Journal of African Law, **50**, 1 (2006), 85–90 © School of Oriental and African Studies.
doi:10.1017/S0021855306000088 Printed in the United Kingdom.

BOOK REVIEWS

J. Hatchard, M. Ndulo and P. Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective*, Cambridge University Press, 2004. 361 pp. £65.00. ISBN 0 521 58464 7.

The 1990s ushered in a mood of optimism across many African states as a flurry of democratic reforms took centre stage. Constitutions based on a liberal blue print replaced the authoritarian systems that had become fashionable after independence. However, such optimism has faded as some governments have backtracked from the democratic path and manifested illiberal tendencies. A considerable number of leaders who had championed democratic change have sought, and in some cases obtained, constitutional amendments enabling them to stay in power beyond constitutional term limits.

Yet, despite these setbacks, there have also been some positive developments. Constitutional devices such as courts, ombudspersons and human rights commissions have successfully upheld the democratic ideal and fostered good governance. It is in light of these contrasting developments that John Hatchard, Muna Ndulo and Peter Slinn seek to draw lessons, both positive and negative, about the problems of constitutionalism in the Commonwealth states of eastern and southern Africa (ESA).

The book focuses on anglophone Commonwealth ESA countries and from the outset, the authors acknowledge the pitfalls of using eastern and southern Africa as a conceptual tool for analysing constitutionalism and good governance (p. 2). The authors, therefore, make no claim to any grand theory regarding constitutionalism and good governance in these states, but merely seek to draw lessons from the experience of all these countries. In this regard, then, the book does not provide a comprehensive analysis of the constitutional frameworks and practices obtaining in each of the target countries, but selectively focuses on particular elements which the authors consider as precursors to the establishment of sustainable good governance regimes.

The authors point out that the Commonwealth is a vital component of the constitutionalism agenda for ESA states. In this regard, they single out the adoption of the Harare Commonwealth Declaration of 1991, which committed Commonwealth heads of government to democracy, rule of law and respect for human rights, as a turning point that has significantly influenced the governance and constitutional practices of ESA states (p. 10). Indeed, the Declaration has become the yardstick for assessing Commonwealth member states' adherence to constitutionalism and good governance. It is has been used as the benchmark for expulsion as well as for admission and re-admission.

In chapters two and three, the authors focus on the post-independence constitution-making activities of ESA states. The authors point out that in the aftermath of independence many governments became undemocratic, over-centralized and authoritarian (p. 19). The liberal independence constitutions bequeathed to the newly independent states failed to work "... not so much because of a failure by Africans to learn the lesson of parliamentary government: rather the lesson of authoritarian colonial rule was taught and learnt too well".[1] In the 1990s, changes in the international political order, donor conditionalities

[1] P. Slinn, "A fresh start for Africa? New African constitutional perspectives for the 1990s", (1991) 35 *J.A.L.* 1, at 6.

and internal dissatisfaction with authoritarian-style leadership led to changes in favour of liberal democratic governance regimes (pp. 22, 28). In this regard, chapter three focuses on the ingredients for devising popular and durable national constitutions. It addresses legitimacy-led issues such as seeking the people's views, modes of adopting new constitutions, utilizing comparative experiences and securing the people's approval in a referendum.

Chapters four to 11 are devoted to technical and institutional matters aimed at ensuring good governance through constitutionalism. Recognizing that constitutions may not be perfect, chapter four deals with amendments to constitutions and the authors outline various procedural mechanisms aimed at protecting constitutions from regressive amendment. In this respect, the authors point out that the people themselves are the "guardians of the constitution" and substantive changes to constitutions must always be authorized by them (pp. 55–56).

Chapters six and nine deal with the allied issues of enhancing access to the political system and the devolution of power to local communities. The authors observe that access to the political system is an integral part of good governance and is fast becoming a normative rule of international law (p. 99), and consequently point out basic requirements for ensuring access, such as conducive institutional arrangements for political party activity and effective and transparent election processes. The legitimacy that a political system gains from inclusiveness will further be enhanced by the provision of processes and institutions that allow for popular participation at all levels (p. 186). However, the authors also urge caution against devolution which enhances ethnic divisions and threatens national identity.

Chapters five, seven and eight focus on the core arms of government—namely the executive, the legislature and the judiciary—and how these should be institutionally structured to promote and protect constitutionalism and good governance. The history of bad governance that has characterized most of the countries considered in the book leads the authors to advocate strong checks against the exercise of executive and legislative power. Consequently, chapters eight and ten focus on the courts as well as autochthonous oversight bodies such as human rights commissions and offices of the ombudsman, which have the crucial role of ensuring checks on unfettered exercise of executive power.

Although the countries under consideration do not have a worrisome record of military coups in comparison to other regions of Africa, Uganda and Lesotho have experienced successful military coups and attempted coups have taken place in Tanzania, Zambia and Kenya (p. 242). Consequently, chapter 11 focuses on mechanisms aimed at maintaining constitutional control of the military. Interestingly, the authors contend that military intervention in civilian governance often results from a failure to establish and maintain effective civilian government and institutions. The challenge, therefore, is to elicit and maintain popular support for civilian rule through the development of effective mechanisms and institutions that promote and protect good governance and the rule of law. Furthermore, the authors advocate the provision of various constitutional mechanisms which make the usurping of power through unconstitutional means less attractive. These include providing for the political accountability of the military (p. 252), incorporating anti-coup provisions in the constitution,[2] and placing of a duty on civilians to resist unconstitutional activities by the military (p. 259).

[2] For example, art. 3(2) of the Constitution of Uganda provides: "Any person who singly or in concert with others by any violent or other unlawful means, suspends, overthrows or abrogates this Constitution or any part of it, or attempts to do any such act commits the offence of treason and shall be punished according to the law".

The above analysis demonstrates that the book covers a considerable number of issues relating to constitutionalism and good governance in great depth. Although focused on ESA countries, the lessons drawn from the study are applicable everywhere and highlight the constant need to ensure that governance institutions remain accountable. It should, therefore, prove useful to practitioners working in this area. One small criticism is that although the authors regard the Harare Commonwealth Declaration of 1991 as an important framework for considering constitutionalism and good governance within the ESA region, they refrain from discussing how the countries featured in the book fair under this framework. The question of what is the potential for good governance in the ESA region therefore remains.

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A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, Oxford: Hart Publishing, 2004. 239 pp, index and bibliography. £45.00. ISBN 1-84113-480-5.

This densely constructed and well-written piece of scholarship deserves to be widely read and considered. Although the book does beg a number of fundamental questions underlying its thesis, its study of the post-Cold War era and the manner in which regional organizations evolved to fit into the overall framework of collective security, challenges one's understanding of the United Nations Charter and the relationship between the UN Security Council and regional bodies. In essence, Dr. Abass develops a thesis which justifies the ability of regional organizations to escape from underneath the umbrella of the collective security regime established by the UN Charter and to project force without authorization of the UN Security Council and in apparent violation of Chapter VIII of the Charter.

This study, the outcome of Ademola Abass' Ph.D. studies at the School of Law, University of Nottingham, is a rarity: a first-time author in the field of public international law who establishes a distinct voice coupled with a challenging and tightly written thesis. Having said that, *Regional Organisations and the Development of Collective Security*: *Beyond Chapter VII of the UN Charter*, does not, as a title, convey two elementary facets of this study: it fails to impart the sense that things have radically changed in regard to collective security both as a result of the end of the Cold War and specifically with regard to Africa. While Dr. Abass—who is currently Senior Lecturer in Law, University of Western England—justifies his "considerable attention on African regional organisations" on the basis that very little has been written about the African contribution to the development of regional collective security, it seems that this is a rather populist justification for a study which easily stands alone on intellectual grounds rather than on needing to prop-up an African perspective, as things *are* happening in Africa which *are* creating a distinct species of regional collective security. In fact, the study would have been stronger if it had focused exclusively on Africa since the end of the Cold War, instead of providing limited coverage of NATO's actions in the former Yugoslavia and more fleeting references to the OSCE and the OAS.

Dr. Abass correctly points out that "the current trend in regional collective security portends dire consequences for Chapter VIII in particular and for the cohesion of the UN collective security in general" (p. xx). He argues that this is

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not a bad thing and that while Chapter VIII remains central to regional action, "this does not and *should* not be taken to mean that the development of regional collective security depends on that Chapter" (p. xxiii, emphasis in the original). As Dr. Abass takes issue with the universal control of the use of force with regard to collective security being vested within the confines of the UN Charter and being the exclusive preview of the UN Security Council, he writes: "This book challenges such orthodox positions on regional collective security" (id.). Yet, the thesis is not as radical as one might assume, as the author continues that even if state practice indicates a "departure from the Chapter VIII framework", this does not warrant a total disengagement of regional organization from the UN Charter. Instead, Dr. Abass goes on to say that the "simple remit of this book is to understand the development of collective security by regional organisations and map out how this can enhance the overall scheme of collective security in the Charter in the contemporary world order" (p. xxv).

That being said, Dr. Abass' central thesis is that there is room for "decentralised collective security" in which regional organizations need not receive UN sanction to use force under the pretext of collective security. While Abass provides a rather sophisticated justification for finding an exception to the prohibition on the use of force beyond the control of the UN Security Council, he finds the elasticity of article 2(4) in the writings of—not surprisingly—American jurists who—once again, not surprisingly—have put forward the thesis "that the deficit in the operation of collective security by the Security Council has made the prohibition of force in Article 2(4) obsolete" (id.). Dr. Abass' argument, which allows for regional organizations to project force without the authorization of the UN Security Council, is based on the notion that article 2(4), which demands that all states "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations", is predicated on the final clause of article 2(4). Abass argues that "there is a lack of consensus on what type of force is not inconsistent with the Purpose of the UN" (p. 187); yet one needs to take issue with this. First, is it right to say that there are types of the use of force which go beyond those allowed by the UN Charter (re. self-defence and Chapter VII)? If so, these would have to be based on an evolution of international customary law, and as no consensus exists, is there not lacking the *opino juris* required to, in conjunction with state practice, establish a new exception?

Yet Dr. Abass' thesis is not concerned *per se* with the establishment of a customary norm which might allow for regional collective security without UN Security Council authorization *à la Kosovo*; instead he simply wants to bring into question the strict interpretation of article 2(4) which does not allow for the use of force outside of the confines of the UN Charter, as he questions "whether or not consensual interventions by regional organisations violate the peremptory norm in Article 2(4)" (p. 187). For Abass, violations of article 2(4) are not, in and of themselves, breaches of a peremptory norm; looking to the 2001 Articles on State Responsibility, Abass notes that the International Law Commission "identified *only* the prohibition of aggression as a peremptory norm under Article 2(4)" (p. 195). If this be the case, then the use of force, which was not of a peremptory character, would be susceptible to circumstances which would preclude its wrongfulness. The following argument thus emerges:

> "that the content of Article 2(4) is divisible into rules violating peremptory norms (aggression) and rules violating a general prohibition but not peremptory norms (lesser forces), [and that] it can be argued that consent given by states to regional organisations may preclude the application of Article 2(4) insofar as such relates to the second category of forces" (pp. 201–201).

Abass builds on his argument by saying that states have contracted into the UN Charter, and if the Security Council fails to take "prompt and effective action" as mandated by article 24(1), then it abdicates its primary responsibility for peace and security, and thus the responsibility falls to regional organizations as a residual power, if they so desire, by contracting out of the UN system.[1] Though somewhat seduced—and acknowledging the African context where the UN Security Council has been de-legitimized by its failure to act in Liberia and Sierra Leone, but where ECOWAS did so successfully, and haunted by the Rwandan Genocide—one finds it difficult to accept the overarching argument put forward by Dr. Abass. Nowhere does Dr. Abass care to define aggression or make reference to the 1974 Definition of Aggression which speaks of the "First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression"[2]. Instead, Abass argues that: "For instance, humanitarian intervention, though perhaps not permitted under Article 2(4), cannot be described as aggression since it is not aimed against the territorial integrity or political independence of the target state" (p. 198, n. 2). One need only think of Kosovo and the manner in which the public authority of the Federal Republic of Yugoslavia was treated, to understand that the territorial integrity and political independence of that state was indeed targeted under the pretext of a humanitarian intervention.

As intriguing as Dr. Abass' thesis is, how does one square the fact that African states remain bound by the UN Charter, yet have created within the ECOWAS Protocol and the Constitutive Act of the African Union parallel systems of regional peace and security which need not refer to the UN Charter imperative of article 53, mandating that no enforcement actions take place "without the authorization of the Security Council"? Might one argue that, in this case, the new provisions emanating from these African inter-governmental bodies are *lex specialis* which overrides the *legi generali* of the United Nations Charter? This could be, but for the constitutional imperatives of article 103, which demands that when there is a conflict with regard to "obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Yet, despite this, as I have shown elsewhere, African states, whilst not formally opting-out of the UN system of collective security, to all intents and purposes have in fact done so.[3]

Dr. Ademola Abass's book heralds the coming of a new voice on the public international law scene—a voice worth considering. As this book review has made plain, the arguments put forward are intriguing, if not ultimately compelling. However, the reality remains: the Economic Community of West African States has consented to allow its membership to use force without the authorization of the UN Security Council to maintain peace and security, and the African Union has gone further by sanctioning the use of force not only to maintain peace and security, but also with regard to "grave circumstances, namely war crimes, genocide and crimes against humanity as well as a serious threat to

[1] This interpretation seems at variance with the fact that the while the UN Security Council has primary responsibility for peace and security, residual power is meant to fall to the other organs of the UN (ie. the UN General Assembly via arts. 11 and 12, and the Secretariat, via the Secretary-General and art. 99) and not states themselves either individually or collectively.

[2] See art. 2, Definition of Aggression annexed to United Nations General Assembly Resolution 3314 (XXIX), 14 December, 1974.

[3] J. Allain, "The true challenge to the United Nations' system of the use of force: the failures of Kosovo and Iraq and the emergence of the African Union", Max Planck Yearbook of United Nations Law, Vol. 8, 2004, 237–289.

legitimate order to restore peace and stability".[4] Dr. Abass seeks to square this circle by asking if there is room within article 2(4) of the UN Charter for states to consent formally within regional organizations to provide for collective security where the United Nations is unwilling or unable to act. It appears that where the African Union and ECOWAS are concerned, that question has been already answered, to the determent, and in breach, of the United Nations' universal collective security system which has existed for more than sixty years, and to the credit of African states which have sought to establish, in the shadow of Liberia, Sierra Leone and especially Rwanda, an effective continental system of peace and security.

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[4] See art. 4, Constitutive Act of the Africa Union, 11 July, 2000, as amended by the Protocol on Amendments to the Constitutive Act of the African Union, 3 February and 11 July, 2003.

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