Three Generations of Constitutions in Africa: An Overview and Assessment in Social and Economic Context*

by

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Introduction

There have been three generations of constitutions in Africa. Independence constitutions were the first generation. With Ghana leading in 1957, most African countries had shaken off the shackles of formal colonialism by early 1960s. The second generation of the constitutions emerged in the process of post-colonial restructuring of power in three decades following independence. The last ten years have witnessed the third generation of constitutions in the context of post-Cold War reorganisation of global hegemonies called globalization.

Each generation of the constitutions has been marked by its processes of constitution-making as well as rationalising discourses and legitimising ideologies. The discourses may be broadly categorised as *modernisation*, *developmentalism* and *globalization* while the corresponding political ideologies may be summed up as *nationalism*, *socialism* and *democratism*, or some variant of these. The categorisation is neither successive nor does it correspond strictly to historical periodisation. In real historical and social space, ideas, and periods overlap, interflow, and interact without sharp discontinuities. Moreover, the dominance, prevalence and hegemony of any set of ideas - whether explanatory (theory) or justificatory (ideology) - is not socially and politically neutral, or self-evident. They are contested terrains reflecting, rationalising, reinforcing, and reproducing real life, and equally contesting, social, political and economic forces, both national and international.

* This paper is heavily based on the paper presented at the Warsaw Conference, 17-19 May, 2001, on Constitutionalism. The conclusion has been re-written to stimulate thought on the current global context.

The contention and premise of this paper is that constitutions and constitution-making processes are best explained and understood in the broad historical and social context. In this paper I intend to apply that premise in presenting an overview of constitutional developments in Africa, citing examples mainly from sub-Saharan Africa.

I. The First Generation or Independence Constitutions

The independence movement was a coalition of inchoate social forces led essentially by proto-middle classes. The objective was, to use Nkrumah's picturesque phrase: "Seek thy the political kingdom, and the rest would be added unto it." The commonality of purpose was the political kingdom while every group in the coalition had its own conception of "the rest" to be sorted out after independence. The first generation constitutions were a product of negotiated independence (except the latecomers Lusophone countries which got their independence through armed struggle) reflecting compromises and concessions between the local contending forces and the departing colonial power (Hutchful 1991, Nolutshungu 1991, Mandaza 1991).

In this contest, the colonial power was no innocent broker as it made itself out to be. While conceding formal political power, the imperial powers wanted to ensure that their overall economic and strategic interests would not be jeopardised. The result was liberal constitutions based on Westminster or "Gaullist" models (Slinn 1991). These constitutions were structured on the twin pillars of *limited government* and *individual rights* on the one hand, and *multiparty electoral process*, on the other (Shivji 1991). Britain, which has never had a bill of rights or separation of powers herself, included such a bill in the independence constitutions with very few exceptions (for example, Tanzania, then Tanganyika). The central right in the bill of rights was of course the right to private property which, the colonial power hoped, would entrench the vested interests of immigrant settler communities and, in some cases, indigenous propertied (mainly agrarian) classes that the colonial power had tried to create on the eve of independence (for example, in Kenya) (Legal Aid Committee 1985, 11-16).

As has been observed often by African scholars, the colonial legal order inherited by the independence regimes was fundamentally despotic (Ghai 1972, Okoth-Ogendo 1991). It was marked by absence of fundamental rights, an ethnically based judicial system, wide discretionary powers of the Executive and virtual absence of judicial

review. The liberal independence constitution was therefore an anachronistic superstructure foisted on a despotic foundation. As we shall see in the next section, the foundation endured while the superstructure foundered in the post-independence period.

For the nationalist elites, just as for their followers, the immediate interest in the constitution lay in the *transfer* of power, not in the niceties of constitutional principles or liberal rules of the organisation of state power. Constitutions therefore were perceived as documents embodying independence and constituting state sovereignty and respectability in the international arena (Okoth-Ogendo *op.cit.*) rather than documents embodying national consensus.

The result was that in the very making of independence constitutions, the issues of participation of the people, the constitution as a terrain of legitimacy or a legal constraint on the exercise of power were at best subordinate, and at worst, non-existent so far as the nationalist elites were concerned. For that matter, by definition, it mattered little to the colonial power whether the independence constitutions had popular legitimacy[1]. What was important to their interests was to leave power to those elites that it perceived to be relatively moderate and who would not rock the boat. Thus the so-called "modern", liberal constitutions bequeathed to the independent states were not an exemplar for the African elites. Rather it was the despotic legal order left behind by the imperial powers that had an enduring impact. The African ruling elites learnt the colonial lessons too well, as the next section will demonstrate.

II. The Second Generation or post-colonial Constitutions

Independent African states were born in the world of intense rivalry between the then super powers. Internationally, they immediately became a pawn on the Cold War chessboard. Internally, in most African countries the local middle classes were underdeveloped, heavily dependent on international capital and in a hurry to accumulate (Fanon 1967). It has been argued that such a social canvass was ill suited for a liberal constitutional order based on Weberian rational-legal premises (Ghai 1991). Modernisation theories in political science and 'law-and-development'

[1] Independence constitutions were handed down as schedules to the Independence Acts passed by the colonial power's legislature.

paradigms predicated on Pound's philosophy of 'social engineering' were the dominant intellectual currents, particularly in the English speaking countries (Ghai 1987, Tenga 1986, Nyong'o 1998, 55-58). The advocates of these currents argued that the governing elites - whether civilian or military- had the task of dragging their societies out of parochial tribalism to the universalism of modern nations and find a place for their countries on the international capitalist market. Parsonian typologies and American behavioural sciences were the dominant modes of intellectual analysis[2] (Nyong'o *ibid*.).

The domestic counter-part of modernisation theories were various nation-building (Wamba 1991) and developmentalist ideologies (Shivji 1986) in which the central agency of social change was the state. The instrumentalist law and the developmentalist state became *the* norm. That norm was embodied in authoritarian party-state constitutions or, as was the case more often, in military states with little regard to constitutionalism. Either way, constitutional legality and legitimacy played little role in the structuring and exercise of public (state) power. This is not to say that African countries did not have documents called 'constitutions'. They did, even military regimes. Constitutions were used to civlianise military regimes and attain some modicum of international respectability. This is the conundrum of constitutions without constitutionalism that Okoth-Ogendo speaks of (*op.cit*.).

Authoritarian constitutions which was the dominant feature of many African states during this period shared certain basic features which may be summarised as follows:

a) They adopted *presidential systems* where the president was typically the head of state, the head of the Executive, commander in chief of the army, appointing authority of many state and parastatal bodies and part of the legislative process. In short, the presidency was vested with virtually unlimited powers. This type of presidency has been described by African scholars as 'imperial presidency.' (Okoth-Ogendo *op. cit*.) Nyerere's (who ruled Tanzania for quarter of a century) quip that the constitution gave him sufficient powers to be a dictator (quoted in Mwakyembe 1986, 45) or Slinn's extension of Kaunda's slogan "One Zambia, One

[2] There were of course counter-currents based on theories of underdevelopment and dependency.

Nation" into "One Zambia, One Party, One Nation, One Leader" accurately portrays the real constitutional and political order.

b) The political system was predicated on *de jure* (Malawi, Tanzania, Zambia) or *de facto* (Kenya until 1982, Senegal, Ivory Coast) one party where the party, if functional at all, was supreme. The institutions and the leadership of the party and the state were merged or virtually identical thus creating the now infamous party-states. In this, the legislative and judicial arms of the state were marginalised.

c) Civil society organisations, both traditional like trade unions. and new ones like NGOs, were either proscribed or statised.

d) The legislature had very little substantive law-making power and oversight functions; much less, prestige in the eyes of the rulers or the people. In many cases, the presidency overshadowed the parliament.

e) Executive powers tended to be couched in wide discretionary terms with little possibility of judicial challenge.

f) Judicial review was either absent or the judiciary tended to be too executive minded for it to be effective.

g) Most African constitutions included fundamental rights, yet they meant little in practice. Violations of human rights were massive, often perpetrated by regimes and with instruments and arms supplied by the Western and Eastern imperial backers of authoritarian regimes (Chomsky & Herman 1979).

h) There was concentration and centralisation of power, both institutionally and personally, in the executive arm and coercive forces of the state.

i) In sum, political legitimacy, if at all, was constructed on different ideological (authenticity, humanism, socialism, developmentalism etc.) and institutional (party, presidency, military) terrains rather than constitutionalism. Coercion was apparent on the surface of law. Law ruled but the rule of law was absent. The state coerced obedience rather than mobilise consensus (Thomas 1984, Shivji 1989a and 1991a).

Justifying to his Western audience the enormous powers vested in the Executive under him in the 1962 Republican Constitution of Tanzania, Nyerere, one of the more articulate African leaders, put it thus in a letter to the *London Observer*:

> Our constitution differs from the American system in that it … enables the executive to function without being checked at every turn … . Our need is not for brakes to social change … - our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred by poverty, and the resistances which are inherent in all societies (quoted in Mwaikusa 1995, 105).

As we observed before, the constitutional and legal order that emerged in the post-independence era was modelled on, and a replica of, the despotic colonial legal order invented and perfected by Western imperial powers.[3] Its reinforcement after independence through various so-called developmental laws was rationalised and justified in no small measure by modernisation and social engineering theories of the Western academia. The statism and fundamentally anti-democratic and anti-people developmentalism of the African regimes, which formed the bedrock of non-liberal constitutional order, continued to derive support and sustenance largely from Western imperial powers and its international financial institutions.[4] Even radical nationalist regimes (for example, Patrice Lumumba's or Kwame Nkrumah's) were not tolerated and overthrown by CIA-engineered coups (Blum 1986, 223, 292). Although it is common these days to identify Africa's party-states and constitutional orders with the former Soviet and Eastern European systems, very few African states, if any, directly borrowed from the constitutional and legal systems of the then Soviet Union. The *de jure* or *de facto* party-state constitutions of Kenya, Malawi, Senegal, Tanzania, Uganda or Zaire, to name a few, had little to do with the Soviet system. In fact, all of them listed here acted as proteges of Western imperialism, varying only in the degree of their subordination.

Post-Independence Constitution-Making

The rush from the liberal independence constitutions to various forms of authoritarian constitutions was accomplished by various methods of constitution-making. For our purpose, three methods may be identified. *First*, in a number of countries, the pre-existing national assemblies, usually constituted under the independence constitutions and therefore by the imperial legislature, transformed themselves into constituent

[3] For a detailed discussion of how the state and political power were structured during colonialism see Mamdani 1996.

[4] Soviet oriented countries like Somalia, Ethiopia, Angola and Mozambique did not remain within that sphere for very long.

assemblies to enact new constitutions. This was done in Ghana and Tanganyika when they made their transition from the monarchical to republican constitutions (Bennion 1962, ch. 2, MacAuslan 1964).[5] This method was again used by Obote to enact Uganda's 1967 Constitution after he had made a "palace coup" overthrowing the independence constitutional order (Mukholi 1995, 16-18).

The *second* method was through amendment of the existing constitution. Most African constitutions were rigid requiring specified majorities to enact amendments. In practice, this did not present any obstacle since the parliaments were packed with the president's men and the members of the ruling party. Where there was any formidable presence of the opposition in parliament, it was either harassed and hounded out of existence or its leaders were accommodated within the ruling party clearing the way for amendments as happened in Kenya (Kenya Human Rights Commission 1998, 124 *et. seq*.; see also Mwakyembe on Tanzania *op. cit.*). The power to amend the constitution was even used to enact a totally new constitution as happened in the case of Tanzania's 1965 One-party Constitution or Zambia's 1973 Constitution (for constitutional developments in Tanzania see Shivji 1998, 29; for Zambia see Chongwe 1998).

The *third* method, perhaps the most common in Africa, during this period was the overthrow of the existing constitutional order by the military and eventual promulgation of a new constitution by a military decree. Between January 1956 and end of 1985 there were sixty successful coups in Africa, that is, an average of two every year (Hutchful 1991, 183). In 1966 alone there were eight military *coup d'etat* and by 1986 out of some 50 African states, only 18 were under civilian rule (Nyong'o *op.cit*. 78). American political scientists who had been analysing the "central" role of political parties in independent states, now without much compunction turned their attention to the modernising role of the military elites (*ibid*.) Men in uniform took off their uniforms after a while and issued new one-party constitutions, which varied from liberal to authoritarian, prescriptive to programmatic, invariably presidentialist, under different ideological labels including marxist-leninist. Whatever the labels and nature of the constitutions, the politics remained firmly authoritarian and power was heavily

[5] Even Guinea whose independence was not negotiated but won from France used its pre-existing national assembly to adopt a new constitution (Nwabueze 1973, 24)

concentrated, whereas popular participation was perfunctory. What was common to most of these constitutional experiments, though, was that most military regimes were underwritten by their foreign backers, most often than not, Western imperial powers. [6] Thus constitutionalism made little headway in civilian, military or civilianised military states. A few civilian states were *de jure* single party (Tanzania and Zambia) or *de facto* one party like Ivory Coast or Senegal respectively under Houphouet Boigny and Senghor (Barry 1991, Diabete 1991). These too could not be described as liberal. Smaller states like Botswana and Gambia which were often held up as examples of multi-party liberal states were exceptions, although even Gambia did not remain such an exception for long and Botswana's special relationship with South African capital and relative wealth perhaps contributed to the formal functioning of its liberal, democratic institutions (Molokomme 1991.) The function and role of the constitutions in this case was then to civilianise military or rationalise authoritarian regimes and attain a modicum of international respectability rather than usher in any participatory constitutional processes.

All in all, the experience of constitution-making during the post-independence period could not be described as democratic, participatory, sustainable or promising. As a matter of fact, by the end of 1980s, the constitutional, political and economic picture of sub-Saharan Africa was bleak. Africa was certainly neither on the track of sustainable development, democratic polity or meaningful independence from imperial powers. Meanwhile, the large majority of its people were suffering from intense poverty, lack of education, health, water, and sanitation. The debt burden of sub-Saharan Africa had increased over twenty-eight times between 1970 and 1991 rising from US $7.0 billion in 1970 to US $196 billion in 1991 (Toussaint 1999, 195-Table 14.2). 'Every year, sub-Saharan Africa spends four times more on debt-servicing payments than it does on healthcare and education combined.' (*ibid*., 195). 220 million people in sub-Saharan Africa, that is 40 per cent of the population, live below absolute poverty which means less than US $1 a day (*ibid*. 194).

Thus when the IMF, the World Bank and the so-called "international community" (an euphemism for US led imperial block) came with their structural adjustment

[6] Britain/Israel and France respectively supported the ruthless regime of Idi Amin Dada in Uganda and Emperor Bokassa in Central African Republic. And the US support of the plundering Mobutu regime

programmes in the early eighties, and their political conditionalities in the late 1980s and 1990s, Africa was on its knees. The state sovereignty that it had attained in 1960 was very quickly, all but eroded as its governments and people lost the right to make their own policy and political decisions. The workers of Tanzania summed it up well when they said, "In the 1960s, the rulers were eating the fruits of independence; now that the fruits are finished, they are squandering independence itself". Nyerere dubbed the IMF, the International Ministry of Finance, which it truly is. So while internationally the sovereignty of the African states had been severely compromised, nationally their legitimacy was at stake. This was then the context and the background to the so-called "democratic revival" and constitutional upheavals of the 1990s, which is discussed next.

III. The Third Generation or Rights-based Constitutions

The disintegration of the Soviet empire and the rapid dismantling of state socialism in Eastern Europe were no doubt great turning points with massive global impact. Given the weakness and extreme dependency of the African states and ruling classes, Africa was most vulnerable to the forces unleashed by the reorganisation of world hegemonies and the onslaught of global multi-national capital or globalisation. The relatively independent ideological and policy niche, albeit minuscule, that some African rulers (for example, a Nyerere or a Kaunda) had managed to carve out by exploiting Cold War rivalries, was no longer available. On the other hand, client states that had managed to remain in power against their own people by dint of coercive apparatuses, felt immediately threatened as their patrons disowned them. The French President formally announced at the Franco-African summit held in June 1990 that henceforth democracy would be a condition for "cordial relations" which left military-authoritarian regimes unprotected. Belgium withdrew its support from Zaire's Mobutu in 1990 following massacre of students at Lubumbashi university campus (Reyntjens 1991, 44-45) and, most probably, the United State covertly aided its "new breed" leaders, Museveni and Kagame, to mount the invasion and overthrow Mobutu.

The IMF, the World Bank and the so-called "donor community" also became bolder in attaching explicit political conditionalities - multi-party, constitutionalism, human rights, good governance (in that order?) to their aid packages (*ibid.*). There were other

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for over thirty years is legendary (Avirgan & Honey 1983).

ideological and political motivations on the part of international imperial forces to mount a democracy crusade.

During the Cold War era, Western liberal ideologies had come under severe attack and denounced as *imperialist, neo-colonialist* etc. At least ideologically, imperialism was on the retreat and the word itself had become shameful. The end of Cold War presented an excellent opportunity to recoup the losses, morally rehabilitate imperialism (Furedi 1994, ch.6) and teach a lesson to irritating nationalist rulers never to raise their heads again. Furthermore, the increasing thrust of IMF/World Bank/donor-driven economic policies of marketisation, liberalisation and privatisation in the interest of multinational corporations was having devastating effects on the large majority of people. Opening up of the market and dismantling of the public sector is resulting in unemployment through redundancy and de-industrialisation; privatising and commoditising land is resulting in displacement and landlessness; unregulated mining activities in the name of foreign investment is destroying the environment; withdrawing of subsidies from education, health and water is causing many to go without these basic needs resulting in further poverty, malnutrition, rise in illiteracy and infant mortality (Tandon 1999, Pilger 1998). Such policies could not possibly be enforced by totally discredited governments or through naked repression and state force. To promote such policies and provide protection to foreign capital under globalisation, the regimes needed some fig-leaf of legitimacy and ideological rhetoric such as political freedom, 'free and fair elections', democracy, human rights, good governance, poverty alleviation, global neighbourhood, etc. As one celebrator of globalization rationalises it,

> Without political freedom there is no game based on economic liberalization - at heart it involves free movement of capital, free exchange of ideas, aggressive enterpreneurship, and capital flowing to its best use. Countries that think they're going to manage themselves into this new economy will not fare well. (Means in *Economic Reform Today* 1, 2000, 58)

The change in the international context was not the only source of so-called democratic revival. The repression, grinding poverty, mismanagement and economic ruin perpetrated by many African regimes had generated internal resistance and the

struggle for democracy.[1] The struggle for democracy in Africa did not begin with the fall of Berlin Wall. It long preceded it but was heavily repressed and subdued with the assistance of precisely those imperial powers which became the champions of democracy in later years.[7]

The change in the balance of international forces, though, had contradictory effect on the internal democratic forces. On the one hand, it encouraged these forces and made success possible. On the other hand, with the wisdom of hindsight, it can also be said that the foreign propelled conversion to multiparty perhaps cut short the maturing of internal democratic forces, thereby ushering in superficial changes and postponing the struggle for substantive democratic changes, transformation of politics and the reconstituting of the state beyond multipartyism. This may partly explain the relative weakness of the democratic changes that took place in the early 1990s and even reversal of some of the gains made then. We now turn to discuss these and, in particular, the constitution-making processes which gave birth to the neo-liberal third generation constitutions.

Constitution-making in the Post-Cold War Period: The Debate

The change from one-party civilian or military to multiparty states produced some of the most liberal constitutions in Africa (for example, Uganda, Malawi, Namibia) embodying fundamental rights, separation of powers, independence of the judiciary and the government's accountability to parliament. In most English-speaking countries, the presidential system has been retained while in Francophone countries the Executive is bicephalous with figure-head president and the prime minister as the head of the government (Reyntjens *op. cit.* 51).

The traditional division between socio-economic and civil-political rights has found expression in a number of constitutions in the non-justiciable 'fundamental or directive principles of state policy' and justiciable 'basic or fundamental rights (for example, Tanzania 1977, Namibia 1990, Uganda 1995.) (for a critique of these traditional divisions see Shivji 1989b). This division was originally adopted in the Irish Constitution of 1937, borrowed by India in its independence Constitution of 1950, and thence found its way to Africa via Nigeria (Shivji 1999). The jurisprudence

[1] See generally Nyong'o 1987.

of the relationship between these two sets is fairly developed in India and it has to be yet fully teased out in Africa (see, for instance, *Minerva Mills v. Union of India* AIR, 1980 SC 1789). Whether constitutionalising and justiciability of socio-economic rights would make a difference in the practical observation of fundamental rights relating to basic needs raises a host of questions which can only be discussed in the larger picture of Africa's political economy (for a brief comment see *infra*.).

It is not the contents of the new neo-liberal constitutions which has been the most exciting experience in Africa; rather it is the processes of constitution-making which has generated productive and innovative methods as well as debates on modes of constitution-making. Three modes are identified: (i) amendment of existing constitutions, (ii) constitutional commissions and constituent assembly, and (iii) national (sovereign) conferences/conventions. Each one of these is discussed in turn.

In a number of countries, the one-party system was *de facto* rather than *de jure* (Ivory Coast, Senegal, Gabon.) In these countries, it did not require constitutional reform to go multiparty. For instance, when Houphouet-Boigny was faced with violent protests and his traditional friend France refused to assist, he legalised multiparty. Elsewhere multiparty was effected by amending the constitutions and removing the clauses, which declared the system as single party (Kenya, Tanzania). In each of these countries, depending on the balance of forces, such changes were preceded and or followed by public debates.

In Tanzania, the decision to go multiparty was preceded by the appointment of a commission under the country's chief justice whose remit was to consult a wide cross-section of the people on whether or not they wanted multi-party. Their ultimate recommendation that the country should go multiparty did not come as a surprise, as it was expected. It was also expected that the ruling party would endorse the recommendation. What was most interesting though was the debate that the consultation generated and the utter dissatisfaction of the large majority of the people - particularly in rural areas - with the existing economic and political system, although 80 per cent of the commission's sample wanted the single party system to continue.

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[7] The US's role in subverting nationalist regimes is well known and documented (see Blum 1986).

In Kenya the constitutional change was simply done by the existing party dominated parliament yet, given the relative strength of civil society, the debate on constitutional reform has persisted (Mutunga 1999).

The second mode was the appointment of a constitutional commission followed by the election of constituent assembly specifically to adopt and enact the new constitution (for example, Uganda, Malawi) (for Uganda see Mukholi *op. cit.,* for Malawi see Kanyongolo 1998). In East Africa this was undoubtedly a novel method. As observed earlier, the tradition in East Africa had been to transform the existing national assembly into constituent assembly. This reduced the legitimacy of the constitution considerably since the constitution was not based on the consensus of the wide spectrum of people, rather it was the product of the ruling party dominant in the national assembly.

As a matter of fact, even in Uganda it had been suggested that the existing legislature (National Resistance Council) put in place by the National Resistance Army, which had overthrown the previous regime by force of arms, should be converted to a constituent assembly.[8] President Museveni specifically rejected this. The result was the appointment of a Constitutional Commission which engaged in a wide-ranging consultation process over a period of four years before it produced a report and the draft of the new constitution (Uganda, *Report of the Constitutional Commission,* 1993). The draft was then presented to a constituent assembly composed of the majority of delegates elected directly by the people on the basis of universal suffrage (Mukholi *op. cit.* 93 et.seq.).

The third method was the most innovative and perhaps specifically an African invention of the mode of constitutional-making. This was the National Sovereign Conference. The national conference was literally born in the streets as a culmination of street protests and demonstrations. It was forced upon the ruling parties and Presidents. The forerunner in this regard was Benin. The declaration of the national conference as sovereign with powers to appoint constitutional commission followed by the enactment of the new constitution was undoubtedly an extra-legal (even an

[8] As a matter of fact legally NRC already had power to convert itself to a constituent assembly by virtue of paragraph 14B of Legal Notice No. 1 of 1986.

illegal) process (Reyntjens *op. cit.*, Nwokedi 1999, ch. 14). The accent here was on the legitimacy of the process, not on its legality.

Benin had a domino effect in West Africa. The method, with variations and varied degrees of success, was repeated in Mali, Niger, Gabon and Togo (see generally Olowu et. al. 1999) and was embarked upon in Zaire but aborted. Interestingly, while it was taken up for debate by the civil society in the Anglophone countries, nowhere it was accepted by the state or the ruling party. The closest that a civil society in East Africa has come to replicate the Benin method is in Kenya where the issue of constitutional reform remains unresolved (see Mutunga 1999, and generally Kibwana 1998). When the multiparty debate had just begun in Tanzania, in 1990 this author suggested a combination of method including the national conference but the suggestion was dismissed out of hand (Shivji 1991b).[9] However, the demand for a new constitution adopted by a national conference has continued to resurface constantly in the democracy debate in Tanzania.

Constitutionalism ten years later: The Debacle?

The results of constitutional reforms leading to liberal constitutions and multiparty polity in the early 1990s have been extremely mixed, but by and large, disappointing. On the positive side, three points may be made. *First*, the constitution-making of the post-Cold War period was considerably participatory, whether this was in the form of the consultation process under the constitutional commission or participation in a national conference. At the same time, the participation was limited to urban intelligentsia and middle classes. The process either passed by the rural folks or they had little interest in, what was essentially, a liberal middle class social project.

Secondly, the most important gain of the "opening up" was in the freedom of the media. In a number of countries, the former monolithic state controlled media - particularly the print media - had to give way to a proliferation of private media.

[9] I suggested a protracted process of constitution-making so as to create a national consensus. First there would be an extra-legal political national conference in which different interests in society would be represented. Its function would be to crystallise a national consensus on basic principles and structure, which would then be translated into a draft constitution by experts. The draft would be presented for deliberation to a constituent assembly elected on basis of universal suffrage. The constituent assembly would only **adopt** the constitution, not **enact** it. The constitution would be enacted by the 'yes' vote of the people in a referendum. Thus, legally, there would be a distinct break with the past and politically the constitution would have legitimacy.

There has therefore been some critical reporting and debate in the media. The newly found freedom, however, is tenuous as foreign media houses take-over local press. This is most marked in the electronic media which are dominated by globalisation propaganda and irrelevant market consumerism of the West. As the former President of Tanzania, Julius Nyerere, sardonically suggested that the people of his country should be allowed to take part in the American Presidential elections because they are bombarded with as much information about the candidates as Americans are (cited in Pilger 1998, 531).

Thirdly, the opening up of the political space, besides resulting in the mushrooming of political parties, has also given birth to the proliferation of many non-governmental organisations (NGOs). There are no doubt a few serious and relevant NGOs but a large number of them have little autonomy or independent agenda relevant to the large majority of disadvantaged groups. Virtually all of them are donor-dependent and donor driven. Invariably therefore they fail to answer the real needs of the people they purport to serve.

Ironically the growth in NGOs has tended to marginalise traditional constituency based organisations like trade unions, co-operatives or peasant associations. On the whole, the impact of NGOs on major policy questions and direction of the development of society is very limited.

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It is perhaps too early to make a final assessment of the constitutional reforms leading to multipartyism. However, the experience in a large number of countries shows that the donor supported liberal democracy is centrally predicated on multipartyism which fails to address the hopes, fears and real life conditions of the large majority of the people. In most countries there have been elections under multipartyism. The elections have been marred by violence, rigging, corruption and ideologies of religion and ethnicism. In a few countries, there has been relatively peaceful transition from the incumbent ruling parties to the opposition (Zambia, Senegal, Malawi) while in others the former parties have retained power. The opposition parties in power have not on the whole shown greater respect for liberal values of constitutionalism, rule of

law and freedom of expression, association etc. than their predecessors.[10] Much less have they cared or managed to address the fundamental issues of development and poverty which affect Africa. Generally, therefore, the euphoria of multipartyism is waning rapidly. Cynicism seems to prevail over hope and vision. The promise of democracy has so far proved to be illusory, although the rhetoric continues.

The post-Cold War period has witnessed far greater instability, including resort to wars and violence, then previously. We have seen disintegration of states in Somalia, Liberia and Serria Leone. A regional war is raging in Central Africa while another is threatening in West Africa. Western arms merchants - often with the tacit support of their states - have been doing lucrative business while all the standard indicators of human development have been sliding down.[11] Under the circumstances, the prospect of constitutional reforms towards freer and consensual constitutional orders cannot be assessed without locating it on the larger social and economic canvas. It is beyond the scope of this paper to do this in any great detail. However, as has been indicated in this paper, the process of political reform in the wake of the end of Cold War has been profoundly contradictory and this may partly explain its severe limitations. I sum this up briefly in the next concluding section.

Conclusion: The Pitfalls of Liberal Reforms

Firstly, there is an irreconcilable contradiction between the rhetoric of constitutionalism based on open, transparent, accountable and legitimate government responsible to its own people, on the one hand, and the economic reforms based on marketisation, privatisation and withdrawal of the state from the economic sphere exposing weak African economies to extreme forms of plunder of resources and pauperisation of its people, on the other. Neo-liberal economic policies embodied in WTO and dictated by IFIs in favour of ruthless multinational capital in which the African government has virtually no say has all but undermined state sovereignty and autonomy. The governments have lost any role in determining broad policies and direction of their economy. Even legislation are imposed and dictated upon by the so-called donor community. As Pilger puts it, 'It [is] the surrender of sovereignty, and

[10] See, for instance, the recent debates in Malawi, Namibia and Zambia where the incumbent Presidents want to hang on to power by extending Presidential terms.

[11] Between 1990 and `1999 US sold arms to Africa worth over $564 million (Federation of American Scientists Website).

without a gunboat in sight.' (*op. cit.* 63) Under the circumstances, there is no way the state can be either democratic or responsible to its people when it is not the ultimate decision-maker. The desperate lament of the Ugandan Minister of Finance at a conference on Multilateral Agreement on Investment (MAI) sums up the utter helplessness of African governments:

> We were told if we had democracy, we would get funds. We had democracy, but no funds came. We were told that if we had structural adjustments, foreign direct investment would come. We had Structural Adjustment Programmes, but no funds came. We were told if we had trade liberalisation and privatisation, investment would come, but none came. Now we are told we will get funds if there is a Multilateral Investment Agreement. You are trying to cheat Africa. (quoted in Pilger *ibid.* 74)

Secondly, as a direct result of liberalisation and privatisation policies, the African society has undergone intense stratification with a small local middle class enriching itself while the large majority further sinking into abysmal poverty and marginalisation. Two-thirds of the African people subsist at or below the absolute poverty line, half of them have no access to health and safe water, over 40 per cent are illiterate while enrolment ratios in schools at all levels are falling (United Nations, *African Recovery* 1997, 25). The social base of support for these policies is extremely narrow. The result is that African rulers are finding it extremely difficult to construct a national consensus across a deep social divide and are increasingly resorting to coercion thus undermining the very basis of a constitutional order based on consensus.[12]

Thirdly, in the social economic circumstances already discussed, liberal democracy and constitutional orders based on it are fragile and unsustainable. Elsewhere I have suggested that Africa needs to construct a political and constitutional order based on alternative forms of state and democracy based on popular livelihoods, popular participation and popular power (Shivji 2000a, 2000b). Such a polity stands in sharp opposition to the economic and political diktat of world hegemonic powers, or, globalizers.

[12] Even relatively peaceful countries like Tanzania And Ivory Coast have not been spared of state generated violence during elections.

Harping on liberal constitutional orders without addressing the larger issues thrown up by real life conditions of the large majority is a convenient alibi for mainstream Western human rights crusaders and a smokescreen for the irresponsibility of world powers and their client states but hardly addresses the real issues of the day.

What is fundamentally on the African agenda therefore is an alternative form of democracy, which will help to reconstruct the African state and society and place it on a trajectory of sustained autonomous development in the interest of its people. Needless to say that such an agenda cannot be constructed as a blueprint, or in a conference, but has to develop from the actually existing struggles of the people in each country. On a more general level, one can only assert that the African people are facing a double struggle for national liberation and social emancipation.

There is little doubt that the post-cold war onslaught of imperialism has affected African countries and peoples far more than say Asian, or even Latin American, countries. Yet, for various reasons, Africa has presented least resistance to imperialism euphemistically called globalisation. At the same time, the continent remains one of the richest whose resources are up for grabs. Hitherto, whether through slavery or colonialism, it is the cheap labour and over-land resources of traditional kind (that is agricultural) which were exploited by international multinational capital. Now increasingly, in the era of cybernetics, it is the intense exploitation of underground and undersea resources on the one hand, and biological resources on the other, which are being coveted. Thus imperial powers and their multinational corporations are ferociously trying to establish their political hegemony (privatisation; so-called private/public partnership; faceless, nameless, and unsegregated stakeholder co-operation; etc.) and economic ownership (TRIPs, TRIMs, etc.) of the bio-resources of the African continent. The WTO's agenda is as clear as can be in this regard. And Africa appears defenceless compared to, say, Asia, which has put up stiff resistance to this hegemonic onslaught.

It must also be remembered that the centre of gravity of world hegemony is moving to the East (China?), however strong and omnipotent the US may appear in the short run. Under the circumstances, the US particularly is making concerted efforts to create Africa as its backyard in which it can be certain of the source of natural and other

strategic resources (for example, oil). This is the scenario, which can be best summed-up in Mwalimu's phrase, 'the Latin Americanisation of Africa'. The unusual attention paid to Tanzania by the US in recent years is therefore not a co-incidence.

It is on the backdrop of this world regional scenario that African progressive forces have to reassess their polities including their constitutional orders. Again, it is not possible, nay, presumptuous, to distil any one blueprint of a good constitution or principles of constitutionalism. What one can say, though, is that the only way African people can resist and overcome the imperial onslaught is to create *enabling political conditions* so that people fully participate in and run their politics. The only way to control one's economy is to be in charge of one's politics. The new constitutional orders should therefore be thought of on these terms rather than continue regurgitating liberal formulae based on market and pluralist, multi-party, etc. theology.

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