The concepts of *rights* and *constitutionalism* in Africa
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Introduction

Ideas stem from practice, and practice comes from life lived by people. A *concept*, from the Latin word *conceptus*, is an abstract idea pointing to a class of objects grouped together to formulate a universe, a body of thought, and so paint a general picture of what can be publicised to a people who bear general knowledge or feelings about the particular situation in question. The existence and acceptance of such an idea enables the consumers thereof to internalise it as reality, to a lesser or greater extent. For instance, even though people have never physically seen God, the concept of an Almighty Creator as an old, bearded male with a deep voice, who is extremely kind-hearted, yet stern, is frequently accepted and passed on to later generations. A concept changes over time as people experience life and acquire existential knowledge, some of which may contradict long-held 'truths' about a phenomenon such as God. A concept must of necessity carry with it easy to comprehend, easy to transmit, and easy to reproduce articulations with a minimal chance of becoming watered down or linked to one individual person or group.

A *concept* is, therefore, a central idea that generates and facilitates an understanding: a reference point which guides the participants in a particular conversation to share a similar axis of leverage pertaining to the subject matter at hand, and from which they can derive a common understanding and/or appreciation of the outcome of the exchange. A concept summons the sense of a common treatment of a phenomenon, so that all parties to the conversation share similar agreements and/or disagreements. For instance, when people across the globe discuss the concept of *death*, they all experience a similar understanding of what it is and what it is caused by, because they recall similar experiences of and with death – and they fear it, or internalise attitudes towards it.

Some concepts function better than others, while some endure longer than others. In this sense, the concepts of *rights* and *constitutionalism* do not evoke the same feelings amongst people; therefore, they are likely to exhibit dissimilar appreciations of what these notions represent, and perhaps require of them. What is right for a Swede may not be right for a Kenyan, and the other way round. What is right for Europe might not be right for Africa, while what is right for Israel is invariably not right for Palestine – and so it goes: sensibilities differ most of the time, and even clash sometimes. To begin with, to speak of *Africa* as one universal body of people, with one monolithic collection of experiences and one set of aspirations unique only to them, is a misnomer, so that this Africa remains elusive because the worlds, both past and present, of the people called *Africans* are as similar as they are existentially dissimilar amongst most Africans.

The concept of *Africa*

> You are not a country, Africa
> You are a concept,
> Fashioned in our minds,
> each to each,
> To hide our separate fears,
> To dream our separate dreams ...[1]

The presupposition of Abioseh Nicol's assertion is that the Africa we know today is the creation of, and an outcome of, European imagination and adventurism. The Africa we know generally was recreated by European potentates in their own image, so that the political systems that exist in most of Africa today remain the outcome of those colonial business architectures. In other words, most of what we have accepted as *African* is either what was told by others to and about Africans, or deals with how Africans imitate other civilisations to become relevant. In this conundrum, and as Africans try to be other than they are, the dearth of leadership remains the most constant common denominator in and of the African condition in so far as the spectre of leadership is concerned.

What we know today as *Africa* is a consequence or creation of three main historical trajectories, none of which is the doing of the very people known today as *Africans*. Firstly, *African* is the ascription of the inhabitants of the continent – the land mass that broke away from the rest of the planet – later to be assigned to some people of a darker hue amongst human civilisations. It so happens that the African land mass has been endowed with resources that the human race needs for survival and for posterity – for better or for worse. The inhabitants of this land mass, for reasons not too clear, happen to share the same developmental features in their economies and exhibit similar tendencies in their treatment of political power and wealth.

Secondly, the permanent dwellers on the African continent today have been subjected to the process of socio-political and economic colonialism perpetrated by uninvited visitors, from the western part of Europe in the main, who came to the continent with the sole purpose of extracting its resources for the development of their own countries' economies.

Thirdly, the people who are commonly known collectively as *Africans* never described themselves as *Africans*: others called them by that term. Even today, the majority of the dwellers on the continent see themselves more as disparate communities rather than post-colonial nation states, as the African political elites in power claim. It is problematic, therefore, to speak with authenticity about a universal African experience. Rights, as such, in Africa, need to be considered against the background of romantic theorising, which is at best speculation.

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1   Nicol, cited in Mazrui 1987).

The concept and genealogy of *rights*

The debate(s) about rights generally and human rights specifically comprise a relatively new terrain of political discourse not only in Africa, but also in the whole (democratic) world. Only in 1791–1792 did Thomas Paine publish *The rights of man*[2] in response to Edmund Burke's criticism of the French Revolution, and both publications appeared only after the Declaration of Independence in the United States of America, which stated rather boldly how self-evident it was that all men (sic) were created equal and endowed by their Creator with inalienable rights, amongst which were life, liberty and the pursuit of happiness.[3] It can be argued that what is known in the body of literature as the concepts of *rights* and, later, *constitutional democracy* owe much of their development to the mid-1792 period of the American Revolution. Thus, the United Nations Declaration of Human Rights, adopted on 10 December 1948, a few years after the end of the infamous World War II, is a multinational expression of the spirit of the United States Declaration of Independence of 1776. After this, in hot pursuit of freedom from European colonialism and the search for national independence, one after the other – but also collectively – African nations borrowed and adopted numerous treatises and documents which sounded like constitutions, as well as programmes echoing the spirit of human rights.[4]

Antecedents of 'the rights of man' in precolonial Africa are very meagre, and the discourse was healthier when it did not turn on Africans themselves as culprits, and when the violation or denial of rights was the sin of the foreign colonial representatives. This is the case because the literature on constitutionalism commences with post-WWII decrees by which members of (nation) states were to be governed.

A history of constitutionalism

The same narrative regarding the history of rights applies to the history and trajectory of the evolution of constitutional rule and democracies. According to CF Strong,[5] the real foundations of constitutional systems of government were not a common feature of governments till the latter-day experiences with European immigrants who fled from oppressive political systems in Europe to inhabit the colonies of North America, which, as the USA, later spearheaded the fervent pursuit of rights and democracy across the globe.

The same, however, cannot be said about constitutionalism, when the concept is stretched to cover even the unwritten ground rules by which preliterate societies governed themselves. The phenomenon of a constitution stretches far beyond written documents or Acts of Parliament or congressional proclamations known as constitutions, for constitutionalism in one form or another, as a system of ground rules, has existed whenever and wherever human beings have eked out a coexistence on the basis that

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2   Henkin (1978).
3   Preamble, *Declaration of Independence*, 1776.
4   Center for the Study of Human Rights (1992).
5   Strong (1972).

such rules had to be known clearly if peace and harmony were to accompany such coexistence. For as long as people *qua* humans or persons have needed guidelines to govern their society – be it a feudal set-up, a tribal system, or a post-conflict arrangement to guarantee uniform adherence and peace – there has been a constitution. In other words, *constitutionalism* is not merely the existence of written documents bound in expensive leather; rather, it comprises a common understanding and acceptance of what is acceptable, honourable, despicable, or worthy of rewarding, let alone permitting of leadership in a given society. As Thomas Aquinas opined, "*Cognitum est in cognoscente per modum cognoscentis*", meaning that human beings perceive the world as it has been constituted for them through what they learn from, in and of society. Constitutionalism, as a sphere that has generated interest in virtually all systems of government, is older than the new era of the battle for human rights, while, in the case of Africa, human rights were treated as synonymous with freedom or political independence. Thus, it can be asserted that, in the context of the struggle for national liberation, constitutionalism was peripheral to freedom and independence. The struggles for freedom from colonial rule in Africa were, without exception, waged for self-rule and democracy. Yet the connection between democracy and the rule of law was not made by freedom seekers, as it ought to have been. The understanding of *democracy* during the liberation struggle was restricted to the desire to end racial and colonial oppression and to take over power. In political terms, *democracy* – in the minds of the liberation leaders – meant what the first President of Ghana, Kwame Nkrumah, so strikingly expressed as follows:[6]

> Seek ye first political independence, and the rest will be added unto it.

Are rights foreign to Africa?

One of the most unfortunate realities in the African post-colonial condition is the extent to which the old Africa reasserts itself in new and often more painful ways, in that the leaders of both pre- and post-colonial Africa are similar in their disdain for the rights of the common persons who are not of 'royal' families, i.e. *royal* in a sense that transcends blood relationships and refers to the holder of political power over the life and death of the common people.

Another part of the African condition is the dissimilarity between the language expressing the search for the rights of African people in colonial times, and the refusal of the same rights to the same African people today – invariably by the same cohorts of leaders. Before political independence, the so-called freedom fighters were the most vociferous campaigners for rights; yet as soon as they attained the goal of political freedom, once they got into power, they became the most aggressive and consistent offenders against rights – the very rights for which they fought and risked their lives. For African leaders, there is a dangerous incongruence between the fight against oppression and the tendency to impede the rights of others. It is in this context that the very people who fought colonial rule, ostensibly for freedom, are the first, once in power, to suggest that the concept of *rights* is a foreign one with which the same former oppressors seek to restore colonial

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6   Melady (1961:133).

rule. Such new leaders soon become despots and tin-pot tyrants who generally turn their marvellous countries into banana republics.

The preoccupation with political power becomes such a psychosis of power in Africa that there is hardly any difference between the lives of the ordinary people before and after the attainment of independence. This illness becomes so entrenched in Africa's leaders that they internalise the falsehood that, without them, the countries which they liberated will cease to exist. In the process, African leaders cease being leaders of their countries as they become very dangerous to its citizens: so much so that they even forget that they made lofty promises either to their own people or in terms of the agreements they sign in the name of the rights of all people. Consider the most recent example of the African contradictions in the context of the New Partnership for Africa's Development (NEPAD) as the driver of the African Union's development and democratisation agenda. An essential component of NEAPD was the African Peer Review Mechanism (APRM), a system that was agreed to by many states. Yet the moment that system turned a critical eye on some of the signatory states, they rejected it forthrightly. In the words of the then Prime Minister, Theo-Ben Gurirab, here is what the Namibian government thought of the APRM:[7]

> ... the mechanism was something that should confine itself strictly to economic matters, and leave political matters to the AU, and that it be consigned to the dustbin of history as a sham. I see it as a misleading new name for the old discredited structural adjustment fiasco … Neo-colonialism … which is what the PRM is … [it] is a killer disease we must run away from ...

President Thabo Mbeki's South Africa, which was the main driver of NEPAD, also rejected the ARPM when it raised mild criticism against South Africa in respect of good governance and the xenophobic signs in the body politic of that country. In its response, the South African government argued that it was unique in comparison with the rest of the continent because of apartheid, and tried, in vain, to persuade the drafters of the review to change it to suit South Africa.[8]

The argument must, therefore, be advanced that the concept of *rights* – be they human rights, property rights, or any of those enumerated during the evolution of the notion – cannot be foreign to Africa, because current native dwellers of the African continent, by virtue of being members of the human family, are as entitled to rights as any other people. Just as others do, they have obligations and responsibilities towards other members of their communities or countries where they are full citizens.

Theorists are correct in asserting that rights, as they are presently being cast, did not constitute an integral part of political life in precolonial African societies. Rights were indeed circumscribed and were exercised along existing patterns of authority and power, in which the largest segment of the society did not possess any rights other than those granted benevolently by the ruler and/or members of his/her family. In other words, members of the family who were accorded power and authority by hereditary right

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7   Melber, cited in *The Namibian*. 7 April 2003; Melber (2005).
8   Boyle (2007).

possessed more privileges than any other subject. Human rights per se did not have the currency that they enjoy today, whereby it is held that all people, by virtue of their being human, and citizens, possess or are at least entitled to the same rights, privileges and obligations, and to exist under the rule of law.

It is submitted, therefore, that the main obstacles or challenges to the respecting of human rights in Africa do not inhere in traditional African values, but rather in new and compelling circumstances that arise from the long nights of subjugation and dehumanisation that comprised the season of colonial rule. A rights orientation should, therefore, only assist African countries in their genuine quest for fulfilling the imperatives of nation-building and, in the end, enable them to deal with the contradictions and trappings of power and privilege.

In his seminal treatise, *The African origin of civilization: Myth or reality*,[9] Cheikh Anta Diop offers no enlightenment as to the situation of rights in Africa before the various colonial episodes. He is eloquent in describing an Africa with a civilisation, with cultures that were stable in strong communities, but says nothing about how they acquired and exercised their rights in relation to other persons. Here, Paulin Hountondji[10] opines that this style of theorising about Africa renders Africanists guilty of seeing the continent only in ethnological or anthropological terms, thus setting Africans apart from other civilisations that offer more objective analyses of the vicissitudes of human life and democracy.

Equally, in his two books in which he sets the tone that what we know of Africa is a colonial dictionary, VY Mudimbe[11] does not offer any helpful insights into the conditions in precolonial Africa with respect to the rights of its people. He offers some insights into what led to the pathological psyche of the African personality, so subjected to dehumanising practices that, in the end, the very notion of *Africa* as a whole is hazy in the minds of many Africans who had internalised nationhood as more important than their Africanity – if there is such a phenomenon or quality like Africanity.

There is still debate about whether, and if so, to what extent, traditional African societies recognised and protected human rights for all their citizens. This debate concerns the recognition or denial that traditional African culture was or is compatible with human rights, or that there was some or other African conception of *human rights* – consistent with the African context, but not with the universality that so-called Western norms of rights contain now, embodied in the International Bill of Human Rights and the like.

Issa Shivji's attempt to settle this matter is helpful when he asserts the following:[12]

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9   Diop (1974).
10   Hountondji (1983).
11   Mudimbe (1988, 1994).
12   Shivji (1989:16).

> There is very little written by Africanists, and even less by Africans themselves, on the philosophical and conceptual foundations of human rights in Africa. In other words, one can hardly talk of the African philosophy of human rights …

On one level, this proposition has merit in so far as it seeks to express the rejection of a kind of cultural imperialism that has become increasingly unacceptable, and that must indeed be guarded against in human rights discourses if headway is to be made in Africa. This is because, to a large extent, Shivji's assertion reflects a historical situation perceived through the prisms of the developed Western nations. Inadvertently, it also provides a basis for the expansion of international human rights norms. At the same time the proposition – that international human rights are not universal but Western, and that there is an African notion of *human rights* that is not ultimately consistent with international norms – is problematic and hard to countenance. This often offers an apology or an excuse for Africa's poor human rights record, on the watch of once-revolutionary African leaders, although we ought to accept that Africa should not be held to standards that are culturally incompatible with the African majority and which they had no part in establishing. Importantly, to deny the universality of human rights may effectively destroy the meaning and the value of the entire concept. It should be emphasised here that the real significance of international human rights lies in the fact that they are universal in nature and appeal.

Against this background, it becomes pertinent to delineate from the outset the periods or historical epochs that led to the growing debates in the evolution of the political realities in Africa today as regards these two distinct but not mutually exclusive phenomena, namely human rights on the one hand, and constitutionalism in the general discourses about democratisation in post-colonial Africa on the other. These periods are the pre- and post-colonial Africas, since they present different characteristics that are important in appreciating the locations of rights in particular and of constitutionalism in general.

Before one ventures into the terrain of comparing the notions of *rights* in Africa to those in the Western world, one needs to point out that, even in the so-called developed democracies today, the concept of *rights* arrived very late in the existences of those nations. That is, they, too, went through long and dark periods when citizens either did not know about their rights, as they did later, or simply did not possess them. The political orders of the time did not lend themselves to the objective understanding and/or appreciation of rights in the way we presently relate to them. Hence, this led to the Universal Declaration of Human Rights, adopted on 10 December 1948.

Precolonial Africa

Like any older, pre-capitalist socio-political order anywhere in human civilisation, precolonial Africa comprised – for want of a better word – feudal and subsistence-based communities living under basic existential conditions and the attendant realities. In the main, there was one ruler or family or clan, holding its position for hereditary reasons or by means of sheer conquest in one way or the other, who ruled by decree, with

unfettered powers over all. Consequently, those who did not belong to the family through consanguinity were considered less than fully human, thus possessing proscribed rights in all spheres, including life and death. They were considered and treated as subjects with more obligations than rights, and were expected to serve and/or satisfy the ruler or his/her representatives. The ruler exercised absolute powers and rights over the well-being of his/her subjects at all times, including the right to life and obligation to die.

As in the days of old, when a King, Emperor or Pope wielded absolute power, Africa had the same disposition: and debates about rights were non-existent.

Then came the reconfiguration of Africa's patterns of authority and roles by the epoch of slavery and colonialism. This phase destroyed the identity of Africans and disfigured the self-understanding that they had enjoyed prior to the total onslaught by colonial rule and all its apparatuses. The essential part of colonial role anywhere in Africa was divide and rule, whereby the colonial potentates were hell-bent on sowing discord amongst people in all sorts of ways with the aim of weakening them and rendering them vulnerable so that they would in turn seek protection from their colonial masters.

Post-colonial Africa

Throughout the colonial experience, the foreign white rulers assumed the powers of demigods together with the responsibilities of giving and taking away human rights. Their African subjects could – and, for the most part, were permitted to – enjoy the role of obedience to the master!

In this process, ordinary Africans were treated as non-persons and were continually dehumanised to the extent that they, in turn, internalised the feeling that they were not quite as human as their masters, unless the latter said so. What we know as human rights today became, to all intents and purposes, privileges that would be granted and/or withdrawn by the colonial administrators at the slightest provocation, in order to enlist cooperation and collaboration.

The person who survived the colonial experience was a wounded beast with one central preoccupation: to end foreign and colonial oppression and subjugation, but who perhaps inadvertently assumed the role of the oppressor in turn. The quest to end foreign domination had very little to do with the desire or striving for human rights as such, or even with democratic constitutional rule. In fact, it had more to do with replacing the old masters with the new local ones, while the oppression of the majority continued and became more painful: now the perpetrators of the pain were local people who had stood against such infliction of pain before, when the wrongdoers were foreigners. This quest was, arguably, not even about improving the humanity of society as such in former colonial territories. Abdullahi Ahmed An-Na'Im and Francis Deng turn to Rhoda Howard, who offers a consolation:[13]

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13   Howard (1984); An-Na'Im & Deng (1990:3).

> [T]he African concept of human rights is actually a concept of human dignity, of what defines the inner (moral) nature and worth of the human person and his or her proper (political) relations with society … Dignity can be protected in a society that is not based on rights …

This is precisely where the African *problématique* with human rights lies: the extension of this logic is to say that Africans, by virtue of being African, are more communalistic than individualistic; therefore, it is what is good for the community that matters, and the individual is and has to be sacrificed in the interest of the community. Thus, African political systems after independence become more oriented towards relegating human rights – which are by nature based upon what is inherently good for the individual – to the common good, and that common good is best known to and ought to be protected by the leader, often referred to as the *Perfect Man*, the *Big Man*, or the *Strong Man*.

The outcome of the colonial experiences that provided the new breed of African rulers, the so-called liberation leaders, was that they usually acquired exactly the habits of oppression from their alter egos, their cruel oppressors, from whom they had masterfully learned the art. Both the oppressors and the new oppressive political elite had one thing in common: they were the only free humans, whilst the rest were required to show gratitude for the benevolence of the harbingers of freedom and independence.

What this means is that, in the Africa before and just after colonisation, the concept of *rights* assumed the character of a zero-sum game: one was either the giver or the seeker of rights, and the two were mutually exclusive. The giver of rights was the ruler, and the seeker the subject – who was always perceived as being inferior to the giver. The concept of *rights* presupposes that people, as human beings, are entitled to rights, regardless of their relationship with the ruler. This was clearly not the case in Africa before and often after the attainment of political independence. In this regard, Shivji[14] offers the advisory that, in the main, the Africans who championed human rights did so when they saw them as a mechanism – or, to be blunt, an ideology – with which to fight oppression and colonialism, and, thus, were not to be perpetuated after freedom had been attained.

Human rights and constitutionalism in an independent Africa

It should be stated that African societies, as confined nation states today, are as much creatures of Western nation states as nation states in the West are. They are new realities in human civilisation that have replaced the systems that existed before the advent of democracy or representative government. Thus, the new systems of government in post-colonial Africa have to be subjected to the same scrutiny of rights and obligations as their counterparts elsewhere. The contradictions that accompany power – or, for that matter, the absolute power that African leaders are wont to wield – are no different from the situation in 18th-century France when King Louis XVI stated boldly that he was the state.[15]

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14   Shivji (1989).
15   The French King Louis XIV (1638–1715) proclaimed "*L'etat, c'est moi*" ("I am the state").

The European philosopher Alphonse Carr warned that "*Plus ça change, plus c'est la même chose*" ("the more things change, the more they stay the same"). Change came to Africa with the attainment of independence without real change in the enjoyment of human rights. The faces of the rulers change(d), but not much else.

The political power that was visited upon European societies throughout most of the centuries, interspersed with outbursts of agitation for rights – such as the Renaissance, the Reformation and the French Revolution, not to mention the flight of citizens across the oceans to establish what became the United States of America – were all indicators of a lack of rights amongst citizens. This is pretty much the situation in which Africa finds herself right now. Hence, the Kenyan novelist Ngugi waThiong'o opines as follows:[16]

> This Kenya, this Africa, you eat someone or you get eaten. You sit on someone or someone sits on you.

The African-American journalist, Keith Richburg, made the following observation:[17]

> In Africa things stay the same until they fall apart.

What about *ubuntu*?

There have been volumes and volumes of writings on *ubuntu* as the African way of exercising humanity in contradistinction with the ways practised by other nations and civilisations. This is a fallacious assumption which cannot be sustained if one considers the life experiences of African people at the hands of their leaders. The experience with African leadership does not accord *ubuntu* a clean bill of health. *Ubuntu*, in essence, collapses in the face of private property and the expansion of communities and even countries to encompass those with whom there are no blood relationships. Greed, avarice, selfishness, lack of a sense of social justice, heartlessness, cruelty and sheer indifference are the result.

Firstly, there is nothing in the African condition that places Africans on a higher plane of human compassion than others. If reference is made to the human-made tragedies that visited the peoples of Africa, such as the slave trade, it is soon realised that influential African people, chiefly political leaders, participated in the selling of their subjects to foreign powers. There could have been no prolonged trajectory of trading in humans if some African leaders had not participated in or had not benefited from it. As in any form of oppression, the oppressed always participates in it. The infamous system of apartheid would not have lasted to the extent that it did without the acquiescence of millions of black people who opportunistically chose to behave in particular ways in order to survive or gain materially from a system that was so horrendous towards their own members.

Secondly, a sound and sustainable argument cannot be advanced that Africans suffered inhuman acts only with the arrival of, and at the hands of, European colonial

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16   Wa Thiong'o (1991:291).
17   Richburg (1998:244).

administrations. In the Africa of old, the kings or rulers wielded unfettered power over their subjects – as they did over their animals and land possessions. The masses of Africa never knew freedom until independence, since royal, ethnic, tribal, and a whole host of other taboos proscribed their freedoms and imposed more obligations upon them to serve their rulers. This is not unlike what happened elsewhere in the world.

Thirdly, upon becoming free, African leaders are invariably more hurtful to their own people than the cruel administrators who did not look, speak, and behave like them. The whole notion of *ubuntu* is about treating other human beings in ways different from non-human entities such as animals, plants and possessions. In this sense, all civilisations have their own brand of *ubuntu*, even though they do not as closely delineate their terms with humanity – as Africans for the most part do. It should also be stated that, invariably, African leaders in post-independence Africa are the worst offenders against the rights of their peoples. Their obsession with holding power permanently, their inability to empathise with the people they purport to govern, their levels of greed and avarice – to the extent that they fleece the resources of their poorer citizens, and their unfettered arrogance as regards power cannot be the bases upon which *ubuntu* can be sustained.

Human rights as a universal ideal

At some point, Africans ought to embrace a culture of rights as being necessary and permanent – and not merely an ideal that is romanticised when matters are favourable to spokespersons for the quest for rights.

Even though rights are universal, some societies exercise them in better ways than others. There should still be self-evident truths that govern rights in Africa in such a manner that they constitute a new reality that offers African citizens a centre to which to return when disagreement looms large. The acceptance in most of Africa that it is normal that you must either eat someone or be eaten cannot be permitted any longer because this is a shallow and demeaning understanding of Africans as inhabitants of a jungle where only the fittest survive.

Constitutionalism as a necessary precept

It would appear that, for Africa to embrace the tenets of the rule of law and appreciate the necessity of judicial independence, more of a premium ought to be placed on the concept of a *social contract* between the governor and the governed. Greater importance should be accorded to the parallel between moral reasoning and political justification, as was expounded by the great social contract theorist Thomas Hobbes, who cautioned that human beings left to their own devices without a moral compass would be hurtful to others. According to this theory, human beings are by nature constantly at war with others: *Bellum omnium contra omnes* ("the war of all against all"). The argument here is that people need social pacts to guide their conduct vis-à-vis one another in order to achieve mutual advantage.[18]

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18   Hobbes (1651/1996).

Scholars of constitutional theory concur that the edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules such as the constitution and acts of legislation, in a context where the premise is that all human beings are equal and deserve decent treatment as persons.

Central to this concept of *government* under such rules is the need to secure space for citizens' liberties through the establishment of a legal cordon around that space. The idea of a public space is rooted in the need to keep the state at bay in this way, in the belief that the scope of arbitrariness is drastically reduced and the autonomy of the individual preserved by a constitutional regime in which acts of government are based on predetermined rules – to curb arbitrariness of discretion and to be observed consistently by the wielders of political power in a given socio-political and legal system. *Constitutional democracy*, such as the one African peoples pray for, is the "antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law".[19]

At stake for most African states today is the uncoupling of executive from legislative powers, and judicial powers from both. In laying the tenets for this school of thought, the 18th-century French philosopher, Montesquieu, advocated in the strongest terms that the three distinct spheres of power contained in one person or body of persons would breed tyranny. Montesquieu argues as follows:[20]

> When a legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.

This understanding, in essence, lays the foundation of administrative justice and constitutes the basis for the government of the people, for the people, and by the people. Africa needs an order wherein the rule of law, checks and balances, and an independent judiciary are not only enshrined in the constitutions of states, but also appreciated and observed by all at all times. This, at the very least, is essential for creating both the necessary as well as the sufficient conditions for the sustainable socio-economic and political development of this great, yet not altogether happy, continent.

Restorative justice as a right

Perhaps what Africa needs, given her unjust experiences before and after colonialism, is restorative justice. This is based upon the acceptance that things went badly both pre- and post-colonialism in Africa.

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19   Nwabueze (1973:1).
20   Montesquieu (1989:157).

Restorative justice is a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders.

To all intents and purposes, Africa cannot boldly make the claim that she has made sufficient progress towards what can be called *restorative justice*. Generally, Africa mustered enough energy, strength and conviction to expunge foreign rule without displaying the same vigour in restoring justice towards the African peoples who were continually deprived of their basic rights.

The need for social justice

Africa cannot and will not move towards a better world unless considerable and deliberate efforts are made towards social justice in all spheres of life. There is a need to restore dignity in her people.

Social justice is a theory that refers to the application of the ideal of justice on a social scale in a given society. The term itself appeared in the rights lexicon around 1800, and before the publication of *The Federalist Papers*,[21] before the work by Edward Gibbon on the history, decline and fall of the Roman Empire. The moral theologian, John A Ryan, who initiated the arguments concerning a living wage, later elaborated on the concept of *social justice*. Another theologian, Father Charles Edward Coughlin, employed the term *social justice* in his works, following President Roosevelt's New Deal in the 1930s.

Later on, the Green Party Movement in Germany, Sweden and the United States made use of social justice as one of its Four Pillars.[22] One of the maxims held by the Green Party Movement's protagonists concerning social justice is that great disparities in wealth and influence are caused by the perversion of, or total lack of, socio-political institutions that should prevent the strong from plundering the weak. Social justice is, in essence, a call for social equality and economic justice as cornerstones of society with respect to establishing social cohesion and stability. It is a general rejection of discrimination based upon race, class, gender, culture or ethnicity, and the view that social change is possible only when there is cohesion based upon the acceptance of the greatest number

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21 *The Federalist Papers* refers to documents reflecting the positions written by mainly the protagonists James Madison, Alexander Hamilton, John Jay and Isaac Kramnick, at a time when furious arguments were raging about the best way to govern America. *The Federalist Papers* had the immediate practical aim of persuading New Yorkers to accept the newly drafted Constitution in 1787. In this they were supremely successful, but their influence also transcended contemporary debate to win them a lasting place in discussions of American political theory. Acclaimed by Thomas Jefferson as "the best commentary on the principles of government which ever was written", *The Federalist Papers* make a powerful case for power-sharing between state and federal authorities and for a constitution that has endured largely unchanged for 200 years.

22 The other three pillars are Ecological Wisdom, Grass-roots Democracy, and Non-violence. See http://en.wikipedia.org/wiki/Four_Pillars_of_the_Green_Party; last accessed 17 September 2010.

of the people in the community, who are accorded equal opportunities and are assisted by others and the state.

Social justice also invariably leads to debates regarding *redistributive justice*, whereby wealth is distributed in order to benefit the less well-to-do in society since the well-to-do have an obligation to assist the vulnerable members of the community and, in so doing, reduce the possibilities of conflict, indifference and violence in society. This way of thinking leads to campaigns for Basic Income Grants is in the case in Namibia, where influential personages such as Bishop Zephania Kameeta have started a campaign towards its roll-out nationwide.

The way forward

Africans, as individual persons, communities, organisations, nations and continentally, ought to (re)define, first of all, who they are: not only in relation to what was visited upon them by colonial forces, but also in terms of what it is that they consider was undermined by colonial experiences, and upon which they can base a better future for themselves and their future generations.

Conclusion

Constitutions – sound ones, like transparent elections, neither make democracy nor guarantee peace, stability, or even sustainable economic development for Africa. The only sufficient guarantee for Africa to move along the pathway of real development for all her people is a new culture and new ethos of rights for all. In his first address to Africa, the US President Barack Obama[23] put this in the following manner:

> First, we must support strong and sustainable democratic governments. As I said in Cairo, each nation gives life to democracy in its own way, and in line with its own traditions. But history offers a clear verdict: governments that respect the will of their own people are more prosperous, more stable, and more successful than governments that do not.
>
> This is about more than holding elections – it's also about what happens between them. Repression takes many forms, and too many nations are plagued by problems that condemn their people to poverty. No country is going to create wealth if its leaders exploit the economy to enrich themselves, or police can be bought off by drug traffickers. No business wants to invest in a place where the government skims 20 per cent off the top, or the head of the Port Authority is corrupt. No person wants to live in a society where the rule of law gives way to the rule of brutality and bribery. That is not democracy, that is tyranny, and now is the time for it to end.
>
> In the 21st century, capable, reliable and transparent institutions are the key to success – strong parliaments and honest police forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in peoples' lives.

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23   Obama (2009).

Here, President Obama spoke of rights: the rights that most Africans lack in spite of the attainment of political independence decades ago. In the Africa of today, we remain divided along all manner of schisms, the most potent one being political-party loyalty, which, in essence, counts for little more than an opportunistic licence to fleece the meagre resources of the people who need them most. Such loyalty does so by enforcing bogus allegiance to amorphous political party leaders that stomp the ground and dispense largesse although their policies do not translate into programmes that can change the lives of ordinary people – except for those who know how to benefit from political patronage.

Africa as a continent and the African people as part of the human family must have observed that the trajectory of political independence in the last 53 years has brought with it the good, the bad and the ugly in the context of rights as desired by the greatest number of the people who inhabit the continent – rich in resources and ideas and even the will to be humane to others. There is also a great reservoir of polarities and contradictions in the practice of rights by Africans and the adherence to constitutional orders for which the formerly oppressed Africans so zealously fought and even sacrificed their lives. In others words, come independence, African rulers became the worst offenders of the people's rights and liberties, and the quickest violators of the very constitutions to which they had appended their signatures. Like other human civilisations, Africans have both good and bad stories in the realms of rights and constitutional systems of governance, and it will take time for the real Africa to emerge.

The history of the human race is strewn with the struggle for rights and some predictability with regard to the rules that govern the greatest number of people in a given living and shared space. As such, the concept of *rights* is not as new as its opportunistic opponents argue when it suits them – just as Africans are by no means unique from other members in the human family. *Rights*, as the body of accepted precepts that account for good human relations and good governance, are necessary conditions for peace, stability and sustainable development for and in Africa. Equally, *constitutionalism* – as the body of accepted rules within which ordinary citizens navigate their lives in relation to other people on the one hand, and the ruling elite on the other – is not strange to Africa. Africans had rules that guided them and assisted those who presided over disputes to interpret and adjudicate over norms and behaviours that occurred outside the range of acceptance.

What is new in both rights and constitutionalism, however, is their codification in the form of laws and written constitutions. Just as other nations struggled through their own experiences to move feudalism or other relatively undemocratic systems of government to better, agreed-upon systems that had rules and were more rights-based, so must Africa endure the growing pains of maturing from traditional styles of government based upon relationships with some primordial tendencies to rights-based systems of governance. In doing so, Africa will not be copying other civilisations, but will be borrowing intelligently, as it were, from the experiences of others. For Africans are not exceptions in the human family: they, too, need to deal with the ills to which constitutional democracies attempt to find solutions.

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Boesl and Diescho opine as follows:[24]

> To protect the inviolability of human dignity worldwide is the ultimate objective of the concept of human rights. Human rights are considered and officially accepted as universal – regardless of their genesis or cultural manifestation.

The great challenge for Africa, therefore, is to move along with the rest of the world as it continues to grapple with making life more meaningful and better for all, to the extent that every person expects to be treated with dignity and respect – as s/he is expected to treat others, in a milieu that is transparent and equitable. Africa cannot continue to countenance the double standards of believing in and fighting for human rights and democratic constitutions for their countries only to attain political power in order to oppress others and suppress freedom while they trample on the very constitutions which they, at one point or another, took part in drafting in some form. Rights and constitutional democracy are just as good and necessary for Africa as they are for any other nation or people.

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24   Boesl & Diescho (2009:vii).

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