

## APPRAISING CONSTITUTIONALISM AND TRADITIONAL AFRICAN GOVERNANCE

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**ABSTRACT:** *The work focuses on the traditional African governance; it specifically examines those traditional forms of governance that made the society to stand firmly before the advent of Europeans. Many of these traditions were not written down, there were no constitutions; it was just a commitment to make the society move. If constitutionalism is defined as a commitment to limitations on political powers, then it is possible to have such a commitment without a single documentary constitution most especially when commitment is in the blood and culture of the people and at the same time, those people have a keen sense of their own identity. In this work, we will interrogate traditional culture of governance in some communities in Africa. We will examine how effective that governance was and then see the level of commitment to limitation on political power (constitutionalism) and whether some of the relics of governance are still preserved till today. This paper therefore, will employ the conceptual, analytical and reconstructive research methods. While the conceptual method will focus on clarifying key concepts such as constitutionalism, commitment, governance, tradition and culture; the analytical method will examine the period of governance before the advent of Europeans. The reconstructive method will establish the need for this commitment in today Africa.*

**KEYWORDS:** constitutionalism, commitment, culture, governance, tradition

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### INTRODUCTION

Constitutionalism is a form of political thought and action that seeks to prevent tyranny and guarantees the liberty and rights of individuals on which free society depends (Reynolds, 1993). It is based on the idea that government can and should be limited in its powers, and that its authority depends on enforcing these limitations. It aims at making the world comprehensible and, to some extent, controllable. It could then be understood as the expression of a set of abstract moral principles (Fombad, 2007). Because constitutionalism is preoccupied with the problem of power, particularly the power of those who would rule, especially when that rule might be arbitrary” (William, 2002), it suggests certain principles of right and justice which are entitled to prevail on the basis of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community.

Constitutionalism, means not only that there are rules creating legislative, executive and judicial powers, but also that these rules impose limits on those powers. Often, these limitations are in the form of individual or group rights against government, such as rights to things like free expression, association, equality and due process of law. Constitutionalism is embedded in the

idea that government should be limited in its powers and that its authority depends on its observing these limitations. Constitutionalism can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens 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” (Tamanaha, 2004).

A constitution, on the other hand, is a charter of government deriving its whole authority from the governed and sets out the form of government. It specifies the purpose of the government, the power of each department of the government, the state-society relationship, the relationship between various governmental institutions, and the limits of the government. The constitution is premised on the principle that the people are the real rulers and that certain rights are inalienable such as liberty of thought and expression, freedom from government’s invasion of privacy, freedom from arbitrary confiscation of property, freedom from arrest without warrant, freedom of association and assembly. In short, these rights would give rise to a society with a free press, wherein, every person’s home is respected and trials are fair, where all the citizens enjoy their equal rights.

To achieve the above mentioned, there is the need for a basic document where the aims, aspirations, objectives and goals are documented along with an institutional structure. The constitution, thus, is the fundamental law with superiority over all the institutions it creates (be it Legislative, Executive or Judiciary). The institutions or organs cannot go beyond the powers vested in them by the constitution. The constitution, therefore, enshrines the Bill of Rights to protect the individual and provides for the separation of powers between the different arms of the state in order to prevent the concentration of power in a single individual or in a structure. It also enables the provision of checks and balances between the structures of state power. The basic aim, here, is to ensure that those who govern are restrained by observing the laid down rules and regulations so as not to use their powers excessively.

In a constitutional democratic society, where constitutionalism is strictly upheld, there is popular sovereignty because the government ultimately derives its power from the people that put the system in place. Since the constitution is the product of the society, the people in consenting to a constitutional system, agree to limit not only their government but also themselves. By so doing, the rights of individuals may be protected not only by the limitations on the power of government, but also by guarantees of specific rights beyond the control of government, or by specific grants of powers to governmental institutions to protect rights. For example, they are bound by the provisions of their constitution until they are formally charged.

## **CONSTITUTIONALISM AND GOVERNANCE IN AFRICA**

Political systems in pre-colonial Africa varied from one community to the other. Before the advent of colonialism, kingdom and community developed important centralized political structures. Politics was the affair of the rulers and his appointed officials. The society was run through an unwritten constitution, but guided by religious sanctions. Two major forms of political organization existed in the pre-colonial period: the monarchical system and

gerontocracy. The monarchical system which operated among the Yorubas in Nigeria was a centralized form of government. Yoruba refers to a group of cultures linked by a common language. A group that inhabits the South- Western part of Nigeria, bounded by the Niger River and the eastern parts of Benin Republic, formerly Dahomey, and the western part of Togo. A Yoruba scholar, Atanda, J.A.(1985) pointed out that a king is selected from a royal family to head the monarchical system of government. The king was assisted by an institutionalized council of chiefs. In the case of Oyo Kingdom, for example; there was check and balances; there was no an absolute monarch or absolute presidents. Constitutionalism is of necessity a version of limited government (Mazrui, 2001). An autocratic king may be rejected; the direct demand may come in the form of political rejection issued to the king. A ruling *Alaafin* could be rejected by his chiefs (the *Oyomesi*) for tyranny, wickedness or as a result of political intrigues or power struggles. This rejection would be communicated to him by the *Bashorun* (Prime Minister) who presented the king with an empty calabash, or one containing parrots eggs, with the pronouncement, ‘the gods reject you, the earth rejects you, the people reject you’ (Johnson 1998). The only option for the king after receiving this message was to commit suicide. As a form of political control, the *Alaafin* also had the right to request any titleholder to commit suicide. (R.C.C. Law, 1971)

The gerontocracy adopted by the Igbo, Niger Delta, and Benue people of Nigeria was a non-centralized political system. The anthropologists refer to this system as stateless or acephalous because the elders and lineage heads performed religious and political functions since there is no institutionalized political authority (Atanda, J.A.1985). Oyemakinde (1979) remarked that gerontocracy was a village democracy where the general will of the people was taken into consideration. Instead of royal courts and palaces, market centers were used for religious and political activities such as debate, and decision on vital issues of public interest were taken there as well.

Political powers in both systems described were not absolute because there was divine intervention and people participation. Osaghae (1992) contended that political power was divine and almost mystical. It epitomized the unity of the people and was held in trust for the people by the ruler and elders of the community. The ruler could not enforce his personal will on the people indiscriminately. Osaghae (1992) further mentioned that there were two sources of political power. First, the concept of “divine right of king” made the ruler a representative of the ancestors as well as the spiritual symbols for the people. Second, the people were a source of political power since they selected the ruler. This indicated that religion and people constituted primary sources of political empowerment for ruler (Osaghae, 1992).

In Ghana, for instance; Chiefs were the leaders who managed the communities, fulfilling legislative, executive, judicial, economic, religious, and cultural functions. Chieftaincy acted as the socio-political and military (Elsa M. Redmond 1998) unit around which local tribes were organized, and provided the requisite focal point for common action. Chieftaincy is known to the different ethnic groups who make up Ghana’s population. According to the Statistical Services of Ghana(2002), eight major categories of ethnic groups exist: Akan, Ga-Dangme, Ewe, Guan, Gurma, Mole-Dagbon, Grusi, and Mande-Busanga. Chieftaincy has common broad sociological elements in all these ethnic groups but differs according to structural organization and its

significance in the socio-political context within each ethnic group. Akan chieftaincy institutions are almost always divided between men (as chiefs) and women (as queen mothers) (Irene K. Odotei 2006). The structure of chieftaincy among the Ewes and Ga-Adangbes is similar to that of the Akans. The major difference lies in the organization of the family system; the Ewes and Ga-Adangbes follow a patrilineal family system whereas the Akan follow a matrilineal family system. (Jeanmarie Fenrich & Tracy Higgins 2006) Among these groups, princes contesting the position of chief are required to appear individually before a college of kingmakers to make a claim to the office of chief. Factors considered by the kingmakers include seniority, character, and popularity of the candidate. Some groups also practice the Gate System, alternating the selection of the chiefs between competing gates or eligible families of royal lineage.

In contemporary Ghana, chiefs still play an important role in the governance of all ethnic groups. Their relevance and functions vary considerably throughout the country, depending on the different rules and tradition of each ethnic group. Overall, their influence in peoples' lives is still considerable. Chiefs' legitimacy rests on the strong support and loyalty to the institution found in many sections of Ghanaian society, particularly in rural areas (GhanaWeb.com 2010).

Besides, in Kenya, among the Ameru people, there is no permanent chair of the council; during any session, everyone has parole provided he is holding the 'stick of parlance' (mureegi jw'ogambi). The decision of one individual is not expected to carry the day without consultation. The process of consultation was actualized through consensus building within age classes and then handed over to the seniors, and finally passed on to the elders for promulgation. There was always the transcendental aspect of decision making, because the spirits of the ancestors were also expected to play part, especially where there was infringement of justice and fairness. In some situations, the transcendental consciousness referred to God, whose existence was not an object of question, coupled with the belief in the spirits of the ancestors. As a consequence, governance, involved all age groups, social classes, and gender, as well as the transcendental; the latter aspect meant God and the spirits of the ancestors. No one is interrupted when he is talking. Any issue under dispute is extensively and exhaustively discussed before a decision is arrived at. Where there is no agreement, the warring parties must accept to go through an oath that calls on the intervention of the transcendental. This oath is taken seriously because the Ameru believe in what they do, the results are convincing, and can be disastrous to the dishonest and the unjust.

## **APPRASING CONSTITUTIONALISM AND TRADITIONAL GOVERNANCE**

The communities mentioned in this discourse do not have a written constitution. There has never been a time in their history whereby a constitutional drafting committee or panel set up to formulate a constitution for its community. All they rely on is the unwritten constitutions which are in form of norm, convention or agreement. These societies were able to survive for many years because constitutionalism is in the blood and culture of the people and, at the same time, the people have a keen sense of their own identity.

The advent of colonialism in Africa and the subsequent taken over of African states brought about the introduction of modern forms of governance that necessitate modern form of constitution which is written and documented. The introduction of this constitution into the

colony is regarded as an imposed constitutionalism. Scheppele, K. L (2003) made a distinction between constitutionalism and imposed constitutionalism. According to him; constitutionalism is legitimate, but the imposed constitutionalism is not. Imposed constitutionalism is illegitimate because it is being drafted “in the shadow of the gun”. None of the African countries under the colonial rules has the opportunity of substantial local participation in the constitutional process. Rather, they have seen substantial intervention and pressure imposed from outside to produce a constitutional outcome preferred by the colonizer. Even after independence, we discovered that almost all the constitutions drafted by African states still follow the same pattern of not allowing a substantial local participation. A noticeable negativity of this imposition is the crisis of legitimacy of the constitutional outcome.

### **Impact of an imposed Constitutionalism**

The advent of European in Africa and the subsequent introduction of new system of governance brought about an imposed constitutionalism. An imposed constitutionalism produced what is known as constitution without constitutionalism. Every political system has a constitution whether it is a constitutional system or not. In this sense, the constitution is no more than a description of the makeup or composition of a political system. It portrays the way a polity is constituted, that is, how its foundation is set forth, its first principles articulated, its character shaped, and its government organized and operated. The fact that a political system has such a constitution even if it is a formally written document does not mean it meets the standard of constitutionalism. The advent of colonialism into Africa jettisoned the traditional forms of government. The traditional institution that has been put in place by the African was abolished and a new system of government was put in place. In some instances the colonizers foisted on them a different worldview and cultural mindset that made them to lose total confidence in themselves and today almost all the countries in Africa have secured their independence, yet the independent African state still follow the foot step of their colonial master.

For example; instances of constitution without constitutionalism can be seen in some African states. The former Apartheid regime of South Africa had a constitution without constitutionalism. Also, General Sani Abacha of Nigeria, Idi Amin of Uganda, Jeane Bedel Bokassa of the Central Africa Empire (now Republic), Marcias Nguema of Equatorial Guinea as well as Gnassingbe Eyadema of Togo had constitutions in one form or the other. But as we all know, these so-called constitutions were devoid of constitutionalism. More importantly, though some of them could be claimed to be legal documents, they were certainly not legitimate. In fact, the sole-called constitutions were instruments for terrorizing the poor and the weak, legitimating corruption and privatization of the state, and rationalizing the suffocation of civil society and subservient relationships with imperialism.

Why were these constitutions illegitimate even if legal? The truth is that they were not compacted through a truly open and democratic process that paid attention to the dreams, pains, and aspirations of African people, their communities, and constituencies. In fact, most of these were directly imposed constitutions or elite-driven processes that treat the people and their ideas with disrespect, if not contempt. The hallmark of imposed constitutions is that they are never subjected to popular debates or referenda. If at any point the constitutions were subjected to public debates, such debates were often brief, carefully monitored and manipulated. The



documents, either in draft or final forms, were never made available to the people. If referenda were called, the results were rigged in favour of the state and its custodians. In some cases, the reports of constitutional commissions were simply ignored after elaborate ceremonies (Rothbard. M. N.1978) aimed at diverting public attention and convincing donors and the international community that something positive was being done about democracy. In some African countries, not only were general and presidential elections conducted without a constitution, but also the draft was never widely debated, seen or voted upon by the people. Even after the presidential election, the government continued to keep the constitution a secret and away from the people. It is not surprising therefore that constitution in postcolonial Africa has never been taken as sacred. This disdainful attitude to constitution in Africa militates against its being properly employed to serve the course of democracy.

A nation's constitution should be its most valued document. Preparing it is a sacred and weighty undertaking that should not be addressed in isolation of the people. Nothing is more important in the political culture and history of a nation than the constitution by which its citizens are ruled. However, the constitution does not really occupy a pride of place in the life of the contemporary states in Africa be it under the military or civilian regime. Under a military rule, the constitution is simply ignored except where it is needed by the military elite to give a similitude of legitimacy to some policies. Almost the same attitude to the constitution is shown by political leaders in Africa. The African elite in its quest for absolute power have no qualms about subverting the constitution and manipulating it to serve the interests of small elite (Buchanan, 1979). Consequently, what we have in many African countries has been constitution without constitutionalism.

### **Aftermath of an imposed constitutionalism on Africa**

In an ideal society, leaders are expected to be role model. But the problem with Africa has remained the issue of bad leadership. Our leaders lack discipline and the citizens are following suit. African leaders have always been known for not obeying the constitution, since the constitution itself lacks merit. The colonialists have already set in place a bad example of governance, but Africa lack good leadership that will confront this dilemma and thus take Africa out of its debilitating condition. (Afolayan. A. 2009) Leadership is observed to be the most critical, such that many depict the continent as “a faraway place where good people go hungry, bad people run government, and chaos and anarchy are the norm.”(Alex Thomson 2002) More so, it has been rightly observed that under “the various oppressive authoritarian regimes which Africa countries have had the misfortune to chafe under for the greater part of its post colonial history, Africans have been treated to a bastardization of constitutionalism and growing impotence of the judiciary in the face of countless acts of impunity, executive lawlessness and economic brigandage by praetorian guards that had imposed themselves on the political landscape of the nation”(Oyebode 2005). The dearth of good leadership in postcolonial Africa “is inversely proportional to the widespread poverty, not only of ideas about running the societies and states, but also the impoverishment of the populace.”(Afolayan. A. 2009) More crucially, however, the failure of the African state to properly manage its affairs is partly responsible for its inability to participate meaningfully in global processes.

The absence of constitutionalism in our constitution gives room for endemic corruption or profiteering by the ruling elites and resistance to transparency, accountability and political representations. This includes wide spread loss of popular confidence in state institutions and process. The president of the country is resisting the public declaration of his assets as the constitution and code of conduct demand. The members of national assembly, governors and all politicians receive disproportionate pay which can be described as criminal. Governors appoint more special advisers than the areas where advice is genuinely needed. No one believes anything the government says and everybody agrees that African politicians are among the most corrupt and unscrupulous in the world.

There is also a disappearance of basic state functions that serve the people, including collapsed infrastructure, total paralysis of the health sector at all levels, constant nationwide power failure and the attendant negative effects on all sectors of the economy; pervasive unemployment, thereby generating increased armed robbery cutting across all ages of our people, debilitating homelessness; retrogressive educational programmes and policies. Also using the state apparatus for agencies that serve the ruling elites, such as the security forces, presidential staff, central bank, diplomatic services, and customs and collection agencies. These are currently the norm in many countries in Africa. There are more policemen protecting politicians in Africa than are available for normal police duties. The civil service has been destroyed by turning it into an instrument in the hands of politicians by making the top post political appointment. Every change in the civil service has been to increase the power of politicians over civil servants and bring them under their control to remove the valuable role they play in checking corruption and maintaining probity in public offices.

Lack of adherence to the rule and regulation laid down in the constitution has led to the emergence of ethnic militias in some countries in Africa, for example in Nigeria; the ethnic militias converse verbally and even openly on the state of nation. Some even went to the extent of engaging in confrontation with the state security forces in pursuance of their goals and objectives; they have different goals and aspirations. For example, the movement for the survival of Ogoni people (MOSSOP) is out to protect the interest of the Ogoni, most especially the oil exploitation and environmental degradation of their land. The Odua People's Congress (OPC) emerged in August 1994 to challenge the annulment of the June 12 presidential election won by late Chief MKO Abiola, as well as ensure the restructuring of the Nigeria federation. The Egbesu boys of Africa came up to fight the environmental degradation and exploitation of the Niger Delta by the multinational oil corporations. The failure of the police to check the menace of armed robbery in the south-east led to the formation of Bakassi Boys. The Arewa people's congress was principally set up to counter OPC which was alleged to have master minded most of the ethnic clashes in the South West. In the same view, some other countries in Africa do have rebels' movement; the group came into being as a result of one or two exploitations that could have been normalized if the government danced to the dictate of the constitution of the countries concerned. But because the ruling government failed to do the right thing the next thing for the rebel is to take arms against the ruling power. This has resulted into serious war in many countries in Africa. It happened in Liberia, Libya, Sierra Leone, Burundi, Malawi, Central Africa republic, Congo DCR and presently in Sudan. The aggrieved individuals felt marginalized and they thought that the best way to make their grievances known to the public is through violence.

## CONCLUSION

As African experiences have demonstrated, constitutions themselves are not automatic guarantees of constitutionalism; it is the will of the people rather than the text of the constitution that is central to the entrenchment of constitutionalism. For the crisis in African polity to be resolved, there is the need for a genuine commitment and adherence to the tenet of the constitutionalism. In other words, the ideas of constitutionalism remain a passing necessity in Africa.

However, in spite of the obvious rough road that constitutionalism has to travel in Africa, constitutionalism still remain a fundamental importance. What we are saying here in essence is that since Africa was having an un written constitution with constitutionalism before the advent of European to Africa, if the new system of government that brought in written constitution to Africa failed to produce constitutionalism, then we are advocating a mixture of traditional system of governance that had been in existence before the advent of Europeans that has constitutionalism. This can be combined with the new system of government that has written constitution but lack constitutionalism to produce a constitution with constitutionalism for Africa so that African can become a better place for the Africans to live.

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