Constitutionalism as a lasting Solution to Governance and Underdevelopment in Africa

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ABSTRACT

This Paper identifies the absence of constitutionalism as a major challenge to political governance in post-independence Africa. It examines the negative consequences this has on socio-economic and political development of the continent, which include: widespread corruption, bad governance, weak political institutions and economic stagnation, which have bedeviled the continent since independence. As a way forward, the Paper recommends such approaches that can promote constitutionalism as the need for a participatory approach in constitution-making which would involve the people, constitutional literacy for the people, and a limited government that respects the rule of law.
Keywords: Constitutionalism,   Constitution,   Authoritarianism, Development, Democratization.

INTRODUCTION

The importance of constitutionalism for good governance in a democracy cannot be over-emphasized. Philosophers, political scientists and jurists often regard societal development as the product of constitutionalism in any democratic society. Fundamental to the idea of constitutionalism is constitutional legitimacy, where the constitution truly represents the people's wishes and aspirations. Another is, a limited government, where the government's powers are strictly subject to the rule of law. Notably, with colonialism came the introduction of the modern form of governance requiring the modern and written form of constitution adopted today in many African states. However, since constitutional governance did not

matter for the colonial masters as Africa's resources, it is hardly surprising that under no colonial rule in Africa was such principle of constitutionalism part of governance. Rather, governance was based on imposition, abuses and arbitrariness, tyranny, repression and unrestrained exploitation.

Perhaps, what is rather surprising is the fact that several decades after the colonial rule, governance in Africa still follows the bad culture of the colonial tyrannical and repressive style. It remains painfully true that, the undermining of constitutionalism, which characterized colonialism, has not only continued, but seemingly flourished in the post-independence Africa. Despite their claim to democracy today, many African governments run very repressive and authoritarian regimes, administered with brute force and hatred for all democratic ideals. Over the years, this has triggered a succession of socio-political and economic crises, with ultimately far-reaching implications on development in the continent. This paper examines the hindrances this has posed to development in the continent; and suggests certain fundamental political adjustments in Africa as a way out.

CONSTITUTION AND CONSTITUTIONALISM
For effective discussion, it is pertinent to distinguish between constitution and constitutionalism. A constitution is a fundamental system of law by which a people in a given sovereign society are governed. It may be written or unwritten, and *ala* James Curry, it functions as a 'power map' (qtd. in Fombad 2011: 1012), in that, it creates, states and delineates the powers of the various organs of government as well as regulate the behaviours of the citizens, be it in relations to themselves or to the state (Olasunkanmi 2018: 272). Benedict Nchalla sees the essence of a constitution as "the distribution of power among the state and society as well as among the various branches of government" (2013: 19). For De Smith and Brazir, "constitutions are primarily about political authorities and the location of power, the conferment, distribution, exercise and limitation of authority and power, among the agents of a state" (qtd. in Olasunkanmi 2018: 272).

It is clear from the above that a constitution is a supreme law of the land, established or accepted as a guide for governing the state. It sets up the basis for government in the state – so as prevent anarchy – by establishing, limiting and defining the relations of the legislative, executive and judiciary powers of the state. It declares the sovereignly of the people and derives its authority from the will of the people. It prescribes a blueprint for representative government responsible and accountable to the people through universal suffrage at periodic elections. Governmental authority is, therefore, to be exercised only in accordance with law established pursuant to constitutional processes and consistent with constitutional prescriptions and limitations (Henkin 1998: 12). Besides, the constitution also provides for the explicit guarantee of the rights and freedom of the people – in order to present tyranny in governance. The constitution also incorporates the ideological pronouncements by which the state ought to aspire as well as obligations of the citizens to the state towards these aspirations. Hence, in a democratic society, the constitution, "is not just a political document but also an instrument for development" (Ihonvbere 2000: 343). Regular constitutional reforms or reviews is necessary for effective democratic processes in line with contemporary realities. However, any form of constitution reform necessarily involves the process of 'constitution-making', which according to Issa Shivji, embraces "both amending an existing constitution as well as making new constitutions" (1998: 47).

The process of constitution-making is fundamental in a democracy, since it is from the constitution that the rulers claim to derive their authority and legitimacy to operate. This legitimacy "cannot hold if the process of constitution-making did not involve the people" (Shivji 1998: 47). Hence, Nchalla maintains that, "popular, inclusive, participatory and democratic are all key aspects of a successful process that bestows both legitimacy and credibility on the constitution of a country" (2013: 24). Such process contributes to making the constitution a living document by taking it to the people so that they are in a position not just to access it, but also to understand it, claim ownership of it, respect and obey it. A constitution becomes devoid of legitimacy, if it lacks such popular

participation of the people in all the processes of making it, that is, from the social and political debates at all levels to its eventual adoption. A constitution without legitimacy is no constitution at all; and it is the foundation of absence of constitutionalism in governance. L. Bucker says that such a constitution "is outside the law in the sense that it ought not to be respected by community against which it is applied" (671). Thus, legitimacy is a function of value for a constitution, which serves as the foundation of constitutionalism in a democratic or constitutional government.

Constitutionalism, on the other hand, implies a government subject to the constitution; a limited government, subject to the rule of law; and fractionalized authority to prevent concentration of power and danger of tyranny in governance. According to Fombad, constitutionalism "encompass the idea that a government should not only be sufficiently limited in a way that protects its citizen from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations" (1013-1014). Government is for the people, but is limited by a bill of individual rights. Many constitutional systems fractionate governmental authority by some separation of powers or other checks and balances. Constitutionalism implies also that the constitution "cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode" (Henkin 12). In this sense, constitutionalism can be seen as a legal and political idea, based on the primacy of the constitution, which incorporates the idea of a limited of a limited government, adherence to the rule of law and the protection of human rights. It combines the idea of a limited government and an accountable government, and it implies that "public authority can legitimately be exercised but in accordance with the constitution. There can be no extra-constitutional government, no exercise of public authority by any person or institution not designated pursuant to the constitution" (Henkin 12). And there can

be no continuation in office beyond the term for which officials were elected or appointed.

The fundamental idea behind constitutionalism is the need to prevent arbitrariness or tyranny in government, by ensuring that the constitution does not become an ornamental document or a sham that politicians can either ignore and violate with impurity or deploy as an instrument of oppression and repression against the people in a democratic society. Thus, in specific terms, among other things, constitutionalism denotes effective restraints upon the powers of those who govern through genuine periodic elections by universal suffrage; a guarantee of individual fundamental rights; the existence of an independent tribunal to enforce these rights; and generally, the enthronement of the rule of law, that is, the absence of any form of arbitrariness, and equality of all before the law (Friedrich 318). Constitutionalism, thus, serves as a means of evaluating the form and substance of a constitution in a democratic government. A constitution of any state will serve no useful purpose in a society without constitutionalism. A society marked by constitution without constitutionalism is often characterized by widespread impunity, disdain for the rule of law, arbitrariness, and weak democratic institutions. Often, these provoke socio-political instability and economic crisis, with severe consequences on development in the society.

CONSTITUTIONALISM IN POST-COLONIAL AFRICA
A recurrent theme in the history of post-colonial Africa has been instability due to political upheavals, ethno-religious and allied social conflicts and economic crisis. The cause of this endemic instability has largely been the lack of constitutionalism in political governance since independence (Adewoye 1994: 136). It would be recalled that, at independence, most African countries adopted the first generation of African constitutions, crafted mainly by the departing colonial powers; for "none of the African countries under the colonial rule had the opportunity of substantial popular participation of the people in the constitution-making process" (Olasunkanmi 2014: 2). In other words, almost all independence African constitutions were more or less

imposed, since the people, apart from a few elites, had not been involved in the constitution-making process (Ndulo 2001: 101). This unfortunate trend of 'imposed constitutionalism' and not allowing a substantial local participation or public involvement in constitution-making process, has largely characterized the post-colonial African constitutional experience till date. This net result of this is the endemic constitutional crisis in the continent today.

Additionally, the colonial powers, who hastily departed the African colonies, committed into the hands of the emergent African leaders at independence, states deposing enormous powers, but with little or no virile institutions to check the abuse of such powers. Such immense and almost raw powers once available to the colonial masters were now at the disposal of these African leaders, who were not loath to use them as their colonial predecessors did. Hence, under many pretexts such as the pursuit of national unity and economic development, many of the democratic principles in the independent constitutions were progressively repealed in the wave of constitutional amendments that suddenly overtook many of the post-independence African states. This rush in constitution amendments, eventually produced various forms of authoritarian constitutions with high concentration of power in the executive. In most of the immediate post-independence African states, the then existing national assembly quickly transformed themselves into constituent assemblies to amend and enact new constitutions for the people. In the words of Mbondenyi and Ojienda, such undemocratic practices, "watered down the essence of constitutionalism and democratic governance in the continent" (2013: 4).

With such brazen political mentality, the immediate post-independence constitutions were quickly turned into instruments of oppression and repression, and the immediate independent African states were characterized by gross violation of human rights, despite the bill of rights or constitutional provisions purported to recognize and protect human rights. The pledge of multiparty democracy eventually became a byword as opposition parties were repressed with maximum state force and the newly-independent states became

one-party states. They banned opposition parties and blamed multi-party system for undermining national unity. As a result, the boundaries between a party and a state structure remained blurred and "the party-state system" became the norm (Teshome 2009: 809). This kind of situation prevailed in Africa in the 1960s, 70s and 80s. This repressive system of rule led to the absence of legally registered opposition parties in many African countries. In this period the only option the opposition groups had was armed struggle to topple the incumbents by force, with dire consequences on the continent's socio-economic and political development. It is what provoked H. Okoth-Ogendo's description of political governance in Africa as that of "constitutions without constitutionalism" (qtd. in Fombad 2011: 1013). In the light of this too, C. Odinakalu rightly observes that, "most of the laws, institutions and repressive attitudes and violation of rights that characterized colonialism did not just survive independence, they prospered" (2003: 35).

For instance, shortly after independence in 1957, Ghana under Kwame Nkrumah became highly intolerant to opposition. In a move to destroy the opposition United Party (UP), the government in 1958, arbitrarily abrogated all regional assemblies in the country. Later in 1964, through a whimsical constitution amendment, the government decreed Nkrumah's ruling Convention Peoples' Party (CPP) as the only legal political party for the country. Kofi Quashigah adds that the amended constitution also gave the president the power to appoint and remove judges at will (2013: 118). This repressive and authoritarian political atmosphere also prevailed in Ugandan, where in 1966, the then Prime Minister, Milton Obote, assumed absolute powers in the country through a series of autocratic actions such as arbitrary abolition of all the kingdoms in Uganda and their constitutionally-guaranteed regional statuses, as well as the institution of a unitary state (Doornbos 1982: 317). In the same autocratic and authoritarian manner, the government of Julius Nyerere, crushed all oppositions and established a single party regime in Tanzania in 1967. Nyerere defended his actions and his executive presidency with enormous powers with the following words: "Our constitution differs from the American system in that it… enables the

executive to function without being checked at every turn….” (qtd. in Shivji 1998: 25).

Also, at shortly after independence in 1958, the government of Guinea, proclaimed the country to be “the most socialistic, radically independent, revolutionary country in sub-Saharan Africa” (Adewoye 1994: 139). It went ahead to erect a political structure that made the ruling Democratic Party of Guinea (DPG) synonymous with the state and dominated practically all facets of life in the country. To heighten the force of repression in the country, then President Sakou Toure abolished and dismissed the legal profession in the country, as “a legalistic formalism which is not only useless, but also incompatible with the social realities of the young African nation” (Nwabueze 1977: 276). With the establishment of a High Court, manned by his political associates in 1961, and the reign of impunity that followed, the voice of opposition and dissent were ruthlessly suppressed together with incalculable human rights violations. By the 1970s, Guinea had emerged a full-fledged totalitarian state.

In the same line of totalitarian action, Mobutu Sese Seko of the Democratic Republic of Congo created one party state when he took over power in 1965. His highly centralized power allowed him the room to loot the coffers of the state with impunity and his long reign was characterized by human rights abuses and killings of political opponents. The situation was by no means different in the Nigerian state. In Nigeria, the period from October 1, 1960 to January 14, 1966, (before the first military coup and takeover of power by the military in January 15, 1966), is generally regarded as “a dark period for democracy in Nigeria” (Sasime 1994: 154). This is because, during this period, anti-democratic forces launched a determined assault on democratic values and constitutionalism in the country. For instance, in spite of its parliamentary majority, the Northern People’s Congress and the National Council of Nigeria and the Cameroons coalition federal government led by the Prime Minister, Abubakar Tafewa Balewa soon “showed itself unwilling to have or live with the opposition” (Ademoyega 1981: 12).

One of such steps taken by the NPC/NCNC coalition federal government to neutralize the opposition Action Group (AG) was to set up a partisan Sir Bairamian's Commission of Inquiry and Tribunals of Enquiry Act in 1961, to conduct inquiry into the affairs of the National Bank (Nwabueze 1977: 276), from which the AG was believed to receive financial support to "mount such a gargantuan country-wide campaign during the 1959 general election" (Awolowo 1987: 147). The government took several steps to undermine the judiciary when the Supreme Court later invalidated the inquiry. Ademoyega reveals that, "within a short time, the judiciary had ceased to be a force that could stand for the rights of the people in the face of the obvious governmental high-handedness and tyranny" (1981: 10). The Action Group crisis of 1962, which eventually led to the arrest of Awolowo and thirty of his AG party lieutenants, and the charged of treasonable felony against them, was believed to have been hatched by the Balewa-led government, which also "afforded the federal government the opportunity to deal with the Action Group and the Western Nigerian government controlled by it" (Sasime 1994: 156).

As evident from our discussion so far, the problems were not caused by the absence of constitutions. Rather, it was the case of the African leaders' deliberate rendering of the constitutions dysfunctional by regularly undermining their provision or by arbitrarily amending them to suit their selfish political ambitions. The general trend in the continent had been in the direction of whimsical amendment of constitutions to concentrate power on the executive and to abridge local autonomy in favour of the central government; to undermine opposition parties and establish a one-party state, using all manners of repression and suppression including detention trial, torture and murder. This become a recipe for the massive civil unrests, ethnic rivalry, political instability, economic decline, as well as the genesis of the misrule and instability in the continent that became an excuse for the military foray into politics in the 1960s, with all the negative consequences this has had on the development in the continent.

With the 1963 Togolese coup d'état leading the pack, a wave of coups d'états swept across the continent with the military taking over

government, purporting to clean the socio-economic and political mess left by the civilian governments. Through their reign of suffocating impunity, suspension of constitutions, dissolution of parliament and unreserved looting of public treasury, the military destroyed every democratic structure they encountered and further set the continent on an incredibly backward trajectory of constitutional crisis and socio-economic and political decline. However, from the early 1990s, there was a gradual return to civil rule in many of the African states. Along with this came the third wave of constitutional reforms in the continent, "designed to introduce constitutions that promote constitutionalism and good governance" (Fombad 2011: 1007). Thus, the 1990s began with a slow and painful move toward what many optimistically hoped would usher in a new era of democratic governance and constitutionalism through the constitutional reforms. But this never happened, due to the resurgence of authoritarian rule under the guise of democracy in the continent.

In fact, from the 1990s, Africa tends to produce some of the worst dictators in the world history. The reforms did not go far enough to adequately address the institutional weaknesses that made dictatorship and the concomitant repression, corruption and economic mismanagement in the continent inevitable. Many of the new constitutions merely paid lips service to issues of separation of power and executive dominance in government and the abuses of power that go along with it. Hence, under most of these constitutions, overbearing and imperial presidents continue to reign and dominate the legislature and the judiciary. The traditional checks and balances are either absent or too weak and ineffective. By every standard, the system of governance in Africa in the post 1990s constitutional reforms, has become even worse; for the so-called "democratic leaders have turned out to be more corrupt, power-drunk, manipulative and inefficient than their predecessors" (Fombad 2011: 1024).

Another issue which is more troubling is the fact that many of these constitutions were never subjected to popular debates or referenda,

whereby through such avenues of open and democratic process, attention could be paid to the dreams, pains and aspirations of the ordinary Africans in drafting the constitutions. Some of the constitutions were simply packaged by the military and imposed on the people as a condition for handing back power to the civil rule. Whenever they were subjected to public debates, such debates were carefully monitored, controlled and manipulated by the ruling elites, and the results skewed to reflect their narrow, selfish political interests. In some cases, the reports of constitutional conferences or commission which truly reflected the desires and aspirations of the people, were rejected or set aside by the state. This is why the question of legitimacy has remained an albatross around the neck of many of the post-1990s African states constitutions.

Furthermore, the resurgence of dominant party dictatorship in the continent, which uses the 'multi-partysm' provisions of the 1990s constitutional reforms as a convenient smokescreen behind which to practice dictatorship, has made a total mess of the practice of constitutionalism in Africa. Wondwosen Toshome concedes that, "opposition political parties… are barely tolerated in the continent" (2009: 811). All that appears to have happened from the 1990s is that, "the old monolithic one-party dictators … simply made way for multiparty 'democratic' dictators, who have maintained the inherited repressive, exploitative, and inefficient structures installed by their predecessors" (Fombad 2011: 1024). Disquiet with what most therefore perceive as 'authoritarian constitutions in their countries, coupled with general detest for the massive abuse of executive powers, have triggered not only to an unprecedented tsunami of socio-political upheavals, wars, and revolutions across the continent today. It has also led to agitations for effective constitutionalism in Africa, believed to be crucial for the continent's development.

In Nigeria, for instance, the current 1999 constitution, faces a challenge of legitimacy, as it "lacks the will and consent of the people" (Chima 2013: 135). Crafted under the 'shadow of the gun', during the Gen. Abdulsalami Abubakar's military regime, the constitution was imposed on the country as a condition for the return to civil rule after

over three decades of military dictatorship. Besides, the disaffection the constitution has induced in the country, due to its obvious deficiency in democratic values, fully justifiable human rights provision, and clear governmental structures that can ensure effective constitutional governance, are other troubling issues surrounding the constitution (Igbuzor 2003: 22). And notwithstanding the 2010 amendments made to the 1999 constitution, it is considered highly impotent for governance for many other reasons as structural imbalances in the composition of the country's 36 federating states, lack of inclusiveness and accountability in governance, and devolution of powers in the federation (Igbuzor 2003: 22). This explains why nepotism, electoral frauds, institutional failure, large-scale corruption, ethnic agitations for self-determination, ethno-religious violence, banditry, agitations for a new constitution that truly represents the wishes and aspirations of Nigerians, are the order of the day in the country. Deju Olowu's remarks poignantly describes the situation: "the best Nigeria has achieved since independence has essentially been constitution without constitutionalism, elections without democratic culture" (2013: 330).

Today, sophisticated means of rigging elections have been device by the parties in power. Such sophisticated means of elections rigging are what sustained the life presidency ambitions of such tyrannical and dictatorial figures in Africa as, Mobutu Sese Sekou of Zaire, Eyadema of Togo, Banda of Malawi, Robert Mugabe of Zimbabwe, Paul Biya of Cameroun, President Toedoro Obiang Mbasogo of Equatorial Guinea, etc. The problem cuts across many African countries today, including and Botswana – a country that has gained international reputation as the "Miracle of Africa" and "a success story on the Africa continent" (Cook and Sarkin 2010: 453). Since it achieved independence in 1966, Botswana has, undoubtedly, maintained high economic growth, sound fiscal policies, and regular elections, which have fed this image. However, this designation has been called to question, especially because of the one-party dominance in the state, with the Botswana Democratic Party (BDP) as the only party in power since the country's independence in 1966. Opposition parties are widely considered to

have no real chance of gaining power in the country because of the intolerant attitude of the government in power.

CONSEQUENCES ON DEVELOPMENT IN THE CONTENENT
The foregoing simply affirms the crisis of governance in Africa arising due to "the absence of constitutionalism in governance" (Aime 2013: 163). The consequence is gross impediments it poses to development in the continent now turned into "a faraway place, where people go hungry, bad people run government, chaos and anarchy are the norm" (Thomson 2002: 56). According to the World Bank's assessment of major impediments to Africa's development: "underlying the litany of Africa's development crisis is a crisis of good governance…." (60). Of course, there can be no good governance without constitutionalism. Today, the continent as a whole is confronted with the disappearance of the basic state functions that ought to serve the fundamental needs of the people to help them live and exist as human beings. According to M. Sinjela, lack of constitutionalism in Africa has precipitated not only widespread corruption and erosion of the possibility of good governance, but also weak political institutions and economic stagnation (1998: 24-25). Fombad, advanced that, "the African economy has remained depressed…." (2011: 1033).

It is, therefore, hardly surprising that African states frequently rank low in all indices of human developments as we as occupy top positions in the Transparency Internationals lists of most corrupt nations in the world. For this same reason, African countries typically fall towards the bottom of any list measuring small size economic activity such as income per capita or Gross Domestic Product (GDP) per capita, despite the enormous resources the continent is blessed with by nature. From the statistics provided by the World Bank, for instance, the GDP of sub-Saharan Africa has continued to dwindle by the years from about 54% in 1965 to 3.2% by 2018 (qtd. in Held 2018: 6). Also in 2019, the World Bank reported that, "the extreme poverty in sub-Saharan Africa translates primarily into 85% of Africans living on less than 5 US Dollar per day (World Bank Report, 2019).

Moreover, Africa's primary commodity trade and her share of foreign direct investment, according to the World Bank Development reports of 1986 and 2000, are said to have dropped from 7 and 13 percent in 1970s to less than 0.5 and 5 percent, respectively in the late 1990s (qtd. in Hoogwelt 2001: 174). A recent data released by FDI Intelligence and EY Africa Attractiveness Report, shows that, there has been a steady decline in the number of foreign investors and projects in the continent over the years, due to socio-economic and political instability. Moreover, in 2006, 34 of the 50 nations on the United Nations List of Least Developed Countries were in Africa (UN, LDC, 2006). In 2009, 22 of the 24 countries of the world identified by the United Nations as having "Low Human Development" were in sub-Saharan Africa (UN, HDI, 2009). And currently, 31 of the 47 countries in the United Nations 2018 List of "Least Developed Countries", are African countries (UN, LDC, 2018).

This shows the close relationship between constitutionalism and quality of life in the society. It explains why, besides mass poverty and diseases ravaging African countries, a greater majority of Africans suffer from illiteracy, despite the preachments about education as the bedrock for development in the society. Joseph Omoregbe argues that, "over 70% of the population of these countries, are illiterate; over 80% of them live in abject poverty while corruption permeates every aspect of life" (2007: 22). There is also the escalation of armed conflicts, wars and banditry, caused by the endemic abuse of power, disregard for the rule and reign of impunity, which have made living in the continent today a rather dreadful experience. Mugabe graphically catalogues the sad situation thus: "Africa is now home to the world's largest number of least developed countries. The continent further boasts of the largest refugee population in the world. Furthermore, it is a theatre of endless conflicts, civil strife and gross human rights abuse...." (qtd. in Igbafen, 2003: 99). This is why African countries constantly remain among the top places for on-going conflicts and wars in the world. Currently, there are over fifteen countries involved in wars, or which are experiencing post-war conflicts and tensions in Africa such as, Mali, Cote d'Ivoire, Guinea, Liberia, Nigeria, Libya, Sierra Leone, Togo, Eritrea, Somalia, Sudan, and Uganda.

Conclusion

For Africa to experience sustainable development, there is, the strong need to decisively embrace constitutionalism in political governance. For this reason, a participating approach to constitution making and reforms that involves the people in the entire process, is strongly advocated here. Besides being essential for the legitimacy of a constitution and its binding effect on the people, this also provides the opportunity for citizens to become familiar with the nature, content and purpose of a constitution. There is equally the need for a sustained and vigorous programme of constitutional literacy and citizenship education to enable the people to defend their constitutional right and resist the present efforts by opportunistic leaders to derail the present effort at democratization and constitutionalism. Furthermore, the government that must adapt to the constitution, as a condition for peace, progress and development in the society; while the crucial constitutional reforms that can promote constitutionalism may be considered: the recognition of the right to free and fair elections, key principles and institutions of accountability, the reduction presidential powers, the removing of immunity clause from the constitutions, and the incorporation of socio-economic rights for the people in the constitutions.

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