.maziwisa@gmail.com](mailto:michelle.maziwisa@gmail.com) copying the two organisers, Prof. Charles M. Fombad, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, [Charles.fombad@up.ac.za](mailto:Charles.fombad@up.ac.za) and Prof. Nico Steytler, SARChI Chair in Multilevel Government, Dullah Omar Institute, University of the Western Cape, [nsteytler@uwc.ac.za](mailto:nsteytler@uwc.ac.za) Any questions on this call for papers should be directed to the addresses given above.

On acceptance of an abstract by the organisers, the author will be invited to submit a draft paper by **30 May 2019** on the basis of which a final invitation to the conference will be extended.

All authors whose papers are accepted will be provided with a return economy class air ticket, and board and lodging in Stellenbosch for the duration of the seminar.

All the papers presented during the seminar will be peer reviewed for publication in the sixth volume of the new series, *Stellenbosch Handbooks in African Constitutional Law*, which is

published by Oxford University Press, Oxford (see first information on the first two volumes attached).

**Please, kindly distribute this call for papers as widely as possible to all colleagues in your faculty as well as to other interested persons such as legal practitioners and judges.**

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