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Constitutionalism and the Juridical Governance Implications of a Continental Order

Naefa Kahn

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Continental Order**

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1. INTRODUCTION

In this paper attention has been focused on the broader concept of constitutionalism, rather than the narrow idea of “a constitution”, in examining the constitutional implications of a continental order. This is primarily because constitutionalism can exist without a constitution and a constitution does not necessarily result in constitutionalism. Moreover, constitutionalism, as shall be shown, incorporates juridical concerns, thereby ‘killing two birds with one stone’.

Moreover, the focus is on the constitutional and juridical implications of the existing continental order which in the current frenzied atmosphere of a new continental order with a push for a ‘United States of Africa’, has simply been forgotten. This is based on the premise that it would be more apt to work with, strengthen and expand the existing structure, rather than work on a framework that may suffer the same pitfalls as the current framework since the underlying problems have not been dealt with.

Consequently, the paper has been developed as follows. Firstly, there is a discussion on constitutionalism. Secondly, the development of constitutionalism in Africa is discussed including the struggles and problems. This is done in order to provide a general understanding of African states’ acceptance and practice of constitutionalism, since this will aid in understanding the third area of discussion - that of constitutionalism at a continental level. This is followed by an examination of how the current structures can be strengthened. Finally, the development of constitutionalism at a state level is discussed.

2. CONSTITUTIONALISM

Constitutionalism is portrayed as the ideal that every state strives to achieve. The term is often bandied about as a must for good governance and used alongside terms such as ‘democracy’ and ‘human rights’. It is used by politicians - elected and unelected - activists and lawyers. But in an African context, it appears to remain elusive.

2.1. Constitutionalism and a Continental Order

Habasonda views constitutionalism as a method of limiting political abuse; it ensures that the powers of the state are constrained and that the state cannot act capriciously.¹ Fombad provides a similar exposition of constitutionalism, focusing on limiting the power of the

1. Lee M Habasonda, *Presidentialism and Constitutionalism in Africa: “Third Term” phenomenon/ extension of tenure; the Zambian experience*, 1-2, available at: http://www.zesn.org.zw/docs/Presidentialism%20and%20Constitutionalism%20in%20Africa%20_lee%20Habasonda.ppt.

state, but adds more explicitly the idea of protecting the individual.² These conceptual definitions provide a foundation for the nebulous concept that is constitutionalism. However, the concept needs to be further expounded upon, since, if a more encompassing definition is utilised, the implications for a continental order can be more clearly extrapolated. This is why Fusaro's writings on constitutionalism are so important.

Fusaro sees constitutionalism as a process which is continually developing. Importantly, he sees Africa as contributing to this development.³ He discusses historical processes which have added to the development of constitutionalism. The formative experience being the French Revolution and article 16 of the French Declaration of the Rights of Man and of the Citizen of August 26, 1789, which encapsulated constitutionalism at the time. An important part of this article reads as follows: "a society in which the observance of the law is not assured nor the separation of powers defined, has no constitution at all".

Fusaro then extracts certain key points which have developed since this period and compiles a list of the most important aspects. The article is, of course, more nuanced and analytical than this, but the list he extracts is important for the present discussion, since it evidences a historical process not limited to a Western experience, and helps to provide the framework which can be used to assess and discuss constitutionalism at a national and continental level. The list is as follows:

- "the protection and the advancement of human rights, inclusive of social rights or citizenship rights, as the undisputed priority: they come before any other value and all public institutions and bodies are bound to foster them; equality among all human beings and in particular the prohibition of all discriminations on grounds of race, colour, sex, social status, ethnic origin, and all unjust and prejudicial distinction is part of human rights, as well as the establishment of a thoroughly independent judiciary;
- the recognition of the principle of people's sovereignty as the base for the establishment and the actions of all collective institutions, which includes majority rule as the main decision making technique and forms of both representative and direct democracy (through referendums for instance);
- the guaranteed subtraction from the supremacy of majority rule of those matters whose regulation may eventually infringe the protection of human rights in general and of some minority rights, as well as of other matters which in each specific social context are regarded as particularly sensitive so that they may be regulated only on

2. Charles Manga Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana', in *Boston College Third World Law Journal*, vol 25:30, 2005.

3. He does at the outset provide the caveat that in his discussion of constitutionalism he is examining the concept and not the actual practise as we all know that what is on paper often does not translate or fails to be translated into concrete developments.

the ground of a particularly high level of consensus, or may even not be regulated at all;

- the full autonomy of the civil and political sphere from the religious sphere in the sense that the public authorities are not allowed to grant privileges to any denomination (even if largely majoritarian);
- a set of institutional arrangements which allows a guaranteed minimum of reciprocal checks and balances so that no institution may concentrate all the public functions or, to say it in other words, strict limitations to the exercise of political power (these arrangements can include a territorial distribution of power along the lines of federal solutions);
- all the previously listed features are established and entrenched in a source of law recognized as higher to any ordinary law and subject to amendment according to specific and extraordinary procedures only; furthermore, the enforcement of this supreme law must necessarily be ensured by some effective system of judicial review;
- the just mentioned higher law itself must be the product of an all-inclusive and negotiated process which may grant the opportunity to participate to all members of the community it is going to insist upon; however the application of the democratic principle in the constitution-making procedures may be tuned in a way to be reconciled with the pursuit of peace among the members of society as a pre-condition of both the acceptance of the final arrangements and the effective protection of fundamental human rights;
- the permanent maintenance of the constitutional arrangements must be granted as a main function of the political entities; poor maintenance or no maintenance of the constitution (the fundamental rules and values which govern a community) may otherwise bring sooner or later to a break down of the constitutional order.”⁴

In summary, the important aspects are: the protection of human rights; limitations on majority rule in so far as it negatively affects human rights, especially minority rights; separation of church and state; limitation on the powers of the state; checks and balances between institutions; the formalisation of all the foregoing principles into a higher law through a process which has been inclusive and consultative; and the constitutional principles must be maintained by the political institutions.

4. Carlo Fusaro. *Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective*, available at: http://www.carlofusaro.it/in_english/costitutionalism%20in%20africa%20and%20constitutional%20trands.htm.

The ideas of inclusiveness, negotiation and compromise are extracted from the African constitutionalism process. These are the principles which should guide constitutionalism at both the national and continental levels.

3. AFRICAN CONSTITUTIONALISM

South African president, Thabo Mbeki, says, “Before you put a roof on a house, you need to build the foundations”.⁵ Essentially, superimposing a continental order without proper foundations is problematic. This section demonstrates the development, or more appropriately, the lack of development of constitutionalism in African states - which has impacted on the ability of the African Union to perform its mandate effectively. This is by no means an exculpatory factor for the African Union - since organs, especially the African Commission, need to be more proactive - but it does assist in understanding the still pervasive elite club syndrome.

3.1. Colonialism and Post-Colonialism Constitutionalism

No analysis of a political structure in Africa can proceed without historical background. The effects of colonialism on African countries are common knowledge; nonetheless some of its general features will be discussed here since they inform the current discussion.

Law in colonial Africa was never a means to protect the majority of its people, but rather to subjugate. Laws were constructed to enforce the clear divide between the coloniser and the colonised, empowering the former and disempowering the latter. The democratic principles articulated and practised in the metropolises were never practised in the colonies.⁶ Considering the authoritarian nature of the colonial regime, it is difficult to understand why authoritarianism took such a grip over African countries after independence.

H Kwasi Prempeh argues that after independence a number of factors influenced the move towards authoritarianism. Among them, the concern that the multi-ethnic make-up of the state would encourage partisan politics and consequently that multi-party politics would hinder the development project. Furthermore, the development plan for the alleviation of poverty, illiteracy and the development of proper infrastructure and health care would not succeed if there was any room for dissent. In Tanzania, the government argued that the developmental agenda needed to proceed unhindered and as a result, the bill of rights should be excluded from the constitution. Furthermore, as already discussed, the state

5 Claire Soares, ‘Ambitious plan for a new Africa: Welcome to the U.S.A (that’s the United States of Africa)’, *The Independent*. 25 October 2007, available at: <http://news.independent.co.uk/world/africa/article2723229.ece>.

6 Richard Roberts and Kristen Mann, *Law in Colonial Africa*, Heinemann, 1991.

inherited a legal system which worked to ensure colonial domination, which meant coercive and repressive legislation. This legal system was maintained and consolidated in many cases. In 1964, Julius Nyerere proclaimed that the “new preventative-detention law” was necessary since, “Development must be considered first....Our question with regard to any matter-even the issue of fundamental freedom-must be, ‘How does this effect the progress of the Development plan?’” A similar attitude was expressed by Ghana’s first independence attorney general when he maintained, in response to critics that: “if denial of access to the courts was justified in 1948 [during British colonial rule] why was it wrong in 1957 [when Africans were now at the helm]?”⁷ Finally, the reverence and deference accorded liberation fighters meant that they were allowed to proceed without any real scrutiny.⁸

Initially, in certain cases, there was evidence that the developmental project was succeeding. However, this did not last. Corruption, mismanagement, nepotism and the continued use of repression and coercion to remain in power slowly destroyed the developmental agenda. Often when the stark reality of failure was no longer possible to hide, the regime would be overthrown to be replaced by a similarly ineffective and authoritarian one. In the 1980s the results of authoritarian government were evidenced by heightened poverty levels, bankruptcy, underdevelopment etc.⁹

In 1988 the President of the Third World Legal Studies Association wrote:

*“Africa’s experience with constitutionalism has not been a happy one in the thirty years since Sub-Saharan countries became independent. The great enthusiasm of the early 1960s that greeted new constitutions providing for democracy, the rule of law, and guarantees of human rights has, in many places, been dashed by military coups, emergency decrees, suspension of constitutional guarantees, and autocratic, abusive rule.”*¹⁰

The 1990s was the dawn of a new era which witnessed the opening of political landscapes in Africa. By 1994, the one party system was practically non-existent.¹¹ Nonetheless, even in this new political era abuses and constitutions without constitutionalism are still the norm. Prempeh argues that one of the reasons for the failure of these new multi-party systems is the “presidentialist character of Africa’s constitutional politics.”¹² According to him:

7. H. Kwasi Prempeh, ‘Africa’s “Constitutionalism Revival: False Start or New Dawn?’’, in *International Journal of Constitutional Law*, July 2007, 479-481. For further information on the developmental agenda see Sammy Adelman, ‘Constitutionalism, Pluralism and Democracy in Africa’, in *Journal of Legal Pluralism*, nr. 42, 1998.

8. Ibid 482.

9. Ibid 482-483.

10. Peter Slinn, ‘A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s’, in *Journal of African Law*, vol. 35, 1991, 2.

11. Prempeh op. cit., 484.

12. Ibid 497.

*The long absence in postcolonial Africa of a tradition of parliamentary autonomy has severely handicapped Africa's legislature in defining or protecting their institutional interests and prerogatives. Despite new openings and opportunities to assert a meaningful role for parliaments in Africa's post-authoritarian constitutional politics, contemporary legislature-executive relationships continue to be defined by conventions established under the executive-dominated ancient regime.*¹³

This results in policies being determined solely by the president without the necessary debate and engagement required to ensure successful policies. And, importantly, Prempeh asserts that when the president does not act on a concern and implements any policy, that situation simply deteriorates.¹⁴

He makes the critical point that the opening of political space has been concerned with democracy primarily and not constitutionalism. So the usual free and fair elections and media freedom effectively ensure only the opening of a closed system.

“In the near term, what is needed to reenergise and advance the constitutionalism project in Africa is a second generation of constitutional reforms, one that will shift the emphasis from merely installing electoral democracies to building firmer and institutional foundations for constitutionalism.”¹⁵

It would, therefore, appear that at a national level constitutionalism has not, as yet, taken root firmly in Africa. We simply have to turn our attention to the crisis in Sudan in terms of imposing Sharia as the state religion, the sad turmoil that the Congolese have had to endure for over 10 years and the current situation in Zimbabwe, and these are merely the ones that have caught the media's attention most recently.

The case of Sharia and constitutionalism is another concern at a national level. Abdullahi Ahmed An-Na'im, in his discussion of African constitutionalism, focuses on the role of Islam in terms of constitutionalism. He believes that Islam cannot be bypassed since it is a very African religion. However, he believes that the state must be secular, since once Sharia is enacted into law it is no longer of divine nature, but the interpretation of a group of people, usually lawyers and politicians with their own views and agendas. A secular state, he maintains, allows one to be “the Muslim one chooses to be”. Once Sharia is enacted into law it becomes the political will of the state and not the belief of Muslims.¹⁶ At the national level this concern already poses problems and it will be interesting to see how a continental order will deal with it since the separation of church and state is, according to An-Na'im and

13. Ibid 498.

14. Ibid 498.

15. Ibid 506.

16. Abdullahi Ahmed An-Na'im, Lecture entitled: *African Constitutionalism and the Role of Islam*, Centre for the Book, Cape Town, 9 October 2007.

Fasaro, a requirement for constitutionalism. An-Na'im makes the interesting point that 70% of Sudan's population is Muslim, while in Senegal it is 96%. Senegal is a secular state and has not experienced the problems Sudan has.¹⁷

Consequently, there are a myriad of concerns with regard to constitutionalism at national levels, most of which have their foundations in colonialism, but which have been maintained and exacerbated by African leaders. A noticeable trend is the need of African leaders to maintain a monopoly of power through authoritarianism in a closed setting, presidentialism in a democratic setting and, in the context of religion, assertion of a set of norms, values and laws determined by a select group of people. Power effectively becomes the domain of the few.

3.2. Constitutionalism at Continental Level

Currently there are myriad opinions on which system should be adopted. There are those favouring a 'United States of Africa' system and others a 'Union of African States' system more akin to the European Union system. Somehow, we have leapfrogged over the actual problems of why our current continental system is considered ineffectual or has failed, and requires an overhaul. The discussion in the previous section provided some understanding of state developments in terms of constitutionalism; the current section examines the continental developments.

There has been a positive shift in African continental structures. The predecessor to the African Union, the Organisation of African Unity, was an elite-driven organisation with power centred in the Assembly.¹⁸ Sovereignty was paramount and as a result human rights abuses continued unabated in certain African countries, with African leaders fully conscious of what was happening.

President Museveni of Uganda in his maiden speech to the Heads of State and Government of the Organisation of African Unity in 1986 stated that:

"Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives (...) I must state that Ugandans (...) felt a deep sense of betrayal that most of Africa kept silent (...) the reason for not condemning such massive crimes had supposedly been a desire not to interfere in the internal affairs of a Member State, in accordance with the Charters of the OAU and the United Nations. We do not accept this

17. Ibid.

18. Chris Landsberg and Shaun Mackay, *Engaging the New Pan-Africanism, Strategies for Civil Society*, ActionAid International, 2004, 14.

reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life.”¹⁹

The African Union, established in 2002, attempted to move away from the exclusively heads of state-driven arrangement to a more democratic institution. Furthermore, although the idea of sovereignty still remained important, intervention in the internal affairs of a country was permissible in times of grave circumstances, such as war crimes, genocide and crimes against humanity as articulated in article 4(h) of the Constitutive Act;²⁰ and in terms of article 4 (p) which deals with unconstitutional changes of government.²¹ Moreover, there is currently a Protocol on the Amendments to the Constitutive Act which will add to the list a “serious threat to legitimate order or to restore peace and security to the Member State of the Union upon the recommendation of the Peace and Security Council.”²²

The Constitutive Act, the founding document of the African Union, in article 3 speaks to constitutionalism in its objectives, including to:

- “(e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;...
- (g) promote democratic principles and institutions, popular participation and good governance;
- (h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments;”²³

Clearly a shift can be noted and these developments have resulted organically. Furthermore, recently the African Union adopted a very important charter, namely, the African Charter on Democracy, Elections and Governance (ACDEG Charter). Chapter 2 of the ACDEG Charter sets out the Charter’s objective, which are as follows:

- Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights;

19. Ben Kioko, ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’, *IRRC*, December 2003, Vol. 85, available at:

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJDL/\\$File/IRRC_852_Kioko.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJDL/$File/IRRC_852_Kioko.pdf).

20. *Constitutive Act of the African Union, 2000/2001*.

21. Unconstitutional change of government: Togo (February 2005), Mauritania (August 2005). The African Union condemned the unconstitutional changes (coups) and suspended the authorities in both countries from partaking in African Union activities; Williams, P.D, ‘From Non-intervention to Non-indifference: the Origins and Development of the African Union’s Security Culture’, in *African Affairs*, April 2007.

22. Ben Kioko op. cit.

23. *Constitutive Act of the African Union, 2000/2001*.

- Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties;
- Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;
- Prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development;
- Promote and protect the independence of the judiciary;
- Nurture, support and consolidate good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance;
- Encourage effective coordination and harmonization of governance policies amongst State Parties with the aim of promoting regional and continental integration;
- Promote State Parties' sustainable development and human security;
- Promote the fight against corruption in conformity with the provisions of the AU Convention on Preventing and Combating Corruption, adopted in Maputo, Mozambique in July 2003;
- Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs;
- Promote gender balance and equality in the governance and development processes;
- Enhance cooperation between the Union, Regional Economic Communities and the International Community on democracy, elections and governance; and
- Promote best practices in the management of elections for purposes of political stability and good governance.²⁴

The ACDEG Charter creates a basis for a constitutional framework; the fact that the Charter was adopted indicates the importance of constitutionalism. The ACDEG Charter was adopted on January 30, 2007 and as yet no country has ratified it.²⁵ This is an obvious

24. *African Charter on Democracy, Elections and Governance*, adopted in Addis Ababa, Ethiopia, on 30 January 2007, available at: [http:// www.africa-union.org](http://www.africa-union.org)

25. Ibid.

concern for any continental constitutional agenda. It is early stages yet, but one would hope that far-reaching charters such as this will be ratified and implemented.

The point is that there has been progress and the process has incorporated elements of constitutionalism. Moreover, since the structures are in place for a constitutionalism resembling that of the European Union, it would be best to utilize these structures and work with these institutions in creating a more unified Africa.²⁶

4. STRENGTHENING EXISTING STRUCTURES

Although the push from certain quarters is for a more federalized system such as the United States of America, with the current hesitation by certain states at the prospect of any united front, pushing for this system - which would mean more significant loss of sovereignty - may be another factor working against adopting this structure. More importantly, if a continental system already exists which has attempted to push forward constitutionalism but has not received the necessary buy-in from member states, it is difficult to see how a new 'United States of Africa' system will be more successful. It is interesting that Libya is at the forefront of the call for a 'United States of Africa' and yet has not submitted to the NEPAD Peer review.²⁷ Moreover, Tim Murithi believes that the current framework for a United States of Africa is:

1. *A top-down approach to continental integration;*
2. *Governed by the whimsical will of the leaders of African governments;*
3. *Has a tendency towards un-democratic practices, like lack of consultation;*
4. *Through its formulation, which largely excluded African civil society, is effectively governed by the rule of Heads of State and not the continental rule of law.*²⁸

One of the problems of the African Union is that it lacks credibility and this is largely owing to its failure to act when clear human rights abuses take place. Instead, it has closed ranks at a heads of state and government level. This is far too reminiscent of the problem of the Organisation of African Unity - a problem which led to the downfall of that organisation -

26. Prince Mashele, *A United States of Africa: Between Vision and Reality*, Institute for Security Studies, 23 April 2007, available at: http://www.iss.org.za/index.php?link_id=14&slink_id=4332&link_type=12&slink_type=12&tmpl_id=3.

27. United Nations Economic Mission for Africa, *ECA in the APRM*, available at: <http://www.uneca.org/aprm/CountriesStatus.asp>.

28. Tim Murithi, 'From Pan-Africanism to the Union of Africa', *Pambazuka*, June 20, 2007, available at: <http://www.globalpolicy.org>.

and a position currently reflected in the attitude adopted for creating a United States of Africa.

It should be reiterated at this point that the focus of this paper is the constitutional and juridical implications of a continental order. As such, political and economic aspects have taken a back seat. This is important since a system which seeks constitutionalism may not prove politically apposite for some, even though the founding document of the African Union speaks in terms of some constitutionalism and the ACDEG Charter is even more explicit.

Comparisons are only useful in so far as they can assist in strengthening and guiding the development of our structures. Our development must be viewed in terms of our own context and history. However, it is useful to use the European Union example of membership requirements as a method for strengthening legitimacy and consequently clout, in the African Union. In 1993 at the Copenhagen European Council it was agreed that membership criteria require that the candidate country must have achieved:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.”²⁹

These criteria, unlike the current peer review mechanism under NEPAD, are compulsory. There are no preconditions for membership of the African Union³⁰ and only in the case of unconstitutional change of government, will the offending state be suspended.

Furthermore, in the European Union, European Law trumps national law. Jo Straw writes that:

“...according to the case law of the Court of Justice, EC law is part of national law and takes precedence over it., including over national constitutional provisions. Enforceable rights under EC law are procedural claims which national courts must uphold for the benefit of an aggrieved individual as against an infringing member state, as well as embodying substantive benefits accorded by the EU treaties.”³¹

29. European Commission, *Accession Criteria*, available at: http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm.

30. Romy Chevallier, ‘EU Entry a Lesson for AU’s Peer Review’, *Business Day*, July 18, 2005, available at: <http://www.globalpolicy.org>.

31 Jo Shaw, ‘Process and Constitutional Discourse in the European Union’. in *Journal of Law and Society*, March 2000, vol. 27, issue 1, 3

As shall be discussed, the juridical order is still in its infancy and the African Court of Justice has been subsumed under the African Court on Human and Peoples' Rights (African Court) which means that legal developments at a continental level, such as those witnessed under the European Union, may be constrained. The European Union has a Court of Justice as well as the European Court on Human Rights. Currently the thinking, in terms of human and fundamental rights, is that the European Court on Human Rights reviews the European Convention on Human Rights, while the Court of Justice reviews the Charter of Fundamental Rights. The later focuses predominantly on the actual institutions of the European Union, rather than the relationship between citizens and member states.³²

In the African Union context, "It is presumed therefore, that the African Charter, given that it was adopted under the auspices of the OAU, will be the benchmark used by the African Union, in its own relationships, foreign policy and throughout its own institutions."³³ This clearly needs to be practised and errant actions by member states should be condemned in terms of the African Charter on Human and Peoples' Rights (African Charter).³⁴

Furthermore, if the African Union is actually capable of acceding to the African Charter, it would mean that citizens would be able to take various organs of the Union to court if they failed to act in certain circumstances.³⁵ This would ensure further citizen participation and moreover, pressurise the African Union to act.

The African Court has finally been permitted to come into force. It should be added here that it took over 5 years for 15 African countries to ratify the protocol, the required amount of ratifications for the establishment of the Court.³⁶ There are 53 members of the African Union. It is hoped that the African Court will be housed in Tanzania. The African Court has no criminal jurisdiction and will only deal with issues of human rights. Jurisdiction covers the African Charter and other human rights instruments ratified by states concerned. The following have *locus standi* in terms of Article 5(1):

- The Commission;
- The state party which lodged a complaint to the Commission;
- The state party against which the complaint has been lodged at the Commission;
- The state party whose citizen is a victim of a human rights violation;

32. Rachel Murray, 'A Comparison between the African and European Courts of Human Rights'. in African Human Rights Law Journal, vol. 2, 2002, 208.

33. Ibid, 208.

34. African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986.

35. Murray op. cit., 208.

36. Human Rights Institute of South Africa, *A Guide to the African Court on Human and Peoples' Rights*, Johannesburg, 2006, available at: http://www.hurisa.org.za/Advocacy/Court_Guide.htm.

- African intergovernmental organizations.³⁷

Article 5(2) states that “When a state party has an interest in a case, it may submit a request to the Court to be permitted to join”. Article 5(3) stipulates that “The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this protocol”. Article 34 (6) provides that:

*“At the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive petitions under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a state party which has not made such a declaration.”*³⁸

Consequently, if there is no declaration, individuals will first have to submit a complaint through the African Commission. The only states which have made declarations thus far are Mali and Burkina Faso.³⁹ In terms of enforcement, the first duty is on the state to comply with a judgement of the Court, however, the Court must also submit its judgement to the Assembly and specify whether there has been compliance - this ensures a form of peer review. The Council of Ministers is also required to monitor compliance on behalf of the Assembly.⁴⁰

It is problematic that NGOs must first be granted observer status before they are entitled to bring a case to court. The European Court of Human rights has no such requirement and therefore anyone who suffers a human rights violation has *locus standi*. However, where the African Court is more progressive is that it is not bound to the African Charter. It has jurisdiction over all human rights treaties ratified by member states. This, it is maintained, will ensure that the African Court is able to examine new forms of violations should they occur.⁴¹

It is unfortunate that a merger between the African Court and the African Court of Justice has occurred. Pityana noted, prior to the merger, that:

“It is, however, generally accepted that the Court of Justice will become the main instrument for the interpretation of the Constitutive Act and for the

37. Protocol on the African Human Rights Court (1998/2004).

38. Ibid.

39. Human Rights Institute of South Africa, *Statement on the African Court*, 15 May 2006, available at: http://www.hurisa.org.za/Advocacy/HURISA_Statement_20060515.htm. Also, Africa Legal Aid (Afla) and the Ministry of Justice of Ghana, *Introducing the New African Court on Human And Peoples’ Rights*, 1-2 December, 2006, Narrative Report, available at: http://www.africancourtcoalition.org/content_files/files/NarrativeReportAFLA_ACHP1_2Dec06.doc

40. N Barney Pityana, *Reflections on the African Court on Human and Peoples’ Rights*, available at: Available at: <http://www.unisa.ac.za/contents/about/principle/docs/Human&People.doc>.

41. Scott Lyons, ‘The African Court on Human and Peoples’ Rights’, in *The American Society for International Law*, vol. 10, Issue 24, September 19, 2006.

resolution of disputes arising between states in terms of the Act. It is a situation akin to the relationship between the European Court of Human Rights and the European Court of Justice, which can be said to be complementary as regards human rights matters.”⁴²

Without the Africa Court of Justice, issues such as border disputes, or member state transgressions which do not fall within the ambit of a violation of human rights, cannot be adjudicated by an independent court. Much can be done to strengthen the existing structures to ensure more effective constitutionalism at a continental level.

Firstly, if membership remains inclusive, suspension should not be limited to unconstitutional change of government. It should also be based on the African Charter. Individuals and NGOs should have direct access to the African Court and an African Court of Justice should be established. Finally, the idea of an elite group of people wielding power (a post colonial national trend infused at a continental level in the Organisation of African Unity, in the African Union - although less pronounced - and now with the push for a United States of Africa) cannot proceed. If the Constitutive Act and the African Charter informs decisions at this level, then hopefully decisions which assist African people will be taken. Moreover, if the judicial structure/s exercise its/their mandate broadly and can adjudicate matters which relate to whether the work of other organs of the African Union is being performed in conformity with the African Charter and other human rights instruments, then a more constitutional system will prevail.

5. DEVELOPING CONSTITUTIONALISM AT A STATE LEVEL

A framework for a continental system does exist and more importantly, for present purposes, includes a constitutional and juridical structure. These structures can, however, be further developed to strengthen this aspect of the Union and further the goal of a ‘United States of Africa’ in the future if the people of Africa so wish. Strengthening the continental structures is not sufficient though, national institutions need to play their part. Pierre Buyoya, former President of the Republic of Burundi, in discussing the concerns of the African Union as compared to the European Union⁴³, writes, in terms of legal considerations, that:

“...the universal principles that, after all, underpin the foundations of the European Union are violated on a regular basis by most of the member states of the AU. These principles include the guarantee of fundamental human rights and liberties, democracy, good governance, and the rule of law. The situation has

42. Pityana, op. cit., 3.

43. Pierre Buyoya, ‘Toward a Stronger Africa Union’, in *Journal of World Affairs*, vol. XII, issue 2, 172-173. For a thorough exposition of the structure of the African Union see Nsongurua J. Udombana, ‘The Institutional Structure of the African Union’, in *California Western International Law Journal*, vol. 33, 2002-2003.

become such that, in certain cases, observers do not hesitate to speak of 'African revolutions that devour their own children.'"⁴⁴

The development of constitutionalism at a state level is therefore imperative. The ACDEG Charter instructs the Commission at a Continental Level to:

"... develop benchmarks for implementation of the commitments and principles of this Charter and evaluate compliance by State Parties;

The Commission shall promote the creation of favourable conditions for democratic governance in the African Continent, in particular by facilitating the harmonization of policies and laws of State Parties;

The Commission shall take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to State Parties in support of electoral processes;

The Commission shall ensure that effect is given to the decisions of the Union in regard to unconstitutional change of government on the Continent.

At Regional Level the ACDEG Charter directs the Commission to:

- "...establish a framework for cooperation with Regional Economic Communities on the implementation of the principles of the Charter. In this regard, it shall commit the Regional Economic Communities (RECs) to: encourage Member States to ratify or adhere to this Charter; and
- Designate focal points for coordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in this Charter in order to ensure massive participation of stakeholders, particularly civil society organizations, in the process.

Moreover, Article 45 says that the Commission shall:

- Act as the central coordinating structure for the implementation of this Charter;
- Assist State Parties in implementing the Charter;
- Coordinate evaluation on implementation of the Charter with other key organs of the Union including the Pan-African Parliament, the Peace and Security Council, the African Human Rights Commission, the African Court of Justice and Human Rights,

44. Buyoya, op. cit., 172-173.

the Economic, Social and Cultural Council, the Regional Economic Communities and appropriate national- level structures.”⁴⁵

The articles are instructive since they set out the duties of the Commission. As is evident from the above, the Commission has extensive responsibilities in this regard since it is considered, as Mackay and Landsberg have noted, the “custodian of treaties.”⁴⁶ Importantly, the Commission is responsible for setting benchmarks and assisting states in implementing the ACDEG Charter. The ACDEG Charter is essential for creating an environment in which the rule of law, human rights, accountability, transparency, and democratic principles, *inter alia*, exist. It does in fact encapsulate many of the requirements for constitutionalism. It is, therefore, imperative that the Commission of the African Union is strengthened to ensure that it performs these important tasks as effectively as possible. Its actions, in terms of the idea of constitutionalism, should be guided by the principles encapsulated in the Constitutive Act and the African Charter.

The idea of constitutionalism should permeate the member states and the African Commission should be instrumental in ensuring that this takes place. Only through strengthening member states can a successful constitutional and juridical order be obtained. As mentioned earlier, the decision was taken to make peer review optional, to make membership open to all regardless of the situation in the member state, and to make unconstitutional change of government the only reason for suspension. However, recently there have been positive developments in terms of membership criteria. For membership onto the Peace and Security Council, member states must “meet governance standards along the lines prescribed by NEPAD.”⁴⁷

6. CONCLUSION

For decades African leaders have spoken for the people and not listened to the people. For decades African leaders have failed to protect their own citizens. Since many African states have failed, perhaps a continental order which has the basis for constitutionalism can make the difference. For a continental order to succeed it does not require some grandiose ‘United States of Africa’; it simply means abiding by the principles of one’s Constitutive Act, ratifying and implanting treaties at a national level, ensuring that an independent court is supported and moving away from an elite-driven club which a ‘United States of Africa’ will only exacerbate if attempted in an environment which currently does not condemn states that violate the basic human rights of its own citizens. The building blocks are needed: our

45. *African Charter on Democracy, Elections and Governance*, adopted in Addis Ababa, Ethiopia, on 30 January 2007, available at: [http:// www.africa-union.org](http://www.africa-union.org).

46. Chris Landsberg and Shaun Mackay, *op. cit.*, 14.

47. James Busumtwi-Sam, ‘Architects of Peace: The African Union and NEPAD’, in *Journal of International Affairs*, Winter/Spring. 2006, 78.

existing institutions need to be strengthened and African leaders need to be reminded that they serve the people. The Commission needs to actively work to ensure that treaties are ratified and that national laws reflect treaty laws. If this does not work effectively, methods need to be found of ensuring more effective implementation. Africans need to voice their objection to the ill treatment by member states of their own citizens as this contravenes the Constitutive Act and the African Charter and, therefore, cannot be condoned. Constitutionalism needs to be both built and strengthened at a state and continental level, rather than Africa following blindly the calls for a more new continental order without solving the problems of the existing one.