

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Conference «Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide» | February 8-9 2007 | Hotel Hilton Basel, Switzerland

Public law values and the governance of marketization in Africa: can administrative law rescue the state from emasculation?

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This paper seeks to explore the place of public law (that is, constitutional and administrative law) in the process of marketization in Africa, which initially revolved around the privatization of state-owned enterprises but has since been extended to embrace contracting out and public-private partnerships. The paper will problematize marketization in the context of the concept of the weak state. The state, as conceived in orthodox terms, is continuously being weakened by the processes of globalization such as marketization. The result has been a transfer of considerable public power to private hands in a context in which the state has little or no regulatory capacity. By and large, this process has not embraced public law values (such as accountability, participation and fairness) with the result that democratic ideals have been compromised to the detriment of citizens, whose livelihoods and liberties have thereby been affected. Accordingly, marketization in Africa has proceeded without suitable governance frameworks, as neoliberal values have trumped public law values. And as the market has taken over, the policing role of the state has diminished. In Africa, the weakening of the state has been exacerbated by development assistance initiatives, which are invariably the primary force behind marketization experiments.

In addition, development assistance initiatives often bypass constitutional accountability frameworks in the quest for speedy marketization. This serves to erode the regulatory capacity of the state even further.

In the absence of proper institutional frameworks regulating the use of the emerging private power, the citizens of many African countries have been left worse off after marketization. The question is whether public law re-form can rescue the African state from this increasing emasculation, as it seen by citizens to be incapable of safeguarding their interests. Quite inevitably, many citizens are also beginning to question the legitimacy of the African state.

The paper will argue that in order to be successful (that is, efficient and democratic) marketization processes must recognize and enforce public law values. In order to make this argument, the paper will use various examples of marketization experiments in African countries – in areas such as policing, the provision of water and health-care. In the final analysis, the paper calls for the reform of public law to accompany the on-going marketization experiments. In particular, the envisaged law re-form would establish suitable institutional frameworks for the regulation of private power.