

Interrogating Colonialism and Constitution-Making in Africa

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ABSTRACT

This work focuses on colonialism and constitution-making in Africa. The work interrogates the activities of the colonizers in their colonies, most especially the attempt to formulate a constitution for them when granted independent. But shortly after independence, many of these countries stated having numerous constitutional problems because the African perception of society, culture and economics was fundamentally different from the European one. These and many more are responsible for the visible problems African is having today. The work then conclude that there should be reconstruction and reconstitution of the post-colonial state so as to provide the people with accountable, transparent, and participatory governance structures and economic system that enhance efficient and equitable allocation of resources. The new constitution must be locally focused and take into account the specificities of the society to be governed by the rules.

Keywords: *Colonialism, Constitution-making, Europeans, Governance, Independent, Post-colonial.*

INTRODUCTION

Colonialism is the establishment of a colony in one territory by a political power from another territory, and the subsequent maintenance, expansion, and exploitation of the colony. It is the policy or practice of acquiring full or partial political control over another country, occupying it, and exploiting it economically. It is an unequal relationship between the colonial powers and the colony and often between the colonialist and the indigenous peoples. The European colonial period was the era from 16th century to 20th century when several European powers established colonies in Asia and Africa. It wouldn't have happened except for the particular economic, social and military evolution Europe was going through then. The advent of European to Africa in particular had a lot of significant effect on socio-cultural, economic and political life of the people. And when many of the colonized countries secured their independence, there is the need for the formulation of a constitution for the newly independence state but shortly after the independence, many of the independent countries started having constitutional problem. That is the reason why this work set out to interrogate the colonialism and constitutional-

making in Africa. It starts with constitution making and governance; here the factors responsible for the problems will be discourse and then the conclusion.

CONSTITUTION MAKING AND GOVERNANCE

The difficulty of establishing constitutionalism to enhance good governance in post-colonial Africa has been compounded by many factors. One of the fundamental factors was that the whole idea of constitutionalism did not arrive with the colonialists. Indeed, traditional African societies had their own system of social and political organisation prior to the advent colonialism. With the arrival of colonialism, these structures were done away with and a colonial system of government was imposed on the Africans. Africa was partitioned by the colonial powers into territorial units at the Berlin Conference of 1884-5 in accordance with their various claims. Colonial boundaries were drawn up without regard to ethnic, linguistic, religious, cultural, economic and demographic or other social bonds in the different regions of Africa. African kingdom, states and communities were arbitrarily divided into unrelated regions and people were brought together whilst peoples who were hit her to

united were torn apart. The era of colonialism consummated a dynamic process of disruption in tribal organisation and tribal life in Africa. Furthermore, traditionally, African law was intertwined with socio-cultural and ethical norms, as a tool of the ruling elite or of those whose duty was to keep society harmoniously integrated. In general, pre-colonial Sub-Saharan Africa did not develop what Kiralfy (1958) has called a “heritage of legality”, not for want of ingenuity, but because the African perception of society was fundamentally different from the European one. Whereas European theories of society tend to emphasize the role of the individual, African societies stress the role of close-knit social formations (Ajayi, 1991), and the supremacy of consensus not law as the measure for ordering public affairs.

Apart from the colonial drawback, Africa’s colonial rulers understandably did little to promote constitutionalism. Colonial legislatures in Africa were devoid of any effective voice from the Africa people, or responsibility to the African people, until fairly late in the colonial period, when Africans thus had little opportunity to practise parliamentary democracy. As a case in point, Nigerians had less than a decade of apprenticeship in parliamentary democracy, after approximately 100 years of colonial rule. The same applies to the rest of Anglophone Africa, and even more forcibly to Francophone areas. Clearly, a decade of participation by Africans in the public affairs of their own countries before achieving political independence could not suffice to develop substantial measure of collective consciousness of political accountability essential for constitutionalist rule. The rule of law on which constitutionalism is founded was also not a flourishing legacy during the colonial period (Ajayi, 1991). Indeed, the restrictions placed on the practice of the legal profession in Anglophone Africa were not removed until towards the close of the colonial era. In fact, France positively discouraged the development of legal elite in her territories. The posture of the colonial judiciary was generally one of self-restraint, reflecting a desire to safeguard the interests of the executive, and this persisted after independence.

In most African colonies, the decolonization process and preparations for independence were usually dominated or controlled by colonial administrators, European entrepreneurial and commercial interests resident in the colony, and

a few indigenous urban elites, most or all of whom had been educated in Europe, had lived there for a while, and had been captured by European culture and values. Members of these three groups (European entrepreneurial, commercial interests and urban elites) were not representatives of the colony’s diverse populations and were not elected by the people to represent them in the constitution making project. Also, they were not well educated about social, political and economic conditions then existing in much of the colony. In most instances, certain ethnic groups dominated the committee which was charged with negotiating on behalf of the African people. In some cases, the process was controlled exclusively by European settlers, with Africans denied full and effective participation.

It should be noted that throughout the continent, the European colonizers only reluctantly engaged in decolonization (Fatton, 1990:455-473). Even in those colonies in which there were significant populations of settlers, the latter opposed decolonization and engaged in military action to hijack the process and to make sure that the outcome was favourable to their selfish objectives. Law in colonial Africa was never a means to protect the majority of its people, but rather to subjugate the people. Laws were formulated to enforce the clear division between the colonizer and the colonized, empowering the former and disempowering the latter. The democratic principles articulated and practised in the metropolis were never practised in the colonies (Claire, 2007). The reluctant and opportunistic reforms implemented during the decolonization process in many African countries failed to deal effectively with the issue of full and effective participation by the indigenous people in post-independence governance and resource allocation; failed to fully engage Africans in constitution making to select appropriate and viable rules for the post-independence society; did not successfully transform the critical domains. i.e. economic, cultural and bureaucratic; and did not enhance the viability of the institutions being inherited from the colonial state (Claire, 2007)

Furthermore, the colonial rule was philosophically and organizationally elitist, centralist and absolute leaving no room for either constitutions or representative institutions. The philosophy of the government was expressed in law principally by rules that gave almost unlimited discretion to colonial officials and the absence of formal controls over its

exercise. This fact has often been argued to be the cause of the centralist style of leadership that most post-independent African governments adopted. So it came as no surprise that many post-independent governments in Africa soon became undemocratic, over centralised and authoritarian as their predecessor colonial governments. The imperfections of post-colonial constitutions were in part a reflection of the fact that those who prepared the colonies for independence were themselves not democratic and were largely ignorant of, or insensitive to, the prevailing social and cultural dynamics of the societies they had colonized. Therefore, the independence constitutions largely failed to work not so much because of Africans failure to learn the lesson of parliamentary government, but because the lesson of authoritarian colonial rule was also learnt by the post-colonial leaders.

Another barrier to constitutionalism in Africa was the feeling of urgency about the need for development. Political leaders became victims of their own slogans and promises of the advantages that would follow political autonomy after independence. Africa was suddenly a continent in a hurry. "Development" became the political religion of the ruling elite and a handy excuse for throwing constitutionalism to the winds and stifling the voices of opposition and dissent. The new African statesman was more of a personal ruler than a constitutional and institutional one; he ruled by his ability and skill as well as the abilities and skills of those he could convince or coerce to be his supporters. As the constitution remains an important feature of governance, and the new Africa leader pays less attention to it, there is less of constitutional constraint on his exercise of power.

There are other factors that influenced the move towards authoritarianism after independence in Africa. Among them was the concern that the multi-ethnic make-up of most of the states would encourage sectional politics and, consequently, this kind of politics would hinder the developmental project. Furthermore, the developmental plan for the alleviation of poverty, illiteracy and development of proper infrastructure and health care would not succeed if there was any room for dissent. Initially, developmental project was succeeding but 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.

More so, the constitutional rules that most African countries adopted at independence did not have the legitimacy which, according to Sundhaussen, usually derives from the "understanding and voluntary acceptance of the constitution by the people as a prescription for settling conflict within society" (Sundhaussen, 1991:108). Thus, while these constitutions were still regarded as legal instruments, they substantially lacked legitimacy. In fact, the constitutional-making exercise was usually conducted in the metropolis, and then imposed on the African people. Most of the emerging countries then based their constitutions on European models, producing rules that did not reflect the realities or specificities of the colony in question. It is true that borrowing ideas from other countries and cultures was not the continent's main problem; the critical issue was that these models did not reflect the values of the relevant stakeholder groups, i.e. the people whose lives would be governed by the rules selected (LeVine, 1964). It is necessary to note however, that those Africans who were involved in the drafting of those constitutions were themselves mentally colonized. Having been educated in the ways of the colonialists, they tactlessly accepted the values of democracy, free elections, multi-party politics and capitalism of the colonial power without appreciating the values of their own societies.

The hallmark of imposed constitutions is that they are never subjected to public debates or referenda. If at any point the constitutions were subjected to public debates, they were often brief, carefully monitored and manipulated. In some cases, the reports of constitutional commission were simply ignored after elaborate ceremonies aimed at diverting public attention (Mbaku, 1994:145). This blatant disrespect for the public debates will widen gap between the state and civil society.

In addition, the prolonged rule of the military in many countries in Africa has had profound effect on constitutional development. The use of military force now prevalent in several parts of the African continent must be seen as the inevitable consequence of the acute nature of internal contradictions and the almost total absence of any credible mechanisms for conflict mediation and transformation within societies. Not only did they suspend the constitution and rule by decrees, they also attempted at

constitutional engineering, which was usually a critical element of their civil-transition programmes, were known to have fallen short of acceptable standards, causing manifold problems, such as instability in government, corruption and injustice.

The deepening crisis of military incursion to governance has added to the already festering problem of leadership confronting Africa. The result has been the predominance of the rule by law at the costly expense of the rule of law with severe ramifications for constitutionalism. Many of the new leaders, failed to take into cognizance the interest of their peoples. Jackson and Rosberg comment on the new African leaders:

The new African statesman was a personal ruler more than a constitutional and institutional one; he ruled by his ability and skill (as well as the abilities and skills of those he could convince to be his supporters), by his personal power and legitimacy, and not solely by the title granted to him by the office he occupied and the constitution that defined it. Insofar as constitutions remained important features of rule, they were important less as constraints on the abuse of power and more as legal instruments that a personal ruler could amend or rewrite to suit his power needs. In taking such actions, the new ruler demonstrated that he regarded himself as being above his office and that the new political system was basically personal and authoritarian (Jackson, and Rosberg. 982:16).

When the new African leaders have the opportunity of amending the constitution bequeathed onto them, the minorities were not adequately considered. They largely considered the interest of the majorities. This lop-sidedness in the consideration of the significance of ethnic factors in constitutional engineering has led to the clamours for sovereign national conference in many African states, most especially Nigeria. The issue of national question has remained the major noticeable problem immediately after independence. The national question in the word of Osagae; “is how to structure the Nigerian federation in order to accommodate groups and guarantee access to power and equitable distribution of resources” (Osagae, 1998). The background to this is the perceived domination of some ethnic groups by others. This was made possible by the structural nature of the Nigerian federation which has remained unbalanced;

exploitative, and has also led to “the growing impoverishment, frustrations and disillusionment of the people all of which have been viewed as a direct consequence of power structure and the ruling class politics in Nigeria” (Osagae, 1998). Within the Nigerian nation, as well as in some African countries, virtually all ethnic groups relate with the national question in one way or the other. Almost all the ethnic groups talk about marginalization or domination in one form or another. The problem of marginalization, domination has been responsible for the incessant ethnic strives in Nigeria.

In Africa, there is lack of recognition of the private morality and personal commitment that contribute to the workability of the laws of the state. Morality is essential to the survival of the constitution. For a nation to be better governed, the citizens as well as the people in government need to maintain certain level of moral restraints and principles. Since there is no nation in the world that can claim to have a flawless body of laws, all laws rely on certain level of universal morality to thrive. The people in government therefore, should be compelled not to selfishly explore the loopholes in governance to their own advantage. But, what we have in Africa is direct opposite. When the interests of those who have the power to change or interpret the law to their advantage can be served by such changes, the law ceases to reside within the realm of legality. Until defending the constitution becomes an issue compelled by moral principles and not special interests, until we become collectively and individually compelled by morals to do what is right, regardless of constitutional limitations, the African of our dreams will never materialize.

Furthermore, there is the problem of lopsided allocation of powers between the centre and the states. In many African constitutions, the centre is too strong and the states are weak. In fiscal matters, the domination of the centre is total. Even in legislative matters, the powers are allocated such that the constitution is centripetal. To worsen the matter, the constitution governs both the centre and the component units. In a true federal system, each of the states in the federation should have its own constitution. The situation in many African countries where only one constitution governs the centre and the component units only presents many of the countries as practising a unitary system of government masquerading as a federal.

The African constitutions were not developed to reflect domestic realities, needs, traditions or aspirations. Right from the beginning, the African constitutions lack acceptability which usually comes from the “understanding and voluntary acceptance of the constitution by the people as the prescription for settling conflict within society” (Adejumobi, 2002). Most of these constitutions were based on the political systems of the European countries, and were characterized by a majoritarian voting rule, and did not offer much protection for minority groups. Thus, it was inevitable that after the apparatus of state was established, political coalitions of ethnic groups totally dominate resource allocation (Sundhaussen, 1991:100-117).

In developed countries that are democratic, once the constitution is seen as a national creed every letter of the document is considered sacred. This is not quite so in many countries in Africa. Some countries in Africa have turned the constitution up-side-down (Mbaku, 1994:149-175). When such manipulations are done at the highest level of government, it is easily predictable that the nation is heading for a profound constitutional crisis. Apart from this, many Africans are very fond of disobeying ordinary rules and regulations such as traffic rules, environmental sanitation regulations, among other rules of a civilized living. The tendency to disobey rules and regulations permeates virtually all aspects of life and not even highly placed government officials are exempted.

There is also a problem with the African intelligentsia. The intelligentsia could not galvanize the people through consistent ideological re-orientation, as a great number of them limit their analytical wavelength within the confines of the Ivory Tower. This is largely due to the fact that the political class has systematically suffocated the intelligentsia by denying University lecturers research grants and better working conditions. The ivory towers which had served as hotbeds of intellectualism and citadels of stimulating debates have been transformed into grim, joyless places because of the anti-intellectual posturing of leaders (Mbaku, 1994:149-175).

Furthermore, we must reiterate that the ultimately power in the sense of decision making at elections belongs to the people. But, we have the problem credible electoral system and lack of confidence of the public in the

system. All these have resulted in political legitimacy in the system. Primarily, the most fundamental way government can establish its legitimacy is through the conduct of free and fair elections. It is lack of this fundamental legitimacy that has led most African countries to tread the path of chaos, interminable conflicts and cyclical instability.

Ignorance of the organizational structure and the functioning of the state have continued to be the lot of large majority of Africans. These informal discussions, although not representative of the total Africans nevertheless revealed through lack of understanding and discomfort about talking, of the constitution on the part of the citizens. An example is found in the following:

Constitution wetin be that? Me a never see constitution before o. Na wetinebi? Na book or na food? Abina di name of one new govnor? My broda, a beg make you talk the one way poor man pikin fit sabi (Ihonvbere, 2000).

It shows that illiteracy and language problems carry part of the blame for this ignorance. Another issue, linked to this ignorance which must be considered, is how the absence or inadequate definition of the collective project as part of the ideological aspirational feature of the constitution may demobilize people from seriously getting interested in the process. If the citizens do not clearly see how the process would directly benefit them, then it may be understandable that they feel no urge to actively and personally get involved.

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 coups, emergency decrees, suspension of constitutional guarantees, and autocratic, abusive rule (Richard and Kristen 1991).

The 1980s seems to be the dawn of a new era which witnessed the opening of political landscapes in Africa. Nonetheless, even in this new political era human rights, abuses and constitution without constitutionalism are still

the norms. 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” (Prempeh, 2000). According to him:

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 - executives relationships continue to be defined by conventions established under the executive-dominated ancient regime (Prempeh, 2000:468)

The above results in policies being determined solely by the president without the necessary debate and engagement required to ensure successful policies. More importantly, Prempeh asserts that when the president does not act on a concern and implement any policy, that situation simply deteriorates (Prempeh, 2000:468). He makes a critical point that the opening of political space has been primarily concerned with democracy but not constitutionalism.

From our analysis so far, it would, therefore, appear that a national level constitutionalism has not, 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, and also the sad turmoil that the Congolese have had to endure for over many years and the current situation in Zimbabwe, and even an attempt by some states in Nigeria to introduce Sharia as state constitution. 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 secular, since it is divine. He, however, believes that the state must be secular, and 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 (Prempeh, 2000). 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 the church from the state is, according to An-Na’im and Fasaro, a requirement for constitutionalism (Prempeh, 2000).

CONCLUSION

In the contemporary Africa, there are continuing debates on issues surrounding the reconstruction and reconstitution of the post-colonial state so as to provide the people with accountable, transparent, and participatory governance structures and economic system that enhance efficient and equitable allocation of resources. Central to this debate, is the issue of the protection of life and property of the individual. Hence, the regular discussion about gender equality, human rights, minority rights, media rights, language rights, the rule of law, and a more effective way to domesticate the military and subject it to constitutional control are essential (Shivji, 1991). In dealing with these issues, it has become evident that constitutional rules secured through top-down, elite driven, participatory and inclusive constitutionalism will not offer the best hope for securing and sustaining these rights and promoting democratic governance in Africa.

While there are many definitions of constitutionalism, its practice must emphasize individual rights and limited government powers. According to Shivji, where constitutionalism is practised, there is separation of powers, periodic fair and competitive elections, rule of law, independence of judiciary, and the right to private property (Trubek, and Gallanter. 1974). It is important to note that in democratic constitution making, the government does not define the rights of individuals. Instead, members of a society form government to protect the rights as defined by them and elaborated in the constitutional compact. In performing its constitutionally mandated duties, if the government exceeds its authority or abrogates the rights of the people, that government could lose its legitimacy. The behaviour of government and its agencies, like that of individuals within the polity, is subject to constraints imposed on it and elaborated in the constitution (Robb, 1999).

Constitutions, however, must be locally focused and take into account the specificities of the society to be governed by the rules. While

lessons and experiences can be drawn from other societies or countries, it is important to understand that the final document must reflect the tastes and preferences of the relevant stakeholder groups i.e., those who lives would be regulated by the rules chosen. Given the importance of participation by all stake holders in the process of compacting the constitution, it is crucial that the constitutional environment be made democratic and competitive. As argued by Trubek and Gallanter, democratic and consultative constitution making requires that no individual or group be allowed to dominate or control the process, and that no special characteristics such as race, ethnicity, wealth, religion, social outstanding, geographic location, etc. must be used as an advantage by one group over the others (Robb, 1999). One, then, must first established the enabling environment within which constitution making can be undertaken and constitutionalism practised.

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