

On the Study of Constitutional Government in Africa

by

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Constitutional government is a form of limited government based on a prescribed division of powers among public officials. Its leading principle, by which it is often defined, is known as the rule of law, which signifies that no political authority is superior to the law itself. When and where the rule of law obtains, the rights of citizens are not dependent upon the will of rulers; rather, they are established by law and protected by independent courts.

In theory and practice, constitutional government and democracy are closely related. For example, constitutional checks and balances are often relied upon to repel threats to liberty by demagogic politicians, even when they are supported by a majority of the people. Conversely, regular democratic elections and other manifestations of popular power counteract the troubling tendency of officeholders and their influential supporters to exercise power on an oligarchic basis, without having to answer to the public for their actions. Of democracy and constitutional government in our time, it can be said that, like love and marriage in an old sweet song, “you can’t have one without the other.”

Nor, we may add, is it possible to experience the joys of either one in an ideal form. In other words, neither democracy nor constitutional government can be fully attained in practice. With regard to democracy, all existing political systems are mixtures of democracy and its opposite, oligarchy. Similarly, rulers everywhere are tempted to disregard the rule of law in the name of national security or public emergency. In countries that have new and relatively weak systems of constitutional government the dangers of arbitrary and despotic rule are

constitutional government the dangers of arbitrary and despotic rule are never far removed from the surface of political life. But this does not mean that constitutional thought and practice in those countries lack either vitality or genuine promise. As in the case of democracy, the elements or “fragments” of constitutional government coexist with their antitheses.¹ The challenge for constitutional thinkers in Africa is to identify the forms and methods of government that both minimize the threat of dictatorship and protect the rights of citizens.

Those who wish to advance the cause of viable constitutionalism in Africa, as elsewhere, would be wise to retrieve the debates of an earlier generation of political theorists who were also constitutional scholars. For guidance, I recommend an illuminating essay by Harvey Wheeler, published in the 1975 *Handbook of Political Science*.² Wheeler identified the core issue for constitutional scholars by referring to the rival theories of Charles Howard McIlwain and Francis Dunham Wormuth, whose ideas were set forth in classic books of the mid-twentieth century.³

Conceptions of Constitutional Theory

Briefly, McIlwain believed that constitutional freedom is a product of the rule of law, which, he taught, has been immanent in the thought of jurists and philosophers in the Western world from ancient Roman times to the present era. I shall refer to McIlwain’s viewpoint as juristic. He maintained that the rule of law would prevail in Western societies so long as governments were accountable to the

¹ For a theory of democracy “in parts,” as an alternative to “whole system” categories, see Richard L. Sklar, “Developmental Democracy,” *Comparative Studies in Society and History* 29,4 (1987): 686-714; and Sklar, “Towards a Theory of Developmental Democracy,” in Adrian Leftwich, ed., *Democracy and Development: Theory and Practice* (Cambridge and Oxford: Polity Press, 1996): 25-44.

² Harvey Wheeler, “Constitutionalism,” in *Handbook of Political Science, Vol. V: Governmental Institutions and Processes*, eds., Fred I Greenstein and Nelson Polsby (Reading, Mass.: Addison Wesley, 1975): 1-91. For my previous exposition of Wheeler’s thesis, from which portions of the present essay are derived virtually verbatim, see “Democracy and Constitutionalism,” in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and accountability in New Democracies* (Boulder and London: Lynne Rienner, 1999): 53-58.

³ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, N.Y.: Cornell University Press, 1947); Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper and Brothers, 1949).

people and judges were free to exercise independent judgement. Apart from those elementary conditions, he did not think that any particular form of government would be required to perfect and preserve constitutional liberty. In fact, he was opposed to the structural separation of powers, entailing separate and distinct legislative, executive, and judicial branches of government, as practiced in the United States. Instead, he favored a British-style emphasis on popular democracy, facilitated by well-organized, issue-oriented, political parties. McIlwain thought that constitutional government arose from a dualistic historical foundation comprising “the higher-law and vox-populi traditions”⁴—one being an intellectual heritage of the Western world, the other embodied in the democratic institutions of every free people. Wheeler remarks that McIlwain was “the scion of a distinguished Harvard tradition that had long advocated the adoption of an American version of England’s parliamentary system.”⁵

By contrast, Francis Wormuth insisted on the primacy of structure rather than a specific history of ideas. He understood constitutionalism to connote a form of government designed to protect principles of liberty whether or not they were supported by public opinion or elected representatives of the people. Liberty, he warned, will not be maintained if it depends on popular-democratic control of the government. There is need for something more, as asserted in 1788 by the author of *Federalist 51* (either Alexander Hamilton or James Madison; uncertainty remains to this day):

The great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

⁴ Wheeler, p. 33.

⁵ Ibid., p. 32.

“To these auxiliary precautions,” Wormuth wrote, “we give the name constitutionalism.”⁶

Reflecting on “the tradition of constitutionalism,” Wormuth drew attention to “a persistently recurring idea of the character of law” – that, properly understood as “a rule of conduct,” it is both general and prospective.⁷ Generality of law means that it should apply to all citizens equally; prospectivity means that the law should not impose penalties on past actions that were not illegal when they were performed. During the civil wars of seventeenth century England, constitutional democrats, known as Levellers, perceived a relationship between the true nature of law and an institutional separation of the legislative, executive, and judicial powers of government. Although the separation of powers as an institutional device never took hold in Britain, the idea migrated to America, where it was destined to become the cornerstone of American constitutional theory more than a century later.

Following Wheeler, I wish to suggest that an awareness of the difference between McIlwain’s juristic and Wormuth’s structural conceptions of constitutional theory and practice will clarify important issues for students of comparative constitutional government. The juristic conception, including the proverbial “rule of law,” is, as McIlwain and many others have believed, closely associated with specifically Western intellectual, judicial, and political traditions. Hence, there are cultural limitations to the moral authority of this idea which cannot be ignored by comparativists. By contrast, the structural conception of constitutionalism is morally neutral and, for that reason, more suited to transcultural dialogues and cross-cultural exchanges.

Unlike principles of government that are normally associated with the rule of law, including independence of the judiciary and the right of redress for injustices perpetrated by the state, structural principles that determine the forms of con-

⁶ Wormuth, p. 3.

⁷ Ibid., pp. 4, 8.

stitutional government rarely provoke angry and culturally defensive reactions. The entire continuum of structuralist ideas—from parliamentary government to separation of powers, including the idea of judicial review, which empowers a court to invalidate the acts of a coordinate legislative body or executive officer—appears to be debated everywhere on practical grounds without excessive heat or passion. The same may be said of other structural ideas, for example, the federal form of government. I do not mean to suggest that these structural ideas are not value-laden. Separation of powers was originally devised by English republicans to secure individual liberty under law. But as a structural conception, it and other such devices are accepted or rejected by constitutional architects throughout the world just as if they were technologies that anyone can use without appearing to compromise the value system of a recipient society. The adoption of a governmental device, like a communications technology, does not imply moral dependence on the originator. Comparativists who distinguish between juristic and structural questions, even when they overlap and interact in practice, are more likely than other thinkers to interpret constitutional issues objectively and thereby contribute to the resolution of disputes that appear to involve cultural difference and conflict.

However, it would be a mistake to minimize the problems that may arise from imported technologies. If borrowed constitutional devices turn out to be incompatible with the principles and traditions of government in post-colonial African countries, they are unlikely to endure or to be maintained effectively. Of course, it is always possible that useful imports of political knowledge and technology will prove to be compatible with the indigenous tradition of political and judicial thought. Every society has its own rule of law that can be discovered in the thought of its own jurists and philosophers. Eventually, comparative constitutional scholarship will manage to incorporate the legal and political traditions of all human societies. Enriched by the contributions of thinkers from non-Western cultures, the rule of law itself would approach universality as a principle of gov-

ernment. Until that, as yet distant, day arrives, the question of cultural resistance to structural, as well as juristic, conceptions of constitutionalism should not be overlooked or underestimated by constitutional scholars. Accordingly, I wish to suggest a third dimension of constitutional analysis, one that is specifically cultural.

Constitutionalism in Africa: Alternative Dimension

The cultural question, or dimension of comparative constitutional analysis, involves a delimitation of boundaries. By this, however, I do not mean to proclaim the existence of cultural boundaries between East and West or North and South, or between any other regions of the world. Hence I am not referring to ongoing debates about the exclusivity of Western values, or the universal commonality of those values. My own view is that principles of freedom transcend cultural boundaries, as argued recently by Amartya Sen with reference to the tradition of Indian political thought that is identified with Akbar, a 16th century Mughal emperor.⁸ Still, there is no denying that in our time, differences among cultures concerning the constitution of a society are inevitable. The challenge for constitutional theorists is to find a boundary, not between cultures themselves, but between those aspects of constitutional thought that are universal and those parts that are relative or particular. Just as we can distinguish between alternative forms, or structures, of government so too should we try to delimit the boundary between commonalities and differences in constitutional thought and practice.

For example, the idea of a boundary may be identified with the concept of jurisdiction: Where courts exist, they have jurisdiction to enforce the law, whatever it is, so long as it is obeyed by officials as well as ordinary citizens. The idea of jurisdiction implies that whatever the law is, everyone must abide by it without exception for the high and mighty. Jurisdiction may be likened to a vessel into which the law with its moral content is poured. The moral principles of constitu-

⁸ Amartya Sen, "East and West: The Reach of Reason," *The New York Review of Books* 47/12, July 20, 2000, pp. 33-38.

tional law will vary among nations, but the idea that courts have jurisdiction may be recognized as a constitutional universal. An even more significant universal, if this can be established, would be independence of the judiciary as a principle of government.

My thoughts on this question are, as yet, tentative and exploratory. They have been stimulated by the current constitutional crisis in Nigeria, where several states of the Nigerian federation have adopted the legal system of Islam, known as *Shari'a*, as the official legal system in those states. Opponents of this action, including Christians and civil libertarians regardless of religious affiliation, contend that *Shari'a* mandates punishments for criminal offenses that are incompatible with “fundamental rights” protected by the constitution. Examples include: flogging in a public place for the new offence of drinking an alcoholic beverage in public; amputation of a hand for the crime of theft; compulsory prayer at regular daily intervals; behavioral restrictions on women, including a prohibition against travel in public conveyances with men, other than family members.

The proponents of *Shari'a* argue that it would not be applied to the Christian residents of those states; but a person’s religious identity may not be obvious to the enforcers and officials who apprehend suspects. In any event, the introduction of *Shari'a* for Muslims means that there would be two categories of citizens in the state concerned, each category based on religion; each with its own set of rights and penalties. Do we not see in this bifurcated legal order the potential menace of a proverbial “house divided against itself,” one that “cannot stand?”⁹

For forty years an historic compromise has been the basis of the legal system in Nigeria. Prior to 1960, inhabitants of the former Northern Region of Nigeria were governed in accordance with three different systems of law: (1) statutory law, based mainly on English legal principles; (2) Islamic law in the Muslim emirates, which contained a majority of the regional population; (3) customary law in

⁹ Richard L. Sklar, “Foundations of Federal Government in Nigeria,” forthcoming in a symposium on Constitutional Government in Nigeria, edited by Ebere Onwudiwe.

non-Muslim areas of the region. As noted by a leading authority on African law, it was often “almost a matter of chance,” whether a person would face death or a “comparatively trivial sentence” for the commission of a crime, depending upon a “largely fortuitous decision” as to which system of law would be applied.¹⁰ In preparation for independence, the Northern regional government sent delegations to study the legal systems of Libya, Pakistan, and Sudan, “all of them Moslem countries which have recently emerged from a similar state of development to that in which the Northern Region now finds itself.”¹¹ Following the receipt of their reports, the Northern regional government convened a panel of jurists which recommended that Muslim law “should be confined to the law of personal status and family relations and, when applicable, to civil cases.”¹²

The resulting Northern Regional Penal Code of 1960 was based mainly on the Sudan Penal Code, which was widely accepted by Muslim legal authorities as containing “nothing that is offensive to or incompatible with the injunctions of the Holy Qur’an and Sunna,” or prophetic practice.¹³ Sudan, like Pakistan before it, had shown that the legal system of an orthodox Islamic society could be adapted readily to changing times and modern life. Moreover, Sudan, like Northern Nigeria was culturally and religiously diverse. Like its Sudanese model, the Northern Penal Code did incorporate elements of Islamic law, for instance, the penalty of whipping, although this was administered in a manner that minimized physical pain and stressed public humiliation.¹⁴ Yet, as Professor Ben Nwabueze has observed, *Shari’a* itself did not thereby become the legal system of the region or any of its 19 successor states in the Nigerian federation. Moreover, the Penal Code is a secular instrument, subject to the Constitution and its declaration of human

¹⁰ J. N. D. Anderson, “Conflict of Laws in Northern Nigeria: A New Start,” *The International and Comparative Law Quarterly* 8, 3 (1959): 442.

¹¹ *Statement by the Government of the Northern Region of Nigeria on the Reorganization of the Legal and Judicial Systems of the Northern Region* (Kaduna: The Government Printer, 1959), p. 1.

¹² *Ibid.*, p. 2.

¹³ Lt. John P. Browne, “An Operational Study of the New Penal Code of Northern Nigeria,” *University of Detroit Law Journal* 39, 4 (1962): 473.

¹⁴ *Ibid.*, 496-97.

rights.¹⁵ When, in the year 2000, *Shari'a* itself became the law of several states, the historic compromise was violated together with Section 10 of the Constitution, which prohibits the adoption of a state religion by either the Federation or any state of the union.

The great question for Nigeria today concerns the possibility of compromise between the proponents of Islamic law and the Christian part of the population. The answer to this question may turn on the discovery of constitutional universals for the Nigerian union. If they prove to be insufficient for the sustenance of a common nationality, Africa's potential paragon for multicultural democracy and unity might then disintegrate. If, on the other hand, Nigerians find firm common ground for two legal systems that appear to be incompatible, other countries, including Sudan, an erstwhile mentor, may profit by that example.

Thus far, I have suggested that the idea of a boundary between the universal and the relative aspects of constitutionalism is applicable to cultural conflicts and attempts to resolve them short of physical and political partition. Now I wish to ask whether this idea can be applied to instances of conflict that are attributable in a significant way to a legacy of historic injustice. This question has arisen in Zimbabwe where it is evident that the rule of law has been trampled upon by a government that intends to seize land to which white commercial farmers have title and distribute it to landless Africans. In this case, the historic injustice is unmistakable: in the 1890s and on several subsequent occasions,

Africans were evicted from their traditional landholdings and shunted into tribal reserves. Within these reserves, the colonial government used the coercive power of the state to create new patterns of production and exchange. Taxation was used to draw adult African males out of the reserves to serve as a labor force on large-scale European farms, and the population who remained behind, composed disproportionately of women, children, and the

¹⁵ Ben Nwabueze, "The unconstitutionality of state enforcement of *Shari'a* law," *The Guardian Online* (Lagos), July 3, 2000.

elderly, were subjected to compulsory regulations about the use of arable, residential, and grazing lands.¹⁶

At the time of independence, in 1980, farmers of European descent and white controlled agro-businesses held some 40% of the country's land, including the best-watered and most productive agricultural areas. An initial policy designed to resettle African farmers on marginally productive land was far from fully achieved and did little to alleviate either the racial imbalance of land holding or the growing pressure on land resources in the African communal areas. Meanwhile, evidence mounted that a considerable portion of the best land was regularly underutilized by its proprietors. Under the independence constitution of 1980, existing property rights were secured for ten years. In 1990, the government embarked on a program of redistribution including compulsory purchase with compensation and redress to the courts for grievant land-owners.¹⁷ A subsequent land distribution Act was partially implemented but suspended in the wake of remonstrations by critics, both domestic and foreign, who alleged that the newly available land was being acquired by senior members of the government and civil service. In 1999 the land issue was exploited by the party in power to counteract the growth of an increasingly popular political opposition. However, the electorate rebuffed the government by voting down a draft constitution that would have both strengthened presidential power and permitted confiscation of land without compensation. In the aftermath of that defeat, the government appeared to sponsor a violent campaign of "spontaneous" invasions of white-owned farms by "war veterans." The government has also declared that it would soon acquire a majority of the white-owned farms without compensation, unless Britain, the former colonial power, provides the funding.

Setting aside the immediate political context, including demagogic conduct on the part of an insecure leadership group that has suffered a severe decline of

¹⁶ Michael Bratton, "Ten Years After: Land Redistribution in Zimbabwe, 1980-1990," in *Agrarian Reform and Grassroots Development* (Boulder & London: Lynne Rienner Publishers, 1990), p. 268.

¹⁷ Tor Skalmes, *The Politics of Economic Reform in Zimbabwe* (London: MacMillan, 1995), p. 161.

popular support, there is yet a question of the historic injustice. Can a remedy for the possession of land by a relatively small racial minority of citizens, whose forebears acquired the land by conquest and dispossessed the majority, be reconciled with the rule of law?¹⁸ This matter is now before the High Court in Zimbabwe, where judges have demonstrated courage and independence in previous crises.¹⁹ As in the case of conflicts between different systems of law, it may be a judicial function to seek common ground for different peoples who grapple with the effects of historic injustice. Once again, the right of courts to decide the issue, and their independence of action in that capacity, is the ultimate guarantor of an embattled constitutional government.

Yet another type of conflict between the values of different legal systems involves the bearing of customary law on African international relations. The lack of congruence between traditional African polities and the boundaries of African states, established by colonial powers, is a continuing source of post-colonial conflict and instability. To what extent shall sovereign governments accommodate the claims of historic nations to exercise traditional authority across national boundaries? Elsewhere, I have examined this question in relation to purely domestic relationships.²⁰ For this analysis, I will adduce a legal decision that validates a principle of transnational political identity.

The story begins in 1869, when the President of the Transvaal government flogged the traditional ruler of the Bakgatla for having resisted taxation. The aggrieved chieftain and a section of his people left the Boer republic and moved to present-day Botswana. However, Bakgatla who remained in the Transvaal have

¹⁸ For an incisive discussion of this question in relation to the Zimbabwean government's initial program of land reform, see Robert B. Seidman, "To What Extent Can We Use Experience to Decide What is Just? A Case Study from Zimbabwe," *The American Journal of Jurisprudence* 29 (1984): 1-27.

¹⁹ Richard L. Sklar, "Reds and Rights," in Dov Ronen, *Democracy and Pluralism in Africa* (Boulder, Colo.: Lynne Rienner Publishers, 1986), pp. 135-144.

²⁰ Richard L. Sklar, "African Polities: The Next Generation," in Richard Joseph, ed., *State, Conflict and Democracy in Africa* (Boulder and London: Lynne Rienner, 1999), pp. 165-177; and Sklar, "the Significance of Mixed Government in Southern African Studies: A Preliminary Assessment," in John Hyslop, ed., *Always Something New: African Democracy in the Era of Globalization* (Johannesburg: Witwatersrand University Press, 1999), pp. 115-121.

continued to recognize the authority of their traditional ruler until the present era. But in 1993, the chief of the Moruleng (Transvaal) section of the Bakgatla attempted to appoint his own son to succeed him, in defiance of the wishes of the traditional ruler in Botswana. The following year, the Moruleng chief appealed to the newly-elected President of South Africa, Nelson Mandela, to prevent foreign interference in the affairs of the Transvaal section of the Bakgatla. After hearing both sides of the argument from the rival chiefs, Mandela decided in favor of the traditional ruler in Botswana, a decision that was in accord with the expressed wishes of an overwhelming majority of the Moruleng people. The Moruleng chief then appealed to the Supreme Court, but in vain. The judge ruled in favor of the Botswana-based paramount chief, in accordance with the unmistakable wishes of a majority of the people and “the laws and customs of the tribe.”²¹

The relevance of this instance of judicial interpretation lies in its acceptance of the extra-territorial authority of a traditional government. Not only did a Division of the South African Supreme Court find common ground for the practice of different systems of law, but its decision also implies constitutional recognition of the rights of historic nations that were divided by colonial rule.

Conclusion

In this paper, I have suggested that a cultural perspective on constitutional government is required to cope with challenges that arise from conflicts of law and value in African societies. I have briefly discussed three instances of cultural concern for legal theorists. In Nigeria, the introduction of Islamic law in several states poses a genuine threat to national unity. In Zimbabwe, the rule of law has been threatened by violent mass action, sponsored by an insecure government, on the ground that it has a mandate as well as an obligation to remedy the effects an historic injustice. In South Africa, the claim of a foreign chief to extra-territorial authority was upheld in deference to traditional law and custom. In each case, stabil-

²¹ In the matter between Chief Tidimane Ramono Pilane and Chief Linchwe, Supreme Court, Bophuthatswana Provincial Division, 1994 (Mimeograph).

ity of the political order depends, to a greater or lesser degree, on the discovery of common ground for the accommodation of colliding values.

In the absence of common ground for the resolution of cultural conflicts, principles of government derived from juristic and structural theories of constitutionalism may not be sufficient to maintain national unity under a rule of law. Something more is needed to fortify the foundations of governmental institutions that have been imported from abroad and adapted to the contours of African societies. The response to that challenge in Africa could illuminate a new horizon for constitutional thought.